# ILLEGITIMACY AND SEX, OLD AND NEW

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## INTRODUCTION

The invitation to explore "the new 'illegitimacy'" necessarily evokes reflections about the "old" status or institution that supplies the point of departure. "Illegitimacy"[1] holds particular fascination for me because my encounter with this concept in law school introduced me to an idea that now informs much of my teaching and scholarship: law, as one aspect of

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1. The term "illegitimacy" conveys an opprobrium that many contemporary scholars reject. I count myself among them. Nonetheless, I use the term in this Article, and not always with quotation marks, because of its history and the invitation of this symposium to reflect on this history.

the broader culture, constructs identity. Many years would follow before I understood that law and culture construct a host of identities beyond illegitimacy and legitimacy, such as gender, race, sex, and sexualities. Nonetheless, my study of illegitimacy as a second-year student stands out as my first glimpse of this particular function of law.

The 1971 family law course that introduced me to this revelatory idea used a casebook that emphasized illegitimacy. Published in 1966, *Cases and Materials on Family Law* by Caleb Foote, Robert J. Levy, and Frank A.E. Sander envisioned what they entitled "The Problem of Illegitimacy" as a microcosm in which the themes, tensions, and values pervading the entire course played out.[2] Accordingly, the editors devoted an entire 169-page first chapter to this topic, with separate sections of the chapter addressing such matters as public support of illegitimate children (welfare, then the Aid to Families with Dependent Children (AFDC) program),[3] the "disposition of illegitimate children" (including surrender for adoption),[4] and procedural issues in disputed paternity cases (for example, the use of lie detector tests).[5] The combination of this material with several important illegitimacy cases decided by the Supreme Court after the casebook's publication,[6] but assigned as supplementary reading, made coverage of this topic the centerpiece of the entire semester, commanding far more class sessions and attention than, say, requirements for a valid marriage or divorce.

The editors' treatment of the topic made plain a point that too often seems invisible or forgotten today, now that conventional wisdom identifies equality for children as the principal lesson of the demise of the old illegitimacy: illegitimacy—like the larger field of family law that has traditionally encompassed it—operates, by design, to regulate sex. Hence,

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2. CASES AND MATERIALS ON FAMILY LAW 7 (Caleb Foote et al. eds., 1966) ("[T]he law of illegitimacy typifies the whole subject of family law . . . .").

3. *See id*. at 66-71. In 1996, welfare reform replaced Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF). *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (reauthorized and revised by the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006)) (codified as amended in scattered sections at 42 U.S.C.); *see also infra* note 72 and accompanying text (suggesting that the contemporary preoccupation with "personal responsibility" gave rise to the enactment of the 1996 federal welfare reform).

4. *See* CASES AND MATERIALS ON FAMILY LAW, *supra* note 2, at 128-69.

5. *See id*. at 54-65.

6. *E.g.*, Labine v. Vincent, 401 U.S. 532, 539-41 (1971) (upholding, under the Equal Protection Clause, the exclusion of children acknowledged by unmarried fathers from inheriting by intestate succession); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968) (invalidating, under the Equal Protection Clause, Louisiana's statute denying recovery for the wrongful death of children born outside marriage); Levy v. Louisiana, 391 U.S. 68, 70-72 (1968) (invalidating, under the Equal Protection Clause, Louisiana's statute that excluded children born outside marriage from recovering for the wrongful death of their mother, while allowing children born to married women to recover).

for example, the casebook chapter on "The Problem of Illegitimacy" also included excerpts from the Kinsey Reports surveying contemporary sexual behavior,[7] references to the assumed neuroses of many sexually active unmarried women,[8] and data on the high rate of nonmarital pregnancies ending in illegal abortion.[9] Such additional materials contextualize legal issues concerning the treatment of children born outside of marriage, reminding us of illegitimacy's crucial role in a larger regulatory project aimed at sex.

This Article's analysis of illegitimacy brings the focus back to sex. In doing so, this Article illuminates modern understandings of parentage and contemporary theories of family law. Without explicit consideration of adult sexual behavior as an important site of regulation, readings of the Supreme Court's case law on illegitimacy remain incomplete. Only by giving a prominent place in the analysis to the state interest in regulating sex, particularly heterosexual intercourse, can we reconcile this case law with the doctrinal differences between the parentage rules for children conceived sexually outside marriage and those for children conceived without sex, by assisted reproductive technologies (ARTs), outside marriage. The sex/no sex[10] "dividing line"[11] that emerges demonstrates why returning the regulation of sex to the center of family law has far more explanatory power than alternative understandings of the field, such as theories that emphasize children's equality or the privatization of dependency.

The Article proceeds as follows. Part I revisits the earlier understanding of illegitimacy, highlighting its emphasis on sexual morality. Part II explores the Supreme Court's (partial) repudiation of the construct, offering several different readings of the case law centered on, respectively, children's equality, parental identification, and personal responsibility. Part III tests these readings by examining their application in cases about two classes of children born outside marriage: those conceived by sexual intercourse, on the one hand, and those conceived by ARTs, on the other—raising questions reminiscent of the "old illegitimacy." For the answers to these questions, this Part then turns to the state's interest in regulating sex,

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7. CASES AND MATERIALS ON FAMILY LAW, *supra* note 2, at 84-88 (citing ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 287-304 (1953), and PAUL H. GEBHARD ET AL., PREGNANCY, BIRTH, AND ABORTION 78, 161, 178 (1958)).

8. *See id.* at 138, 141-42, 144 (discussing how social workers encounter many complex problems in assisting unwed mothers and address various psychological pressures and problems facing such clients).

9. *See id.* at 112 (indicating that up to ninety percent of nonmarital pregnancies end by induced abortion, as suggested by a study conducted by the Kinsey Institute).

10. For the meaning of this shorthand, see *infra* note 132 and accompanying text.

11. *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 126 (2008) (criticizing marriage as the wrong "dividing line").

which harmonizes the seemingly inconsistent rules of parentage for the two groups of children while highlighting the policy choices that always underlie such rules. The Conclusion emphasizes how any regime of parentage necessarily creates illegitimacy of one form or another. Throughout, this Article shows how illegitimacy continues to provide a lens for examining the basic doctrines, theories, and constructed identities animating family law—just as it did forty years ago.

## I. "THE OLD ILLEGITIMACY" AND ITS MESSAGE ABOUT SEXUAL MORALITY

Illegitimacy has always, by design, operated as a means of regulating sex and, in turn, conveying a moral message about sex. It has accomplished these objectives in several ways. First, illegitimacy has served family law's "channeling function,"[12] seeking to confine sexual activity within marriage by creating a disfavored status for children conceived and born outside marriage.[13] Second, its doctrinal and evidentiary supports—such as the presumption of legitimacy[14] and Lord Mansfield's Rule[15]—have covered up illicit sex, by treating a married woman's offspring as the children of her

12. Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498-500 (1992) (examining marriage and parenthood to illustrate family law's "channelling function," which "supports social institutions which are thought to serve desirable ends"); *see also* Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 276-85 (2008) ("Today, family law claims to not repress sex, but to 'channel' it into marriage.").

13. *See* Brief for the Attorney General, state of Louisiana as Amicus Curiae Supporting Respondents at 4-5, 7-8, Levy v. Louisiana, 391 U.S. 68 (1968) (No. 508), 1968 WL 112828 (asserting that one method of encouraging marriage is to confer greater rights to legitimate offspring than illegitimate offspring). For a glimpse of the evolution of academic treatment of illegitimacy before the Supreme Court intervened, compare Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 477-82 (1967) (summarizing the rights afforded nonmarital children on the eve of Court's 1968 decision in *Levy v. Louisiana*), with Kingsley Davis, *Illegitimacy and the Social Structure,* 45 AM. J. SOCIOLOGY 215, 215 (1939) (describing "the bastard" as "a living symbol of social irregularity, an undeniable evidence of contramoral forces; in short, a problem—a problem as old and unsolved as human existence itself").

14. According to this presumption, often described as one of the strongest known to law, a mother's husband is the father of her children. To the extent that some jurisdictions made the presumption conclusive, it operated as a substantive rule of law, not as an evidentiary or procedural guide. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 117-20 (1989) (plurality opinion) (examining a California statute that "indisputably presumed" children to be "of the marriage" when the mother is cohabiting with her husband, who is neither impotent or sterile); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 232-34 (2006) ("[W]e might think of the presumption of legitimacy as a default rule that determines parentage in the absence of further action, whether an attempt to rebut the presumption (in those circumstances permitting rebuttal) or proceedings to transfer parental rights to another.").

15. *See* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 119 (1971) (noting that Lord Mansfield's rule "denies spouses the right to testify as to the illegitimacy of a child born in their marriage").

husband, even when he is not the genetic father.[16] Illegitimacy has long made marital sex normative and everything else second-class at best and deviant at worst.

Illegitimacy's moral message is unmistakable, as the following examples demonstrate. Consider, for instance, that in its heyday illegitimacy/legitimacy did not constitute a simple binary, but a complicated hierarchy with "adulterine bastards" and "incestuous bastards" the lowest of the lot.[17] An especially disfavored category that developed in the United States was that of the "miscegenous bastard."[18] Thus, the immorality of birth outside marriage was a matter of degree reflected in the classification system. In turn, not only social, but also economic, disadvantages imposed on the child hinged on his or her particular category.[19]

A second illustration of illegitimacy's moral message emerges from the story of how officials in southern states in the United States deployed illegitimacy for their own race-based ends in the years following *Brown v. Board of Education*.[20] In doing so, they not only constructed identities based on marriage, sex, and immorality, but they constructed race and racial identities as well. Legal historian Anders Walker documents how white opponents of desegregation seized on the notion that they could use immorality as a proxy for the race of those whom they sought to confine to separate schools, not directly challenging *Brown*, but circumventing its impact.[21] Accordingly, they developed pupil placement laws designed "to keep black children out of white schools based on questions of moral

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16. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 201-02 (1985) (explaining how early English common law, through the presumption, elevated children's interests and family integrity over paternal rights).

17. KRAUSE, *supra* note 15, at 2; *see Michael H.*, 491 U.S. at 124 (plurality opinion) (citing H. NICHOLAS, ADULTURINE BASTARDY (1836)); JOHN WITTE, JR., THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED 89 (2009) (noting how medieval canon law recognized five classes of illegitimates, determined by "the severity of the sexual sin of their parents").

18. KRAUSE, *supra* note 15, at 2. This was so even though earlier, during slavery, the mixed-race offspring born to slave mothers, often from forcible rapes by the master, were regarded as valuable property belonging to him. *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 23-29 (1997) (identifying the "essence" of black women's experiences during slavery as the "brutal denial of autonomy over reproduction," with female slaves helping to reproduce the master's labor force).

19. *See, e.g.*, KRAUSE, *supra* note 15, at 77 (challenging the possible justifications for "giving the *extra*marital child lesser economic rights than are given the *pre*marital illegitimate") (emphasis in original).

20. 347 U.S. 483 (1954).

21. ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 3-9 (2009); *see also* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 107-09 (2003) (noting the "convergence of race, sex, and class," including the use in the 1960s of illegitimacy "as a proxy for race in implementing public policy").

background,"[22] with the legal identities of illegitimate and legitimate as valuable props in this undertaking.

In attempting to make this strategy for replicating pre-*Brown* segregation ever more effective, Walker explains, political leaders in these southern states worked to abolish common law marriage and thus increase the number of children deemed illegitimate, knowing the impact of such moves would fall more heavily on African Americans than on their white counterparts.[23] They understood that far more black children than white children would be unable to produce documents showing the formal marriage of their parents. They also understood that, when white women became pregnant outside marriage, they typically surrendered the children for adoption—usually in secrecy in order to protect their own moral reputations and those of their families from the opprobrium of sexual transgression.[24] Once adopted by married couples, then, these white children were deemed legitimate and thus cleansed of the stigma of immorality generated by their status at birth.[25] By contrast, black children born outside marriage were usually reared by their mothers and extended families, thus increasing illegitimacy rates in this segment of the population.[26]

In addition to these measures, consciously designed to boost black illegitimacy rates and thus provide an alternative basis for preserving racially segregated schools, southern political leaders explored other punitive interventions—all centered on illegitimacy. These included proposed laws that would require sterilization of a woman after she gave birth to one illegitimate child, deem illegitimate children abandoned and neglected, make having more than one illegitimate child a crime, trigger

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22. WALKER, *supra* note 21, at 41.

23. For an examination of the different approaches to pregnancies outside marriage, before legalized abortion, in the white and African-American communities, see RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* (1992).

24. *See* ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* (2006) (presenting narratives from women who surrendered children for adoption). Indeed, white babies were valuable commodities who would help white, childless couples in this post-World War II era of "compulsory parenthood." ELAINE TYLER MAY, BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS 127-49 (1995) (documenting the post-war "baby craze" and that era's social pressures favoring parenthood).

25. WALKER, *supra* note 21, at 79-81 (showing how white unmarried mothers could use maternity homes and adoption agencies that were unavailable to African Americans). Adoption practice, then as now, replaces the child's original birth certificate with a new one showing the names of the adoptive parents. *See* Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry Into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 375-78 (2001).

26. *See* WALKER, *supra* note 21, at 78 (citing TECHNICAL SUBCOMM. OF THE COMM. ON CHILDREN & YOUTHS, N.C. CONFERENCE FOR SOCIAL SERV., THE PROBLEM OF BIRTHS OUT OF WEDLOCK (1959)).

investigations of families with illegitimate children, and limit public assistance for families with illegitimate children.[27] Other laws introduced at this time were designed to increase the regulation of marriage licenses and birth certificates, so that the former would be more difficult for African Americans to obtain and the latter would allow the tabulation of illegitimate births among African Americans.[28] All of these initiatives sought to emphasize the lack of sexual discipline and hence moral inferiority of African Americans, justifying segregation.[29]

These manipulative attempts to maintain racial apartheid provide important insights about illegitimacy as a legal and social construct. Even if emphasizing the connections between race and nonmarital births reflected nothing more than crass political opportunism, these efforts highlight that sexual immorality constitutes the animating and taken-for-granted core of illegitimacy.[30] Outside the South, this view gained momentum as African-American communities and families were marginalized as exemplars of what the federal Moynihan Report dubbed the "culture of poverty"—a term that took particular aim at the unmarried motherhood and welfare dependency seen as characteristic of urban blacks.[31] Accordingly, through the construct of illegitimacy, immorality was linked not just to race, but also to economic dependency on the state. Indeed, persistent emphasis on the low marriage rate of African-American women has kept these ideas alive, even if the description of the problem has changed over time.[32]

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27. *See id.* at 77-82 (examining efforts in North Carolina in the late 1950s to deny welfare benefits to nonmarital children).

28. *See* Anders Walker, Note, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following* Brown v. Board of Education, 47 DUKE L.J. 399, 410-18 (1997) (finding that adjusting the regulations on birth certificates served to raise reported black illegitimacy levels and "discredit[] traditional modes of black family formation").

29. *See* WALKER, *supra* note 21, at 39-43 (documenting efforts in Mississippi in the late 1950s to perpetuate segregation by taking aim at the moral background of African-American students).

30. This seemingly obvious point is often eclipsed today by emphasis on other aspects of illegitimacy, such as the unfairness of unequal treatment of children. *See infra* notes 41-49 and accompanying text.

31. *See* OFFICE POLICY PLANNING & RESEARCH, U.S. DEP'T LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) (often called "The Moynihan Report" for short); *see also* Patricia Cohen, *"Culture of Poverty" Makes a Comeback*, N.Y. TIMES, Oct. 18, 2010, http://www.nytimes.com/2010/10/18/us/18poverty.html ("Although Moynihan didn't coin the phrase, . . . his description of the urban black family as caught in an inescapable 'tangle of pathology' of unmarried mothers and welfare dependency was seen as attributing self-perpetuating moral deficiencies to black people, as if blaming them for their own misfortune.").

32. *See, e.g.*, RALPH RICHARDS BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011) (urging interracial marriage as the solution to the dismal same-race marriage prospects for middle-class, educated black women); KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005)

## II. THE OLD ILLEGITIMACY IN THE SUPREME COURT: READING THE CASES

In 1968, the Supreme Court began to dismantle much of "the old illegitimacy" in a series of cases finding "illogical and unjust" the punishment of children for the sexual transgressions of their parents.[33] For example, in *Levy v. Louisiana*,[34] the Court struck down Louisiana's law denying nonmarital children damages for the wrongful death of their mother.[35] Calling attention to the humanity and personhood of "illegitimate children,"[36] the Justices could find "no action, conduct, or demeanor of theirs [that] is possibly relevant to the harm that was done the mother."[37] Put differently, in *Levy*, the Court saw no reason why a tortfeasor should avoid responsibility or the tort victims should forfeit recovery simply based on birth outside marriage.[38]

*Levy* suggested that children have no control over whether their parents engage in sex outside of marriage and that, thus, they do not deserve legal disadvantages stemming solely from such parental behavior. Later cases, however, articulated this principle expressly: "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."[39] Over the years, this idea has become iconic, even if the sentence expressing it leaves a number of assumptions unarticulated and unexamined.[40]

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(explaining the rise of unmarried motherhood by documenting the value that poor women attach to having children and the criteria that these women use for identifying worthy marriage partners).

33. The Court first used the "illogical and unjust" language in *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972), which held that the denial of worker's compensation recovery to children born outside of marriage violates the Equal Protection Clause.

34. 391 U.S. 68 (1968).

35. *Id*. at 72.

36. *Id*. at 70 ("[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause . . . .").

37. *Id.* at 72.

38. *See id.* at 71 (emphasizing that illegitimate children should not be denied constitutionally protected rights when they are subject to all of the responsibilities of citizenship, including the obligation to pay taxes).

39. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

40. For example, the Court offered no support for its empirical claim that laws disadvantaging children born outside marriage did not deter the sexual activities of adults. Even if the number of children born outside marriage showed that deterrence was not completely effective, the nonmarital birth rate might have been higher without such legal disadvantages. Certainly, recent increases in the nonmarital birth rate might support such inference. *See infra* note 102 and accompanying text (citing data showing an increase from 5% in 1960 to 41% in 2008). Further, the Court's language does not disentangle the effort to discourage nonmarital sex from the pressure to marry should such sex occur and result in conception, and even today the public discourse includes conversations about whether parents should marry for the sake of their children. *See, e.g.*, *Should Parents Marry for the Kids?*, Room for Debate, N.Y. TIMES (Aug. 30, 2011), http://www.nytimes.com/roomfordebate/2011/08/30/shotgun-weddings-vs-

### *A. The Children's Equality Reading*

It should come as no surprise that one reading of the Supreme Court's illegitimacy case law highlights the unfairness of penalizing children for the choices and actions of their parents, in turn establishing a legacy that makes equal treatment of children a recognized constitutional value.[41] This "children's equality reading" provides the point of departure for this symposium on "The New 'Illegitimacy,'" which accepts as "an axiom of modern family law[] [that] children should not suffer as a result of being born to unmarried parents."[42]

Indeed, this reading is so powerful and compelling that it lends itself to applications well beyond marital status. Thus, for example, the majority opinion in *Plyler v. Doe*[43] invokes this reading of the Supreme Court's illegitimacy cases to overturn laws that would deny public schooling to children who live in the United States as undocumented aliens, stating: "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[44] Of course, *Plyler*, like the illegitimacy precedents upon which it relied, did not foreclose alternative means of regulating "the conduct of adults" or discouraging "a parent's misconduct."[45]

If the idea that children should not be penalized for the actions and choices of their parents extends beyond marital status, as *Plyler* illustrates, then questions arise about the limits of the children's equality reading. Surely, not every inequality tied to parental conduct raises arguments likely to succeed under the Equal Protection Clause. Indeed, children's opportunities and futures under our current neoliberal regime,[46] which

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cohabitating-parents/. Finally, the Court's sentence fails to examine the highly gendered impact of laws disapproving of nonmarital sex, from which women bore a disproportionate share of shame and stigma. *See, e.g.*, FESSLER, *supra* note 24 (presenting narratives that document this double standard in the context of pressure for unmarried white women to surrender their babies for adoption).

41. The emphasis on illegitimacy as an issue of children's equality was a chosen litigation strategy. *See* Davis, *supra* note 21, at 92-100 (describing how challenges came to focus on children born outside marriage and this strategy succeeded in achieving legal change, albeit limited).

42. *The New "Illegitimacy": Revisiting Why Parentage Should Not Depend on Marriage*, AM. U. WASH. C.L., http://www.wcl.american.edu/secle/founders/2011/20110325.cfm (last visited Sept. 26, 2011).

43. 457 U.S. 202 (1982).

44. *Id*. at 220; *see also id*. at 238 (Powell, J., concurring) (citing *Weber*, 406 U.S. at 175 and Trimble v. Gordon, 430 U.S. 762, 770 (1977)). This language moots the unsubstantiated empirical claim in *Weber*. *See supra* notes 39-40 and accompanying text.

45. 457 U.S. at 220.

46. *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) (defining neoliberalism as "a theory of political economic practices that proposes that

couples parental autonomy with only a minimal government role in meeting economic needs, depend largely on parental choices and conduct; nonetheless, the Court has embraced such pluralism among families,[47] despite the life-altering and differential impact on children.[48]

Wherever the outer bounds of the children's equality reading might lie, however, we might tentatively posit that the Court's precedents require an especially careful examination of laws tying a child's access to benefits to the circumstances of his or her birth. As the Court put it, "Obviously, no child is responsible for his birth . . . ."[49] Beyond this starting point, however, the Court's illegitimacy cases themselves suggest additional readings that help trace out the contours of the principle of children's equality, as shown below.

### *B. The Parental Identification Reading*

In the wake of *Levy*, which left room to debate the governing standard of review,[50] some commentators asserted that strict scrutiny should apply in illegitimacy cases because discrimination based on birth status is "imposed without regard to an individual's actions or capacities and affect[s] persons who have no more control over their birth status than the black man has

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human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade," with "the role of the state . . . to create and preserve an institutional framework appropriate to such practices").

47. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602-03 (1979) (recognizing parental authority over children, including decisions whether to institutionalize them for mental health problems); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4-6 (1973) (upholding the Texas public school finance system based on each district's property taxes, despite disadvantages to children residing in poor districts); Wisconsin v. Yoder, 406 U.S. 205, 229-35 (1972) (upholding the right of Amish parents to exempt their children from high school, despite the possible limitations on children's future opportunities).

48. *See* Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 2-3 (2008) (positing the tension between the commitments to equal opportunity and family autonomy, given differences in economic class and their impact on children); *see also, e.g.*, Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1409 (2009) (critiquing *Roe v. Wade*, 410 U.S. 113 (1973), based on "the profoundly inadequate social welfare net and hence the excessive burdens placed on poor women and men who decide to parent").

49. *Weber*, 406 U.S. at 175.

50. *See* 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, 2-19 (1969) (reviewing *Levy* and *Glona* to conclude that they provide a basis for challenging any law imposing disadvantages based on illegitimacy); *see also* Gareth W. Cook, Note, *Bastards: Denial of Recovery for Wrongful Death Based Solely on the Illegitimacy of Either Claimant or Decedent Is a Violation of Equal Protection of the Laws*. Levy v. Louisiana, *391 U.S. 68 (1986);* Glona v. American Guar. & Liab. Ins. Co., *391 U.S. 73 (1968)*, 47 TEX. L. REV. 326, 329 (1969) ("[T]he Court in *Levy* held that the rights involved are basic civil rights involving the intimate, familial relationship between mother and child, and implied that the classification of illegitimates was, therefore, inherently suspect.").

over the color of his skin."[51] Notably, however, once the Court addressed the issue directly, it chose intermediate scrutiny[52]—the same standard used for sex-based discrimination.[53]

I have always understood this move, the choice of intermediate scrutiny, to communicate two important points. First, like sex-based discrimination, classifications of children based on the marital status of their parents often reflect archaic and unfounded generalizations;[54] these are especially unfair to the children, who have no control over their parents' behavior. Certainly, the Supreme Court's initial foray into this terrain—invalidating Louisiana's wrongful death provisions that refused to recognize the mother-child relationship outside of marriage—reflected this rationale.[55] Whatever the state's interest in channeling the sexual behavior of adults into marriage, the Court understood legal denial of the mother-child relationship as a constitutionally insupportable means.

Second, however, by identifying intermediate scrutiny as the appropriate standard of review, the Court indicated that sometimes "real differences" justify classifications based on illegitimacy, just as in the Court's view sometimes such differences justify classifications based on sex.[56] The most

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51. Gray & Rudovsky, *supra* note 50, at 6.

52. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461, 465 (1988) (using intermediate scrutiny to invalidate, under the Equal Protection Clause, a statute limiting the time when children born outside marriage may sue to establish paternity and seek child support). On the interplay between illegitimacy and sex-based discrimination, see Davis, *supra* note 21.

53. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 279, 282 (1979) (using intermediate scrutiny to invalidate, under the Equal Protection Clause, a statute imposing alimony obligations only on husbands, but not wives); Craig v. Boren, 429 U.S. 190, 197-98, 210 (1976) (using intermediate scrutiny to invalidate, under the Equal Protection Clause, different ages at which males and females may drink 3.2% beer).

54. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 651-53 (1975) (invalidating, as a violation of equal protection, a provision of the Social Security Act that permitted widows but not widowers to collect special benefits while caring for minor children). Some of the most valuable cases in making the connection between sex-based discrimination and discrimination based on parental marital status involve both. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 394 (1979) (finding unconstitutional a law that permitted adoptions without the consent of unmarried fathers, upon a showing of the child's best interests, while requiring such consent from mothers, whether married or not, and married fathers).

55. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968). These laws, refusing to recognize the mother-child relationship, were unusual for their time even though, historically, children born outside marriage were deemed "filius nullius" or "son of no one." *See* KRAUSE, *supra* note 15, at 3-4 (defining term). The NAACP's amicus brief in *Levy* and *Glona* pointed out the racial discrimination worked by the laws in question. *See* Brief for Harry D. Krause & Jack Greenberg et al. as Amici Curiae Supporting Appellants, Levy v. Louisiana, 391 U.S. 68 (1968) (No. 508), 1968 WL 112827.

56. *E.g.*, Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 469-72 (1981) (plurality opinion) (citing females' capacity to become pregnant as a difference justifying gender-based statutory rape laws); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1004 (1984) (using the term "real differences"). For critiques of such reasoning, see, for example, Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1177 (2010) ("The Court's concern about

compelling candidate for a "real difference" applicable to children born outside marriage seemed to be the challenge of identifying the father.[57] Although the mother's inevitable presence at birth eliminated any doubt about her identity,[58] the Court's early opinions allude to "lurking problems with respect to proof of paternity."[59] Even with the subsequent advent of exacting DNA tests,[60] however, the possibility remained that the man had disappeared or the woman declined to provide evidence necessary to identify him.[61] Because the presumption of legitimacy (in some states a conclusive rule[62]) *always* identified the father of children born to married women,[63] but no similar default rule applied to children born to unmarried mothers, one could appreciate how the illegitimacy classification might occasionally be rationalized in particular contexts.

Indeed, the Court has never said that *all* illegitimacy-based distinctions must fall, and a number of unsuccessful challenges to such classifications demonstrate the partial nature of the revolution.[64] Melissa Murray's valuable contribution to this symposium contends that the presence or

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illegitimate pregnancy seems to have blinded it to the harm in leaving boys unprotected against sexual abuse, or to any inequality in allowing young men to have consensual sex with older partners, while criminalizing all nonmarital sex by young women."); Law, *supra*, at 999-1001 (emphasizing that it is not just nature that imposes the burdens of teenage pregnancy, but also "the social and legal ethos that makes women solely responsible for nurturing the children they bear . . . .").

57. KRAUSE, *supra* note 15, at 82. *But see infra* notes 198-228 and accompanying text (challenging a purely genetic understanding of parentage).

58. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 63 (2001) ("Fathers and mothers are not similarly situated with regard to the proof of biological parenthood."). Contemporary practices such as egg donation and gestational surrogacy challenge the assumption that maternity is always obvious. *See, e.g.*, K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Raftapol v. Raney, 12 A.3d 783 (Conn. 2011).

59. Gomez v. Perez, 409 U.S. 535, 538 (1973); *see also* Clark v. Jeter, 486 U.S. 456, 461 (1988) (recalling this problem).

60. *See, e.g.*, *Clark*, 486 U.S. at 465 (recognizing the development of "increasingly sophisticated tests for genetic markers [that] permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child").

61. Federal law imposes on recipients of public assistance an obligation to cooperate with state authorities in establishing paternity, with exceptions in certain circumstances. 42 U.S.C. § 654(29)(A) (2006).

62. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 131-32 (1989) (plurality opinion) (approving California's then-conclusive presumption).

63. *But see id*. at 115 (noting that even the traditional conclusive presumption of legitimacy recognized some exceptions, as illustrated by the codification challenged in *Michael H.*, which excluded cases in which the husband was impotent or sterile).

64. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259, 275 (1978) (upholding the requirement of a judicial order of filiation for a child to inherit from his unmarried father by intestate succession); Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (upholding the exclusion of the relationship of unmarried fathers and children from preferences under federal immigration law); Labine v. Vincent, 401 U.S. 532, 539-40 (1971) (upholding the exclusion of children acknowledged by unmarried fathers from inheriting by intestate succession). For an examination of illegitimacy-based discriminations that persist today, see Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011).

absence of marriage-like behavior helps us sort the cases, explaining why some challenges to illegitimacy classifications succeeded while others did not.[65] I agree that such analysis proves illuminating. I would take the observation one step further, however, to point out that marriage-like behavior often serves the additional purpose of identifying a child's father, based—of course—on a social understanding of "father" constructed in the shadow of marriage (with more on this point to come later).[66]

Under this "parental identification reading" of the illegitimacy cases, concern about the difficulty of identifying nonmarital fathers remains a possible basis for laws distinguishing children born outside marriage from their marital counterparts.[67] According to this reading, once outlier laws refusing to recognize for some purposes the seemingly obvious mother-child relationship had been put to rest, so that the term "filius nullius" or "son of no one" no longer strictly applied,[68] the focus of illegitimacy reform became the recognition of the child's *second* parent. Indeed, according to some authorities, to say that a child is illegitimate is to say that the child has only one parent.[69]

This view of what the Supreme Court was trying to accomplish in this line of cases received an early boost with the 1973 Uniform Parentage Act's (UPA's) proposed network of parentage presumptions, including some applicable to children whose parents never married.[70] These corrective measures synthesize the children's equality reading with the parental identification reading, seeking to provide content for the former by facilitating the identification of a child's second parent.

### *C. The Personal Responsibility Reading*

If the Supreme Court's decisions and the 1973 UPA were child-focused—developments designed to help children of unmarried parents achieve parity with other children—they also offered welcome changes for the state itself, paving the way for the increasing privatization of dependency. The identification and recognition of unmarried fathers as parents helped to transform critiques about the "culture of poverty"[71] into a preoccupation with "personal responsibility," a theme that suggests still

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65. *See* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012).

66. *See infra* notes 209-19 and accompanying text.

67. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 56 (2001) (showcasing this assumption by the majority in *Nguyen*).

68. *See supra* note 55 and accompanying text.

69. *See* H.M. v. E.T., 930 N.E.2d 206, 210 (N.Y. 2010) (Smith, J., concurring).

70. *See* UNIF. PARENTAGE ACT § 4 (1973), 9B U.L.A. 393-94 (2001); *see also* UNIF. PARENTAGE ACT § 204 cmt. (amended 2002), 9B U.L.A. 23-24 (Supp. 2011) (including presumptions in new, updated UPA).

71. *See supra* note 31 and accompanying text.

another reading of the Supreme Court case law. This new preoccupation culminated in the enactment, in 1996, of federal welfare reform, specifically the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[72] which Congress enacted to replace the more generous AFDC program with the more restrictive Temporary Assistance for Needy Families (TANF) system.[73] TANF imposes work requirements and time limits on public assistance, allows disincentives for procreation, and strengthens measures to collect support from absent parents.[74] Today, we see the same phrase in "Personal Responsibility Education,"[75] the name for one of two federally funded sex education programs.

What does "personal responsibility" mean? The phrase seeks to communicate that participating in heterosexual intercourse has consequences, at least the risk of legally imposed child support obligations, as signaled by PRWORA's emphasis on ever more aggressive measures to impose and enforce such obligations.[76] While marriage provides one way to carry out such obligations, it is not the only way. One alternative entails transfer payments between unmarried parents. According to this understanding, licit sex no longer refers exclusively to sex within marriage, but also contemplates the use of birth control and/or financial support for any resulting children.[77] Put differently, more personal responsibility means less government responsibility.

This "personal responsibility reading" of the illegitimacy-classification

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72. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996) (reauthorized and revised by the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006)) (codified as amended in scattered sections at 42 U.S.C.).

73. *See supra* note 3.

74. *See* ROBERTS, *supra* note 18, at 202-45; Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155 (1996). On the role of the federal government in this traditional matter of state family law, see Laura W. Morgan, *A Shift in the Ruling Paradigm: Child Support as Outside the Contours of "Family Law*," 16 J. AM. ACAD. MATRIM. LAW. 195 (1999).

75. *See* 42 U.S.C. § 713 (Supp. IV 2010); *cf. id*. § 710 (separate program for abstinence education).

76. *See, e.g.*, *id.* § 667 (state guidelines for child support awards); *id.* § 666(b) (income withholding). These measures condition states' receipt of federal funds on meeting specific federal conditions. *See also id.* § 228 (federal Deadbeat Parents Punishment Act).

77. *See, e.g.*, NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 1-15 (2010) (describing a "blue family" model). One can find echoes of "personal responsibility" talk in the controversy over whether women, even those working for church-affiliated employers, must have free access to contraception as part of federal health care reform. *See, e.g.*, Lauren Brown Jarvis, *Religious Liberty vs. Reproductive Liberty: A New Political Minefield Pits Women Against the Church*, HUFFINGTON POST (Feb. 17, 2012, 5:32 PM), http://www.huffingtonpost.com/lauren-brown-jarvis/religious-liberty-vs-repr_b_1285607.html.

cases receives reinforcement from opinions spelling out the criteria for constitutional protection of unmarried fathers' parental status. These are cases in which observers see at work a "biology plus" test[78] that conditions constitutionally protected parental rights for unmarried genetic fathers on specified conduct, which typically includes financial support. For example, in accepting Peter Stanley's challenge to the Illinois law that omitted unmarried fathers from the definition of "parent," the Supreme Court noted not only that he had "sired and raised" the children,[79] but also that he had supported them.[80] By contrast, in ruling that unmarried father Jonathan Lehr failed to meet the behavior-based test to earn the right to object to the mother's arrangement of a stepparent adoption, the Court juxtaposed Lehr's never having supported the child[81] with the prospective stepfather's financial commitment, as evidenced by his marriage to the mother and his adoption petition.[82]

The personal responsibility reading of the cases dismisses any notion that a child of unmarried parents should be regarded as "filius populi" or "son of the people," entitled to public support, rather than "filius nullius" or "son of no one."[83] In turn, with marriage as the basis for child support duties out of the way, family law and policy could pursue in earnest the goal of privatizing dependency in all families. Pursuit of this goal has meant that, despite theoretical tension suggested by the "biology plus" cases,[84] biology alone suffices to make a sexually conceiving unmarried father personally responsible for child support.[85] Accordingly, today courts

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78. *See* Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 827-28 (2006) [hereinafter Jacobs, *My Two Dads*] (reviewing case law from the Supreme Court that ties fathers' rights to demonstrated commitment and establishes a "biology plus" standard); Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 975, 980 (1992) (using the term "biology plus" to describe the criteria for constitutionally protected paternal rights in the Supreme Court's case law). On the judicial development of the "biology plus" doctrine, see Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. Rev. 637 (1993); Melanie B. Jacobs, *When Daddy Doesn't Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 207-08 & n.69 (2004) [hereinafter Jacobs, *Paternity Fraud Claims*]; *see also* Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 433 (2007) (contending that the Court used the attributes and rights of motherhood as the model for the "biology plus" test for unmarried fathers).

79. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

80. *Id*. at 650 n.4.

81. *See* Lehr v. Robertson, 463 U.S. 248, 249, 252 (1983).

82. *See id*. at 259. *See generally* Murray, *supra* note 65.

83. Blackstone used both terms. 1 WILLIAM BLACKSTONE, COMMENTARIES *459.

84. *See supra* notes 78-82 and accompanying text.

85. *See* Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 101 (2004) (noting that, once an unmarried father has paid child support, he is then well-positioned to meet the "biology plus" test in any future dispute).

consistently hold unmarried men responsible for child support for children conceived during a sexual encounter on the same terms applicable to married fathers,[86] whether or not the father has yet developed any personal relationship with the child.[87] Moreover, this result obtains even when the man made clear before intercourse his intent not to become a father, when he received reasonable assurances that no conception would occur, and sometimes even when he fell victim to "birth control fraud" or the nonconsensual seizure of his ejaculate after the encounter.[88] Courts in such cases regard the man's decision to engage in the sexual encounter as the "cause" of the financial obligation[89] and deem the man's child support obligations a rational response to legitimate state interests.[90]

Consistent with this causation-based approach, in 2005, in *Elisa B. v. Superior Court*,[91] the California Supreme Court upheld the child support obligations of a biological mother's former partner, recognizing her as a second parent based on intent and conduct[92] and finding "no reason why

86. *See, e.g.*, Walsh v. Jodoin, 925 A.2d 1086, 1087 (Conn. 2007) (holding that equal protection requires retroactive application of "family statutes [designed] to render the support available to a child of unmarried parents equal to that provided to a child whose parents have divorced"); Jackson v. Proctor, 801 A.2d 1080, 1090 (Md. Ct. Spec. App. 2002) (using the approach applicable to children of divorced parents to set a support award for a child of never married parents because support calculations cannot vary based on the parent's prior marital status).

87. *See* Oren, *supra* note 85, at 117-18.

88. *See, e.g.*, Dubay v. Wells, 506 F.3d 422 (6th Cir. 2007); N.E. v. Hedges, 391 F.3d 832 (6th Cir. 2004); Child Support Enforcement Agency v. Doe, 125 P.3d 461 (Haw. 2005); Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005); State v. Frisard, 694 So. 2d 1032 (La. Ct. App. 1997); Wallis v. Smith, 22 P.3d 682 (N.M. Ct. App. 2001); L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983). *See generally* Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045 (2005); Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29 (2003); Brenda Saiz, *Tort Law: Tort Liability When Fraudulent Misrepresentation Regarding Birth Control Results in the Birth of a Healthy Child—* Wallis v. Smith, 32 N.M. L. REV. 549 (2002).

89. *See, e.g.*, Dubay v. Wells, 442 F. Supp. 2d 404, 410 (E.D. Mich. 2006) ("[T]he State played no role in the conception or birth of the child in this case, or in the decisions that resulted in the birth of the child."), *aff'd* 506 F.3d 422 (6th Cir. 2007); *cf.* Scott Altman, *A Theory of Child Support*, 17 INT'L J. L. POL'Y & FAM. 173 (2003); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 Ga. L. Rev. 649 (2008); Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 129 (2008) (all exploring theoretical bases of child support obligations). *But see Dubay*, 506 F.3d at 430 n.4 (affirming the district court while correcting its statement that biology alone creates liability for child support: "[The statute] thus does more than simply 'confirm a biological fact'—it establishes that the putative father is the *legal* father, which gives rise to legal consequences.") (emphasis in original).

90. *See, e.g.*, *Dubay*, 506 F.3d at 430; *Doe*, 125 P.3d at 472.

91. 117 P.3d 660 (Cal. 2005).

92. The California Supreme Court had previously used this approach to resolve a dispute between genetic and intended parents versus the gestational surrogate who had agreed to carry the pregnancy for them. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (resolving conflicting indicia of maternity by looking to intent after stating, "[b]ut for [the parties'] acted-on intention, the child would not exist").

both parents of a child cannot be women."[93] Not coincidentally, the push for this outcome came from the state itself, after Elisa's partner and the twins began receiving public assistance.[94]

Such developments reinforce the claim that the privatization of dependency has become the central pillar of family law.[95] According to numerous analyses and critiques, family law's doctrines, values, and policies—from the channeling of sex into marriage to the elevated place of both marriage and parental autonomy[96]—all contribute by design to a regime in which the state has virtually no obligation for care-giving and support of vulnerable young members of the population.[97]

Even if the strongest evidence for this hypothesis once lay in family law's emphasis on the marital family, certainly the modern rhetoric of personal responsibility and its implementation reveal that keeping dependency private is a policy that now extends well beyond marriage. As modern family law recognizes increasingly diverse family forms,[98] then, it

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93. *Elisa B.*, 117 P.3d at 666. *See also* H.M. v. E.T., 930 N.E.2d 206, 208-09 (N.Y. 2010) (holding that the family court has jurisdiction to impose a child support obligation on the mother's former same-sex partner).

94. *Elisa B.*, 117 P.3d at 672. The county's district attorney brought the suit. *Id.* at 662.

95. *E.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y 3 (2010); Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415 (2005); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1282-83 (2009); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 193-94, 224-26 (2007).

96. Parental autonomy plays an important role in the privatization of dependency because of the "exchange view" of parentage, which treats parental obligations (including child support) as the moral basis of parental rights. *See* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297-98 (1988). For other "takes" on the relationship among parent, child, and state with respect to financial support, see, for example, Marsha Garrison, *Autonomy or Community?: An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 92-117 (1998) (evaluating different models for calculating child support); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2418-19 (1995) (proposing the use of concepts from the law of agency and trusts to reconceptualize parental responsibilities).

97. *See supra* note 95 (citing authorities). Children born to never-married parents tend to experience more disadvantages than their peers born into a marriage because these children are more likely to be poor, more likely to need public assistance, and less likely to receive support than children of previously married parents. *See* TIMOTHY S. GRALL, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2007 (2009), *available at* http://www.census.gov/prod/2009pubs/p60-237.pdf; *see also* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007) (detailing how child support policies are not successful and harm children and their families).

98. *See, e.g.*, POLIKOFF, *supra* note 11 (proposing recognition of a broad range of family arrangements); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) (proposing principles to govern financial consequences and allocation of responsibilities for children upon the dissolution of

emerges as a structure for making more and more of these arrangements independent of public support.

## III. TESTING THE READINGS AGAINST NEW CLASSIFICATIONS: CHILDREN OF SEXUAL CONCEPTION AND CHILDREN CONCEIVED WITHOUT SEX

If the Supreme Court's rulings on illegitimacy decreased marriage's legal salience, contemporary scholarship has decreased marriage's importance to family law theory[99] and to law reform.[100] At the same time, empirical data show marriage's decreasing prevalence in lived experience and in public opinion about family life—with only 52% of adults married in 2008 (compared to 72% in 1960),[101] 41% of children born to unmarried women in 2008 (compared to 5% in 1960),[102] and a majority of survey respondents defining "family" to include various departures from the traditional norm of a married couple with children.[103] Meanwhile, with the advent of constitutionally protected access to contraception,[104] legalized abortion,[105] and the proliferation of ARTs,[106] sex and reproduction now represent quite distinct activities and objectives.

With the fading prominence of marriage and reproductive sex in all facets of family law, other classifications and points of distinction become more visible. Although the "new illegitimacy" prompting this symposium stems from the reinvigorated emphasis on parental marital status in recent

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marriages and some nonmarital relationships). For some of the advantages for children in recognizing multiple parents, see Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171 (2008); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007); Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL OF RTS. J. 909 (2006); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 327-32 (2007).

99. *E.g.*, Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31 (2006); Laura T. Kessler, *New Frontiers in Family Law*, *in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 226 (Martha Albertson Fineman ed., 2011) (examining trends in contemporary family law); Rosenbury, *supra* note 95.

100. *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 98.

101. PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 21 (2010), *available at* http://pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf.

102. *Id.* at 54.

103. *Id.* at 40 ("Nearly nine-in-ten Americans (88%) say a childless married couple is a family, and nearly as many say a single parent raising at least one child (86%) and an unmarried couple with children (80%) are families. A smaller majority say a gay or lesbian couple raising at least one child is a family (63%).").

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

105. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Gonzales v. Carhart, 550 U.S. 124 (2007).

106. *See, e.g.*, K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Raftapol v. Raney, 12 A.3d 783 (Conn. 2011); Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007).

cases about same-sex couples,[107] other contemporary classifications of children raise similarly vexing questions. This Part tests the various readings of the Supreme Court's illegitimacy precedents by analyzing what emerges as possibly an even "newer illegitimacy": the increasingly notable legal differentiation between nonmarital children based on the circumstances of their conception, either through heterosexual intercourse or through ARTs. Does the truism acknowledged by the Supreme Court, "no child is responsible for his birth,"[108] cast doubt on the doctrinal divergences currently dictated by the method of conception?

The following analysis yields two important insights for our understanding of illegitimacy both old and new. First, the regulation of sex persists as a governmental purpose, trumping other family law policies that have garnered far more attention in scholarly and public discourse. Indeed, child support may be conceptualized as a "tax" on heterosexual intercourse that does not apply to conception by nonsexual means.[109] Second, as it always has been, parentage remains a legal construction; we cannot eliminate the distinction between legitimacy and illegitimacy without dismantling legal parentage altogether[110]—because legitimacy is simply a way of expressing whom the law recognizes as a child's legal parent, while illegitimacy communicates the absence of legal recognition.

### *A. Complementary Readings: Children of Sex*

In many cases, the three readings of the Supreme Court's illegitimacy cases—children's equality, parental identification, and personal responsibility—work together seamlessly. For all practical purposes, in terms of access to support and other benefits, parental marital status has become irrelevant for children conceived by heterosexual intercourse.

Consider as an illustration *Dubay v. Wells*,[111] a case about support obligations for a child conceived outside marriage. Here, Matthew Dubay unsuccessfully challenged his legal status as the child's father, despite

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107. *E.g.*, Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010) (recognizing a biological mother's former partner as a parent, only because of the couple's formal civil union), *cert. denied*, 131 S. Ct. 908 (2011); *see The New "Illegitimacy": Revisiting Why Parentage Should Not Depend on Marriage*, *supra* note 42.

108. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

109. *See infra* note 118 and accompanying text.

110. On the dismantling of parentage, see Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 453-54 (2008); *see also* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 60-62 (2008) (exploring this idea). On the disaggregation of the "bundle" of parental rights and responsibilities, see Jacobs, *My Two Dads*, *supra* note 78. *But see* Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127 (2010) (questioning trend that would sever rights from family status).

111. 506 F.3d 422 (6th Cir. 2007).

asserting that he had made clear his desire not to become a parent before sexual intercourse with Lauren Wells and that he had relied on her assurances about her infertility and her use of contraception as an extra precautionary measure.[112] Wells became pregnant, chose to carry the pregnancy to term, and joined with the county to seek a paternity order and child support after Dubay maintained his refusal to become a father.[113]

Once the paternity complaint and DNA evidence *identified* Matthew Dubay as the child's father, state law made him *personally responsible* for child support, in turn achieving *equality* by according the child the same treatment that would belong to a child born of "legitimate" parents.[114] The outcome, namely Matthew Dubay's child support obligation, synthesizes all three readings of the case law, notwithstanding his arguments about the unfairness to him based not only on the circumstances of conception but also on a woman's post-conception opportunity to "opt out" of parenthood by means of abortion or adoption surrender.[115]

Moreover, cases like *Dubay* demonstrate that under all three readings, the Supreme Court's illegitimacy precedents leave ample room for state efforts to channel and otherwise manage adult sexual activities so long as children do not suffer a penalty. True, the judicial rhetoric in cases like *Dubay* conveys a punitive tone, but the court directs it at the father, not the child.[116] For example, in a predecessor case in the same jurisdiction, relied upon in *Dubay*,[117] the court of appeals described child support as a tax on conception and hence, implicitly, as a tax on heterosexual intercourse:

> Child support has long been a tax fathers have had to pay in Western

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112. *Id.* at 426.

113. *Id.*

114. *See, e.g.*, Walsh v. Jodoin, 925 A.2d 1086 (Conn. 2007); Jackson v. Proctor, 801 A.2d 1080 (Md. Ct. Spec. App. 2002).

115. Dubay contended that state law denied him equal protection by disallowing men like him to extricate themselves from parenthood, while affording women the choice of abortion or access to "safe havens" for surrendering a child for adoption. 506 F.3d at 428. He had publicized his case as an effort to secure "*Roe v. Wade* for men." *See* Ethan J. Leib, *A Man's Right to Choose (an Abortion)?*, LEGAL TIMES, Apr. 4, 2005, at 60; John Tierney, *Men's Abortion Rights*, N.Y. TIMES, Jan. 10, 2006, select.nytimes.com/2006/01/10/opinion/10tierney.html; *see also* Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests In and Obligations to the Unborn Child*, 7 J. L. & POL'Y 1 (1998). On "safe haven" laws, see Jeffrey A. Parness, *Deserting Mothers, Abandoned Babies, Lost Fathers: Dangers in Safe Haven Laws*, 24 QUINNIPIAC L. REV. 335 (2006); Carol Sanger, *Infant Safe Haven Laws: Legislating a Culture of Life*, 106 COLUM. L. REV. 753 (2006); Lucinda J. Cornett, Note, *Remembering the Endangered "Child": Limiting the Definition of "Safe Haven" and Looking beyond the Safe Haven Law Framework*, 98 KY. L.J. 833 (2010).

116. This punitive tone no doubt traces back to the crime of nonsupport and criminal bastardy proceedings. *See* KRAUSE, *supra* note 15, at 109-10, 153-56. For the history of the crime of nonsupport and the development of the modern approach to child support, see Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123 (1999).

117. 506 F.3d at 429-30.

> civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring—even if unwanted and unacknowledged—remains constitutionally sufficient to support paternity tests and child support requirements.[118]

Indeed, the child purportedly benefits from this tax on sex,[119] if we accept as a given the premise that the state itself will not pay support.

This analysis does not conflict with cases such as *Stanley v. Illinois*[120] or *Caban v. Mohammed*,[121] in which the Supreme Court struck down laws that disadvantaged unmarried fathers in their ability to protect their parental rights, compared to married fathers and unmarried mothers. In both cases, by emphasizing not just the financial support that these men had provided but also the affective ties that they had developed with the children, the Court reached results that protected the children's own emotional bonds and ensured relationship continuity.[122] The Court's failure to follow this apparent path in *Michael H. v. Gerald D.*,[123] when the Justices rejected a challenge to the traditional presumption of legitimacy by a biological father

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118. N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004); *see, e.g.*, *Dubay*, 506 F.3d at 430 ("[T]o the extent that Dubay claims that Michigan is not affording him equal protection of the law by denying men, but not women, 'the right to initiate consensual sexual activity while choosing to not be a parent,' . . . his argument must fail."); Dubay v. Wells, 442 F. Supp. 2d 404, 406 (E.D. Mich. 2006) ("The consequences of sexual intercourse have always included conception, and the State has nothing to do with this historical truism."), *aff'd* 506 F.3d 422 (6th Cir. 2007); Child Support Enforcement Agency v. Doe, 125 P.3d 461, 469 (Haw. 2005) ("The father elected a course of conduct inconsistent with the exercise of his right not to beget a child. The reproductive consequences of his actions were imposed by the operation of nature, not statute.").

119. *But see, e.g.*, Hatcher, *supra* note 97 (questioning benefits to children). *Cf.* Stephen L. Carter, *As a Compromise, How About a Federal Sex Tax?*, BLOOMBERG VIEW, Feb. 17, 2012, http://www.bloomberg.com/news/2012-02-17/as-a-compromise-how-about-a-federal-sex-tax-stephen-l-carter.html (facetious proposal designed to argue for separation between church and state).

120. 405 U.S. 645 (1972).

121. 441 U.S. 380 (1979).

122. *See Stanley*, 405 U.S. at 652-53 ("We observe that the State registers no gain towards its declared goals [of advancing child welfare and strengthening the minor's family ties] when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."); *see also Caban*, 441 U.S. at 389 ("There is no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father."); *id.* at 393 ("In cases such as this, where the father has established a substantial relationship with the child and has admitted his paternity, a State should have no difficulty in identifying the father even of children born out of wedlock.").

123. 491 U.S. 110 (1989). In this case, the Court upheld the constitutionality of California's conclusive presumption of legitimacy, which recognized the mother and her husband, not the biological father, as the child's legal parents. *Id.* at 123-27 (plurality opinion). As legal parents, they had the authority to prevent all contact between the child and the biological father even though the two had previously developed a relationship, such that the child called him "Daddy." *See id.* at 143-44 (Brennan, J., dissenting).

who had forged a relationship with his daughter, helps prove the point. In this case, the biological father lost his bid for continued contact with the child over the objection of the legal parents, the mother and her husband. Pulling no punches in its punitive tone toward the adult members of the "extraordinary" family in question,[124] the *Michael H.* plurality opinion presented the presumption of legitimacy as a means of serving the particular child's interests as well as those of society—with such interests understood to be advanced by the preferred family form of marriage[125] and through the usual deference to the decisions of legal parents on behalf of their children.[126]

Indeed, *Michael H.* demonstrates that when children's equality, parental identification, and personal responsibility can be secured through traditional means, namely reliance on the marital family, laws that disadvantage or penalize "illegitimate parents" can survive constitutional scrutiny. Put differently, the Court has never questioned a state's ability to prefer and privilege marriage as the site of sexual relationships.[127] Further, nothing in the Court's illegitimacy precedents challenges a state's authority to enact morality-based laws that discipline sex, even if more recent rulings require a more nuanced analysis of such measures.[128] Rather, a narrower

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124. *Id.* at 113 (plurality opinion) ("The facts of this case are, we must hope, extraordinary."); *cf.* Ariela R. Dubler, *Constructing the Modern American Family: The Stories of* Troxel v. Granville, in FAMILY LAW STORIES 95, 107-08 (Carol Sanger ed., 2008).

125. *Michael H.*, 491 U.S. at 123-24, 123 n.3, 131 (plurality opinion) (invoking traditional protection of the "unitary family" and "the integrity of the marital union" in upholding the presumption of legitimacy); *id.* at 131 (rejecting the child's equal protection argument for a protected relationship with her genetic father because the law makes her legitimate and recognizes her relationship with her legal father); *see also id.* at 135 (Stevens, J., concurring) (noting that the trial judge found that "the existence of two (2) 'fathers' as male authority figures will confuse the child and be counter-productive to her best interests").

126. *Id.* at 131-32 (plurality opinion); *see, e.g.*, Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion) (protecting parental liberty to rear one's children); Parham v. J.R., 442 U.S. 584, 602 (1979) (noting parents' "high duty" to prepare their children for adult responsibilities and justifying parental authority over children based on law's recognition that "natural bonds of affection lead parents to act in the best interests of their children"). The legal principle that the Constitution protects parents' authority to direct a child's upbringing dates back to earlier cases. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

127. Certainly, the equal protection analysis in *Eisenstadt v. Baird*, striking down restrictions on access to birth control by unmarried individuals but not married individuals, gestures toward a rule of government evenhandedness without regard to marriage. 405 U.S. 438, 453 (1972). Even if *Eisenstadt* once conveyed that promise, however, certainly the myriad laws currently privileging marriage show how little has changed in the interim. Indeed, in today's challenges to laws excluding same-sex couples from marriage, courts routinely cite the many legal consequences that accompany marital status. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 903 n.28 (Iowa 2009) ("Plaintiffs identify over two hundred Iowa statutes affected by civil-marriage status . . . ."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955-56 (Mass. 2003) (noting that "'hundreds of statutes' are related to marriage and to marital benefits" and listing examples).

128. In striking down the Texas criminal ban on same-sex sodomy, *Lawrence v.*

lesson emerges from the three readings of the illegitimacy case law: penalizing children is an impermissible means of implementing efforts to shape parental sexual conduct and to send a moral message.[129] By contrast, laws penalizing the adultery of the father in *Michael H.* and disapproving such conduct present no such problems,[130] especially if the state steers clear of criminal punishment.[131]

### *B. Apparently Conflicting Readings: Children of No Sex*

Removing heterosexual intercourse from the fact pattern triggers a quite different parentage rule for children conceived outside marriage.[132] Sperm donors need not pay the tax that sexually conceiving unmarried fathers must pay.[133] Rather, agreements between sperm donors and clinics or between sperm donors and recipients ordinarily suffice to insulate a genetic father from recognition as a legal father even if, as a consequence, the child—born to an unmarried mother—will have no second parent and even when the identity of the genetic father is not in doubt and a lawsuit claims that the child needs economic support. Thus, when conception occurs by ARTs, the compatibility of the three readings of the Court's illegitimacy case law unravels. Indeed, the parentage rule for many children conceived by unmarried women via ARTs stands at odds with each of the three readings, which simply do not apply when conception occurs without sex.

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*Texas* found majoritarian morality an insufficient justification. 539 U.S. 558, 577-78 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). But, the majority's disclaimers signal significant limitations on the holding, *see id.* at 578, suggesting that civil laws, as distinguished from criminal penalties, might well remain within constitutional bounds. Moreover, even after *Lawrence*, the Justices have invoked moral concerns to justify particular criminal abortion restrictions. Gonzales v. Carhart, 550 U.S. 124, 158 (2007); Stenberg v. Carhart, 530 U.S. 914, 962, 979 (2000) (Kennedy, J., dissenting).

129. Some read *Lawrence*'s invalidation of a stigmatizing prohibition, 539 U.S. at 575, to reflect anti-subordination principles. *See, e.g.*, Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007). This interpretation fits well with the conclusion that states may enact morality-based laws so long as they do not single out a particular class for opprobrium—such as gays and lesbians or children of unmarried parents.

130. Given the child's status as "legitimate," the *Michael H.* plurality saw no discrimination against her, despite the state's refusal to recognize her relationship with her biological father. 491 U.S. at 131-32.

131. Whether or not the reasoning in *Lawrence* would invalidate criminal adultery laws remains uncertain.

132. Of course, I do not mean to suggest that the adults examined in this section do not have sex at all or even that "sex" refers only to penile-vaginal penetration. Instead, by my use of the term "no sex" or my effort to "remov[e] sexual intercourse from the fact pattern," I simply mean that the children in question are conceived without sex, using ARTs, typically alternative insemination but sometimes by in vitro fertilization (IVF) with donor sperm. Likewise, adults in the "sex" group presumably engage in a variety of sexual activities apart from their participation in procreative intercourse.

133. *See supra* note 118 and accompanying text.

No doubt, the source of this particular parentage rule lies in the marital paradigm assumed at the time that donor insemination first attracted legal attention.[134] For married women using donor insemination, the presumption of legitimacy and principles of estoppel typically have made her husband the legal father of the child, with the donor having no parental status.[135] A number of states enacted the codification of this approach offered by the 1973 UPA, which expressly employed the language of "husband" and "wife."[136] These authorities apparently believed that only married women would use donor insemination or that the exclusion of single women from the governing legal principle would confine the practice to married couples. Of course, today we see widespread use of ARTs by unmarried women, including single women and women in relationships with other women that are not formally recognized.[137] Although many states now have developed approaches that will recognize a woman's partner or former partner as a parent or quasi-parent under appropriate circumstances,[138] the subset of "illegitimate" children conceived by donor insemination and born to single women have only one legal parent.

For example, in *In re K.M.H.*,[139] a divided Kansas Supreme Court applied and upheld a state statute treating a sperm provider as "not the birth father," absent a written agreement to the contrary with the woman. In this case, the uninformed failure of Daryl Hendrix (a gay man reportedly hopeful about the opportunity to become a parent) to secure a written agreement from Samantha Harrington naming him as birth father left

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134. On the history of donor insemination, including the governing law, see Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002).

135. The classic case is *In re Adoption of Anonymous*, 345 N.Y.S.2d 430 (Surr. Ct. 1973).

136. UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 377, 407-08 (2001).

137. *See, e.g.*, DIANE EHRENSAFT, MOMMIES, DADDIES, DONORS, SURROGATES: ANSWERING TOUGH QUESTIONS AND BUILDING STRONG FAMILIES (2005); Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES, Mar. 19, 2006, (Magazine), at 44 (detailing the experiences of several single women who used donor insemination to have children). Some same-sex relationships are not formally recognized because the couple lives in a state that restricts legally sanctioned relationships to heterodyadic marriages. *See, e.g.*, VA. CONST. art. I, § 15-A (West, Westlaw through End of 2011 Session) (Virginia Marriage Amendment). Others are not formally recognized because of the choice or inaction of one or both partners. *See, e.g.*, Elisa B. v. Super. Ct., 117 P.3d 660, 663 (Cal. 2005) (noting that the couple did not register as domestic partners).

138. *E.g.*, *Elisa B.*, 117 P.3d at 666; C.E.W. v. D.E.W., 845 A.2d 1146, 1149 (Me. 2004); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 98, § 2.03(1) (2002) (formulating criteria for "parent[s] by estoppel" and "de facto parent[s]"). *But see, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1073-74 (Mass. 2006) (declining to recognize parentage by estoppel); Stadter v. Siperko, 661 S.E.2d 494, 499 (Va. Ct. App. 2008) (declining to recognize de facto parentage).

139. 169 P.3d 1025 (Kan. 2007).

Hendrix with no paternal status as to the resulting twins even though he went all the way to the U. S. Supreme Court in an effort to claim parental rights and accept parental responsibilities, including support obligations.[140] In rejecting his arguments, the *K.M.H.* majority interpreted the statute to advance state interests in "predictability, clarity, and enforceability."[141] Explaining that the statute afforded Hendrix an opportunity to bargain for parental rights before providing his semen for Harrington's insemination, the majority asserted that "the male's ability to insist on father status effectively disappears once he donates sperm."[142] A divided Pennsylvania Supreme Court reached a similar result in *Ferguson v. McKiernan*,[143] a suit for child support in which the court enforced an agreement relieving the man of all parental obligations that the parties entered before in vitro fertilization (IVF).[144]

In these cases, then, the children each have one legal parent—precisely the outcome that Matthew Dubay unsuccessfully sought to achieve for his sexually conceived child and, according to some authorities, precisely the disadvantage that "illegitimacy" encompasses.[145] An even more telling illustration of this differential treatment becomes apparent in a recent Indiana case, *In re Paternity of M.F.*,[146] a suit for support for two children whom J.F., an unmarried mother, bore during a long-term committed relationship with a same-sex partner.[147] After she and her partner split up, J.F. and the county joined to sue W.M., the children's genetic father.[148] W.M. argued that he was a sperm donor who had helped conceive the children by alternative insemination and cited an agreement with J.F. relieving him of support obligations in exchange for his semen.[149] J.F. counter-argued that W.M. had failed to prove that conception did not occur

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140. *See In re K.M.H.*, 129 S. Ct. 36 (2008) (denying certiorari); *Man Fights for Parental Rights*, KCTV5-KANSAS CITY (Nov. 23, 2007), http://www.kctv5.com/news/14673759/detail.html (accessed archive at http://www.ottawamenscentre.com/news/20071123_rights.htm). *See generally* Elizabeth E. McDonald, *Sperm Donor or Thwarted Father? How Written Agreement Statutes are Changing the Way Courts Resolve Legal Parenting Issues in Assisted Reproduction Cases*, 47 FAM. CT. REV. 340 (2009) (analyzing the case and the policy issues it raises).

141. 169 P.3d at 1039.

142. *Id.*

143. 940 A.2d 1236 (Pa. 2007).

144. *Id.*

145. *See Ferguson*, 940 A.2d at 1249 (Saylor, J., dissenting) (asserting that the majority's approach violates state law prescribing legitimacy for all children); *see also supra* note 69 and accompanying text. For a more detailed exploration of some of the contrasts in sex and no-sex cases, see Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 329-33 (2011).

146. 938 N.E.2d 1256 (Ind. Ct. App. 2010).

147. *Id.* at 1257.

148. *Id.* at 1258.

149. *Id.* at 1257.

by sexual intercourse and that, in any event, such agreement would be unenforceable in violation of public policy—an invalid attempt by adults to bargain away the rights of these children.[150]

As the court acknowledged, both parties had some Indiana law on their respective sides: For conception by alternative insemination, a contract relieving the donor of support obligations is valid and enforceable, if a physician performed the procedure.[151] For conception by sexual intercourse, such agreements are invalid and unenforceable.[152] J.F's ability to secure a child support order against W.M. would depend entirely on the method of conception, of which there was no proof in this case. There was a donor agreement entered into evidence, however, that clearly applied to the first child.[153] Because J.F., the plaintiff, was seeking to avoid the contract, she bore the burden of proof but failed to carry it because she could not prove conception by sexual intercourse; hence, she lost, leaving the first child without support from W.M.[154] For the second child, however, the agreement did not clearly apply, so the court remanded with instructions that the lower court grant J.F.'s petition to establish paternity,

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150. *Id.* at 1260.

151. *Id.* at 1259-60. The Kansas statute applied in *K.M.H.* contains this requirement. *In re* K.M.H., 169 P.3d 1025, 1029 (Kan. 2007) (quoting a statute, which requires "semen provided to a licensed physician"); *see also* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986). In *M.F.*, the majority also emphasized the participation of a physician. 938 N.E.2d at 1261. Of course, self-insemination is easily performed. *See* Renate Duelli Klein, *Doing It Ourselves: Self-Insemination*, *in* TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD? 382 (Rita Arditti, Renate Duelli Klein & Shelley Minden eds., 1984); Daniel Wikler & Norma J. Wikler, *Turkey-Baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5 (1991). The physician's participation performs a valuable evidentiary function, however, preventing any dispute about the method of conception (sexual versus medical) from devolving into a "he said/she said" argument, as *M.F.* illustrates. Indeed, in *M.F.*, both the majority and dissenting opinions agree that "informal, spur-of-the moment written instrument[s]" should not relieve a biological parent of support duties. 938 N.E.2d at 1261; *id.* at 1264 (Crone, J., concurring in part and dissenting in part). For another case with evidentiary complications, see Adams-Hall v. Adams, 3 A.3d 1096 (Del. 2010); *see also* Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 984 (2009) (criticizing physician-participation requirement while explaining its evidentiary purpose); *cf.* UNIF. PARENTAGE ACT § 702 cmt. (amended 2002), 9B U.L.A. 67-68 (Supp. 2011) ("The new Act does not continue the requirement [in the 1973 version] that the donor provide the sperm to a licensed physician."). Note that, today, some authorities prefer the term "alternative insemination" to "artificial insemination." *E.g.*, MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 80 (2001).

152. *M.F.*, 938 N.E.2d at 1260; *see, e.g.*, Straub v. B.M.T. *ex rel.* Todd, 645 N.E.2d 597, 601 (Ind. 1994) (rejecting father's contention of "artificial insemination by intercourse"); State *ex rel.* Kayla T. v. Risinger, 731 N.W.2d 892 (Neb. 2007) (rejecting a genetic father's argument that an agreement with the mother relieves him of support obligations to a child they conceived in a sexual relationship).

153. *M.F.*, 938 N.E.2d at 1262.

154. *Id.* at 1260-61.

based on a presumption of conception by sexual intercourse in the absence of evidence to the contrary.[155] The outcome: two siblings, both conceived in the same intimate same-sex partnership and with the same genetic parents, but one sibling has one legal parent and the other has two, with the different treatment based on the method of conception and its proof.[156]

In all three cases, *K.M.H.*, *Ferguson*, and *M.F.*, there were judges who did not agree with the majority. These minority opinions contended that parents cannot bargain away the rights of their children,[157] that a focus on the interests of the children would have compelled a different conclusion,[158] and that family law policies requiring child support trump contract law policies honoring agreements.[159] Examined through the lens of the Supreme Court's illegitimacy precedents, these minority opinions collectively express concern that the circumstances of a child's birth—or conception—determine the recognition (or not) of a second legal parent.

Although these cases appear to stand at odds with the Court's illegitimacy precedents and *Dubay*,[160] calls for a new parentage rule for donor-conceived children of single women remain quite limited and have acquired little traction. Over a decade ago, Marsha Garrison challenged the doctrine that permits a one-parent family through alternative insemination.[161] Yet recent cases, such as *K.M.H.*, *Ferguson*, and *M.F.*, continue to reinscribe this doctrine, notwithstanding Garrison's proposal for two parents for every child. In addition to Garrison's targeted critique of principles of parentage for donor-conceived children, one can find broader arguments for enshrining the heterodyadic[162] marital family as the norm for all—by means of a proposed understanding of parenthood that

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155. *Id.* at 1261 n.1, 1263.

156. *Id.*

157. Ferguson v. McKiernan, 940 A.2d 1236, 1249 (Pa. 2007) (Eakin, J., dissenting) ("I respectfully dissent from the majority's conclusion appellee can bargain away her children's right to support from their father merely because he fathered the children through a clinical sperm donation.").

158. *Id.* at 1249-51 (Eakin, J., dissenting) (asserting that children's best interests require support obligation by the genetic father); *In re* K.M.H., 169 P.3d 1025, 1051 (Kan. 2007) (Hill, J., dissenting) ("Who speaks for the children in these proceedings?").

159. *M.F.*, 938 N.E.2d at 1264 (Crone, J., concurring in part and dissenting in part). Judge Crone, however, does leave open the possibility that, in narrow circumstances and subject to clearly defined requirements, the donor might not have support obligations. *Id.* at 1264-65.

160. *See supra* notes 111-19 and accompanying text.

161. Garrison wrote that in the context of sexual conception, "our legal system grants no parent, male or female, the right to be a sole parent." Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 906 (2000). Thus, she argued that she could find no justification for "a policy that would invariably deprive technologically conceived children of two legal parents." *Id.* at 907.

162. *See* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 *passim* (2010) (using this term).

would integrate legal, social, and biological elements.[163] Proponents of this approach urge family law to privilege this integrative model and to limit recognition of departures from this norm.[164] Yet the prospect of moving to a legal regime based on these values seems slim, given family law's trajectory, with the increasing authorization of same-sex marriage[165] and recognition of an array of nontraditional, informal domestic arrangements, many of which include children parented by adults in the absence of any biological relationship.[166]

Family law's modern embrace of new family forms finds strong support among advocates of the principle of children's equality rooted in the Supreme Court's illegitimacy precedents.[167] For example, Nancy Polikoff invokes the illegitimacy case law[168] to make a powerful argument for family law to abandon marriage as the "dividing line" for official recognition and the distribution of rights and benefits[169] and, instead, to adopt a "valuing-all-families legal system."[170] Polikoff proceeds to propound several guiding principles, including "plac[ing] the needs of children first"[171] and "support[ing] children in all family forms."[172] Similarly, Courtney Joslin criticizes the refusal of some jurisdictions to extend the parentage doctrines governing married couples' children to the ARTs-conceived children of unmarried couples, including same-sex

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163. *E.g.*, DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 155-57 (2007); ELIZABETH MARQUARDT, COMM'N ON PARENTHOOD'S FUTURE, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS, 10-15 (2006) (a survey of relevant developments in the United States and abroad, led by principal investigator Elizabeth Marquardt); Karen Clark & Elizabeth Marquardt, *The Sperm Donor Kids Are Not Really All Right: A New Study Shows They Suffer*, SLATE (June 14, 2010, 11:23 AM), http://www.slate.com/id/2256212/.

164. *See generally* WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY (Linda McClain & Daniel Cere eds.) (forthcoming 2013) (on file with author).

165. In 2012, Washington became the seventh state to allow access to marriage by same-sex couples. *See* Reuters, *Washington; Gay Marriage Legalized*, N.Y. TIMES, Feb. 13, 2012, http://www.nytimes.com/2012/02/14/us/washington-gay-marriage-legalized.html?scp=2&sq=marriage&st=cse.

166. *E.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (recognizing three legal parents, former lesbian partners and their sperm donor); N.R. Kleinfeld, *And Baby Makes Four, and Complications*, N.Y. TIMES, June 19, 2011, http://www.nytimes.com/2011/06/19/nyregion/an-american-family-mom-sperm-donor-lover-child.html (describing the informal familial arrangement of a single mother, her son. and a gay male couple). *See generally* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 98 (proposing principles to govern the financial consequences and allocation of responsibilities for children upon dissolution of marriages and some nonmarital relationships); *supra* notes 137-38 (citing additional relevant authorities).

167. *See supra* notes 42-45 and accompanying text.

168. *See* POLIKOFF, *supra* note 11, at 129-31.

169. *Id.* at 126-31.

170. *Id.* at 132.

171. *Id.* at 138-39.

172. *Id.* at 140-41.

couples.[173] While ARTs-conceived children of married couples have two legal parents, the same result does not always obtain for ARTs-conceived children of unmarried couples. Joslin challenges such discrimination because it disadvantages the children of nontraditional families and undermines these children's wellbeing by denying them some "critical financial protections and benefits," in particular, resources that an additional parent could provide.[174]

These arguments, which sound in equality and recall the seductively incontestible idea that no child should be penalized because of the circumstances of his or her birth,[175] are compelling. Yet, taken literally and pushed to their logical conclusion, these arguments invite questions about another class of children: the ARTs-conceived children of single women. Because of the choices of their mothers and their genetic fathers, these children have no second legal parent or the "critical financial protections and benefits"[176] that a second legal parent could provide. Does the reasoning of Polikoff and Joslin require recognition of sperm donors as legal parents in such cases, notwithstanding the contrary intent of the adults who entered into the reproductive arrangement? Certainly, an emphasis on reproductive or family autonomy would provide an easy answer: no. Polikoff and Joslin, however, emphasize children's equality[177] and urge law to make irrelevant situations over which a child has no control. Although the advocacy and scholarship of both Polikoff and Joslin leave no doubt that they contemplate something other than a purely genetic approach to legal parentage,[178] their work necessarily poses a challenge: how to

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173. Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

174. *Id.* at 1195; *see id*. at 1177 ("The Supreme Court has declared that children should not be penalized based on the circumstances of their birth."); *id*. at 1228 ("Over the past forty years, many of the laws that once penalized children born outside of marriage have been eliminated or at least mitigated."); *see also* Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 214-20 (2007) (citing the Supreme Court's illegitimacy precedents to criticize the failure of the UPA to recognize a mother's partner as second parent of ARTs-conceived child); Maldonado, *supra* note 64, at 386-87 (urging "equality for all children . . . by extending the presumption of parentage to nonmarital children in cases where a person has held the child out as his or her own regardless of a biological link"). All of these authorities fail to explore the apparent inequality resulting from parentage laws applicable to single women (that is, those without partners) who use donor insemination, however.

175. *See supra* notes 39-40 and accompanying text.

176. Joslin, *supra* note 173, at 1195.

177. This emphasis on children's equality is reflected in the announcement for this symposium. *See supra* note 42 and accompanying text.

178. For representative examples of such scholarship, see Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81 (2011); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J.C.R. & C.L. 201 (2009).

reconcile the Court's illegitimacy precedents with due respect for families that do not conform to traditional norms, in particular single women who use ARTs for the purpose of creating a one-parent family.[179]

### *C. Sex, Nature, and Law*

The challenge posed by the contrasting parentage rules for two groups of children conceived outside marriage, those from sex and those without sex, highlights three significant propositions. All three illuminate not only the conceptualizations of illegitimacy, both old and new, but also the understanding of family law itself.

First, the regulation of sex remains an important function of family law, and the policy of personal responsibility, with its connection to heterosexual intercourse, represents a modern instantiation of this longstanding legal enterprise. The absence of support responsibilities for sperm donors reinforces this conclusion; in such cases, reproduction occurs without sex—leaving the state without the regulatory interest so strongly applied and enforced for sexually conceived children.[180] Indeed, the divergence in the treatment of nonmarital children, depending on the method of conception, reveals that the regulation of sex has far more explanatory payoff than the privatization of dependency when it comes to identifying the core value or policy of contemporary family law. The fact that family law permits some children conceived by donor insemination to have only one legal parent, even when they might need support, as in *Ferguson* and *M.F.*,[181] confirms the limits of the privatization of dependency as family law's theoretical foundation.[182] The regulation of sex, however, harmonizes the determinative role played by the method of conception, providing a rationale for the unequal and hence apparently anomalous outcomes for the two groups of children.

Second, to the extent the Supreme Court's illegitimacy precedents focus on condemnation, punishments, and penalties imposed on undeserving children,[183] the Supreme Court's own bounded understanding of such

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179. *See* Egan, *supra* note 137.

180. Some readers will recognize the resemblance of this move to a part of the methodology of governmental interest analysis for resolving choice of law issues. *See, e.g.*, Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (1959).

181. *See supra* notes 143-56 and accompanying text.

182. Hence, I disagree with Katharine Baker's assertion that "there is a growing consensus that family law as a discipline is shifting from a set of rules designed primarily to regulate sexual relationships between adults to a set of rules designed to regulate parental relationships between adults and children." *See generally* Baker, *supra* note 89, at 651. I would still place sex at the center of family law. *See* Appleton, *supra* note 12, at 272-85.

183. *E.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("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

concepts helps explain why children conceived without sex who have only one legal parent suffer no penalty under the prevailing doctrines. In several different cases arising in diverse settings—from challenges to funding schemes that subsidize childbirth for indigent women but not their medically necessary abortions[184] to insufficient protection provided by the state in response to family violence[185]—a majority of the Court has taken a very narrow view of state action.[186] Using this narrow view, the Court fails to see (or to goes out of its way to downplay) the state's participation in creating the contested situation.

A few notable opinions illustrate the pattern. For example, in ruling that the Constitution does not require state funding for medically necessary abortions for poor women even when the state pays for childbirth, the Court reasoned that no deprivation of liberty occurs when government fails to "remove [obstacles] not of its own creation."[187] As the opinion explains, "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[188] The Court accepted a woman's poverty and, implicitly, her health problems warranting abortion[189] as features of a "natural"[190] status quo that the state did not cause and thus has no affirmative obligation to address. In the process, the Court considered irrelevant the government support provided for poor women who carried their pregnancies to term.[191] The Court has used similar reasoning to find

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an infant is illogical and unjust.").

184. *E.g.*, Harris v. McRae, 448 U.S. 297 (1980).

185. *E.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989); *see also* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005).

186. *See infra* notes 187-97 and accompanying text.

187. *Harris*, 448 U.S. at 316.

188. *Id*.

189. *See id*. at 339-40 (Marshall, J., dissenting) (describing the health conditions that may make an abortion medically necessary).

190. I put "natural" and related terms in quotation marks throughout this discussion to emphasize the indeterminacy of the term's application.

191. *See id*. at 333-34 (Brennan, J., dissenting). Justice Brennan explained:

> [W]hat the Court fails to appreciate is that it is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth. A poor woman in the early stages of pregnancy confronts two alternatives: she may elect either to carry the fetus to term or to have an abortion. . . . By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse. . . . [A]s a practical matter, many poverty-stricken women will choose to carry their pregnancy to term simply because the Government provides funds for the associated medical services, even though these same women would have chosen to have an abortion if the Government had also paid for that option, or

no state interference with constitutionally protected interests in cases of family violence even when state actors were inextricably involved in the events leading up to the violence.[192] Thus, according to the Court, family violence arises exclusively from "natural" (not state) causes, even when child welfare authorities made the decisions to return a child to an abusive parent's custody and to keep him there[193] or the police did not respond to calls to enforce a judicial order of protection, despite a statute making enforcement mandatory.[194]

In failing to acknowledge the state's participation and in naturalizing the consequences that ensue in such cases, the Court has rejected arguments that the state is imposing a penalty for choosing abortion[195] or that the state is depriving persons of constitutionally protected interests because of its role in the physical harm they have suffered as a result of family violence.[196] Under this circumscribed analysis and the baseline that it uncritically assumes, a penalty or deprivation occurs *only* when the state interferes with or worsens the "natural" status quo for an individual or class.[197] In setting a boundary between private and public, the Court has chosen an expansive view of the former and a blinkered view of the latter.

The Court's general approach, problematic and contrived as it might be, reaches beyond abortion and family violence. In particular, it has implications for parentage and the status of the ARTs-conceived children

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> indeed if the Government had stayed out of the picture altogether and had defrayed the costs of neither procedure.

*Id.*

192. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

193. *Id.* at 193-94; *cf. id*. at 205-06 (Brennan, J., dissenting) (emphasizing state action in the facts of the case).

194. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 751-59 (2005); *cf. id*. at 788 (Stevens, J., dissenting) (recognizing Gonzales's entitlement to protection because "the statute's guarantee of police enforcement is triggered by, and operates only in reference to, a judge's granting of a restraining order in favor of an identified 'protected person'").

195. *Harris*, 448 U.S. at 317 n.19 (explaining that disqualification from other benefits for engaging in protected activity would constitute a penalty, but failure to fund protected activity is not); *see also* Maher v. Roe, 432 U.S. 464, 474 n.8 (1977) (explaining why the state has not imposed a penalty in declining to fund elective abortions, while funding care incident to carrying to term and delivery).

196. *DeShaney*, 489 U.S. at 191; *see Gonzales*, 545 U.S. at 764-69 (rejecting arguments that a Colorado statute gave a mother an entitlement to enforcement of a restraining order in the face of fatal violence by the children's father, so that police inaction did not violate due process).

197. *See generally* Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981). Contrast the laws challenged in the abortion-funding cases, in which the Court found no penalty, with a mandatory maternity leave from employment, which the Court described as "penaliz[ing] the pregnant teacher for deciding to bear a child." Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 640 (1974). *See also* Perry v. Brown, 2012 WL 372713 (9th Cir. 2012) (holding California's Proposition 8 unconstitutional because it withdraws from gays and lesbians the access to marriage that they previously enjoyed).

of single mothers. The Court's reasoning suggests that deciding whether a particular parentage scheme unjustly penalizes a class of children or unfairly deprives them of a second parent remains very much an open question, one that depends on identifying (or assuming) the baseline or the "natural" state of affairs. Accordingly, we must return to the illegitimacy precedents to examine what the Court regarded as the "natural baseline" in terms of parentage for children born outside marriage so that laws robbing a given relationship of legal force would have been seen as penalizing these children. Put differently, the question becomes whether the Court envisioned genetic paternity as the "natural baseline" in the illegitimacy case law.

This inquiry in turn reveals the third significant proposition: parentage is anything but "natural." Traditionally, as well as now, genetics do not determine parentage,[198] and many observers doubt the wisdom and desirability of reforms that would achieve such ends.[199] In overturning discrimination based on illegitimacy, in fact, the Court has made clear the insufficiency of genetic connection alone for constitutional protection.[200] For example, the Court upheld the required performance of certain formal acts for an unmarried father to be recognized as a legal parent, such as obtaining a judicial order of filiation.[201] Similarly, the Court developed what some observers call the "biology plus" test.[202] By stating that biological connection merely creates a unique opportunity for achieving recognized parental status and requiring genetic fathers to undertake supplementary paternal conduct in order to gain constitutionally protected parental rights in the absence of marriage, the Court has left no doubt that a state may refuse to recognize a biological father as a legal parent when he merely provides genetic material.[203]

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198. For example, during slavery, law ignored the male owner's genetic connection to children conceived through sexual intercourse, forcible and otherwise, with his female slaves and determined the status of children exclusively through gestation. *E.g.*, ROBERTS, *supra* note 18, at 23, 29, 267-68 (1997); *see also* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) ("Illegitimacy is a legal construct, not a natural trait."); Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 9 (2009) ("Marriage [and illegitimacy] thus functioned . . . as a way for men to maintain sexual freedom without adverse consequences to themselves or their (official) families.").

199. *See, e.g.*, Baker, *supra* note 89; Jacobs, *Paternity Fraud Claims*, supra note 78; Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246 (2006).

200. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978).

201. *Id.* at 275-76 (upholding a requirement of a judicial order of filiation for a child to inherit from his or her unmarried father by intestate succession).

202. *See supra* note 78 and accompanying text.

203. Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972). These cases regard biological connection as merely providing an opportunity to develop a relationship. *Lehr*, 463 U.S. at 262.

Today, the rise of doctrines that determine parentage according to function and performance push this approach beyond the notion of "biology plus." The more contemporary, functional approaches use performance not as an *addition* to genetic connection but as a *substitute* for it[204]—just as the presumption of legitimacy always did, with marriage as the required performance. Indeed, albeit with divided opinions, a majority in *Michael H. v. Gerald D.* upheld the presumption of legitimacy against the constitutional challenge of a genetic father and daughter, who sought recognition of their relationship.[205] As the *Michael H.* plurality opinion explained in rejecting the child's claim to a relationship with her biological father, over the objection of the mother and the mother's husband, this *legitimate* child suffers no illegitimacy-based discrimination, and "[i]llegitimacy is a legal construct, not a natural trait."[206] Now, in some jurisdictions, the very traditional presumption of legitimacy extends to nontraditional families, recognizing a mother's wife or domestic partner as a legal parent.[207] Further, the terms "natural father" and "natural child" legally apply even in the absence of genetic relationship.[208]

The UPA has followed a similar path. The 1973 UPA set forth a network of parentage presumptions applicable to children to whom the presumption of legitimacy did not apply.[209] This network included conduct-based triggers, most notably a presumption of paternity arising from a man's receiving a child into his home and holding the child out as his own.[210] A revised UPA, first promulgated in 2000, attempted to respond to improved genetic testing and the proliferation of ARTs.[211] This

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204. *E.g.*, Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Shondel J. v. Mark D., 853 N.E.2d 610 (N.Y. 2006).

205. Michael H. v. Gerald D., 491 U.S. 110 (1989). In addition to Justice Scalia's plurality opinion for four Justices, rejecting the arguments of the genetic father and child, Justice Stevens concurred in the result on the theory that the genetic father had received all the process he was due and that, on the merits, his claims were insufficient to overcome the presumption in this case or to gain access to the child over the legal parents' objections. *See id.* at 132-36 (Stevens, J., concurring).

206. *Id*. at 131.

207. *E.g.*, Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26 (Ct. App. 2009), *overruled in part by* Reid v. Google, Inc., 235 P.3d 988 (Cal. 2010); Shineovich v. Shineovich, 214 P.3d 29 (Or. Ct. App. 2009). *See generally* Appleton, *supra* note 14 (exploring the application of the presumption of legitimacy to same-sex couples); Jeffrey A. Parness, *Civil Unions and Parenthood at Birth*, 99 ILL. B.J. 472 (2011) (exploring how legal parenthood should be assigned at birth to children born into civil unions).

208. *E.g.*, Nicholas H. v. Kimberly H., 46 P.3d 932, 933-34 (Cal. 2002).

209. UNIF. PARENTAGE ACT § 4 (1973), 9B U.L.A. 393-94 (2001); *see also* UNIF. PARENTAGE ACT § 204 cmt. (amended 2002), 9B U.L.A. 22-23 (Supp. 2011).

210. UNIF. PARENTAGE ACT § 4(a)(4) (1973), 9B U.L.A 393-94 (2001) (the presumption of paternity applies if "while the child is under the age of majority, [the man] receives the child into his home and openly holds out the child as his natural child").

211. *See, e.g.*, UNIF. PARENTAGE ACT §§ 501, 701 (amended 2002), 9B U.L.A. 329, 354 (2001).

version retained the presumption of legitimacy based on marriage but initially eliminated the "holding out" trigger for paternity on the theory that genetic testing would identify the fathers of children born outside marriage.[212] The drafters, however, then became aware that the elimination of this provision "could result in differential treatment of children born to unmarried parents."[213] In 2002, in order to "more fully serve the [UPA's] goal of treating nonmarital and marital children equally," the drafters restored the "holding out" provision, albeit with a new durational requirement.[214]

Despite concerns about equal treatment, however, all the versions of the UPA specify that a donor of genetic material is not a parent, so long as certain requirements are satisfied,[215] and the updated UPA's treatment of ARTs contemplates situations when the child will have only one legal parent, a mother.[216] Moreover, the UPA makes clear that such provisions do not apply to children conceived by sexual intercourse.[217]

As this brief survey reveals, parentage has been and remains a legal construction, a social and political choice, not a biological inevitability. The state is inextricably involved, determining the criteria that make one a parent.[218] Given the long history of the presumption of legitimacy in marriage, it should come as no surprise that alternative bases of parentage still include one or more ingredients that remind us of this legally favored relationship: sex, care, support, co-residence, and/or other familial performance. Marriage casts a shadow even if its formalities are no longer essential for family recognition, as various observers have noted in evaluating contemporary functional approaches.[219]

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212. UNIF. PARENTAGE ACT § 204 cmt. (amended 2002), 9B U.L.A. 311-12 (2001) (current version at 9B U.L.A. 23-24 (Supp. 2011)).

213. UNIF. PARENTAGE ACT § 204 cmt. (amended 2002), 9B U.L.A. 23-24 (Supp. 2011).

214. *Id.*

215. UNIF. PARENTAGE ACT § 501 (amended 2002), 9B U.L.A. 329 (2001); UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 407-08 (2001).

216. UNIF. PARENTAGE ACT § 702 cmt. (amended 2002), 9B U.L.A. 67-68 (Supp. 2011) ("[T]his section shields all donors . . . from parenthood in all situations in which either a married woman or a single woman conceives a child through ART with the intent to be the child's parent, either by herself or with a man. . . ."); *see also id.* § 704(a), 9B U.L.A. 69 ("Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction[,] must be in a record signed by the woman and the man. This requirement does not apply to a donor.").

217. UNIF. PARENTAGE ACT § 701 cmt. (amended 2002), 9B U.L.A. 354 (2001) ("Article 7 [entitled 'Child of Assisted Reproduction'] applies only to children born as the result of assisted reproduction technologies; a child conceived by sexual intercourse is not covered by this article, irrespective of the alleged intent of the parties.").

218. *See, e.g.*, JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 26 (2006) (explaining that the state is always involved in identifying parents, even when it chooses to rely on biological criteria).

219. *See, e.g.*, Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L.

The court of appeals in *Dubay* emphasized the state's role in assigning parental status,[220] correcting the lower court's erroneous declaration that the state had nothing to do with the unintended father's predicament.[221] Although the dissent in *M.F.* raised questions about the refusal to recognize the sperm donor as the father of one child,[222] we might ask why the mother's former partner, who would have been recognized as a parent in several other jurisdictions,[223] bore no responsibility for support. To say that this child in *M.F.* or the twins in *K.M.H.* and *Ferguson* suffer a discriminatory penalty based on the circumstances of birth, in contravention of the Supreme Court's illegitimacy precedents, would require identifying a "natural" status quo that the state has infringed or worsened. The very concept of parentage defies such efforts: a parent-child relationship exists only when the state says it does.

Perhaps, however, the analysis need not remain so hopelessly circular. The Court's emphasis on parental performance in the "biology plus" cases,[224] the role of conduct in the other illegitimacy precedents, and the rise of contemporary functional approaches to parentage all suggest that some hints of the "natural" family, the status quo, or the baseline might well be found in the ongoing domestic or domestic-like interactions that adults and children share. Again, although marriage is not required, it provides a template for evaluating function and performance.[225] When the state acts to disrupt or negate these subsisting arrangements, as it did in discounting the active role that Louise Levy,[226] Peter Stanley,[227] and Abdiel Caban[228] had played in the children's lives, the state penalizes those children, according to the Court. By contrast, when the state chooses not to recognize a genetic tie, that is, when the genetic tie provides the only connection between an adult and a child, the state's inaction works no interference and it imposes no penalty, in the Court's view. Under this analysis, the one-parent families created by donor-insemination laws do no represent a "newer illegitimacy." These were always one-parent families, so the state took nothing away.

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REV. 1643, 1665 (1993); Katharine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004); Murray, *supra* note 65.

220. Dubay v. Wells, 506 F.3d 422, 430 n.4 (6th Cir. 2007).

221. *See* Dubay v. Wells, 442 F. Supp. 2d 404, 414 (E.D. Mich. 2006), *aff'd*, 506 F.3d 422 (6th Cir. 2007).

222. *In re* Paternity of M.F., 938 N.E.2d 1256, 1264 (Ind. Ct. App. 2010) (Crone, J., concurring in part and dissenting in part).

223. *See supra* note 138 (citing authorities).

224. *See supra* notes 78, 202 and accompanying text.

225. *See supra* note 219 and accompanying text.

226. Levy v. Louisiana, 391 U.S. 68 (1968).

227. Stanley v. Illinois, 405 U.S. 645 (1972).

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

## CONCLUSION

In overturning many laws that made marriage the dividing line for access to rights and benefits, especially for children, the Supreme Court's illegitimacy precedents invite critiques of all laws that classify on the basis of marriage and that attach material consequences to the circumstances of a child's birth. The equalizing impulses at work here, however, often prompt us to forget the critical role of sex and sexual morality in illegitimacy. Even with the demise of many instantiations of the "old illegitimacy," the state's interest in regulating sex persists, with legal reforms extending support to children born to unmarried parents often framed not just as means for privatizing dependency but also as regulations of sex. That such reforms do not apply to a subset of children born to unmarried parents, namely children conceived without sex, underscores the enduring power of the state's interest regulating sex, while also exposing the limited explanatory value of children's equality and the privatization of dependency in our efforts to make sense of family law's modern trajectory.

Hence, a regime that makes marriage the dividing line has given way to one that makes sex the dividing line. Should this classification trouble us, given that a child's parentage with all its legal consequences will depend on the circumstances of conception, in apparent contravention of the Supreme Court's illegitimacy case law?

One short response to this question would challenge, as a normative matter, the state's continuing effort to discipline sex, notwithstanding judicial rhetoric protecting sexual liberty and privacy.[229] Another short response would emphasize the autonomy of those who use donor insemination and other ARTs, including women who choose to have a child without a second parent.[230] The first response is unsatisfactory because it fails to differentiate this particular regulation of sex, child support obligations for sexually conceived children, from all the others imposed by family law, which would require a thorough rethinking.[231] The second is unsatisfactory because reproductive autonomy applies as well to sexual procreation, precisely the context in which the state imposes a "tax" in the form of child support, regardless of the choices of the participants.[232] Moreover, neither of these responses focuses on the children, whose equal treatment stood out as such a commanding consideration in the illegitimacy

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229. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Eisenstadt v. Baird, 405 U.S. 438 (1972).

230. *See, e.g.*, JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); *see also, e.g.*, *In re* Roberto d.B., 923 A.2d 115 (Md. 2007) (recognizing the intended father as the sole legal parent upon the birth of a child born pursuant to a gestational surrogacy agreement).

231. *See, e.g.*, Appleton, *supra* note 12, at 272-85.

232. *See supra* note 118.

precedents.

Considering the impact on children of the sex/no sex dividing line requires a longer response that in turn raises additional questions. As this Article has shown, determining when a particular connection between an adult and child receives legal recognition always constitutes a policy choice. Indeed, some children might have two legal parents, others three,[233] and still others only one. Should we consider some of these children "legitimate" and other "illegitimate"? Which ones? Some children have adults who play important roles in their lives but the law of parentage excludes them, such as grandparents, stepparents, nannies, and foster parents.[234] We can probably eliminate the last vestiges of illegitimacy—the law's failure to acknowledge the reality of a particular child's lived experience no matter how unique—only by dismantling parentage altogether.[235]

Meanwhile, however, the choices that law makes about legal parentage—perhaps a less troubling and provocative term than "illegitimacy," even if the inquiries share much in common—not only shape our understanding of family by acknowledging some connections and dismissing others; in doing so, these choices also construct the identities of the affected individuals, adults and children alike.

In turn, these legal and policy choices reveal family law's values and concerns, recalling the casebook editors' claim many years ago that the "law of illegitimacy typifies the whole subject of family law."[236] To the extent that this insight remains valid, then, modern doctrines of parentage expose family law's continuing interest in regulating sex even more than equalizing children and privatizing dependency.

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233. *See* Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (recognizing the biological mother, her former lesbian partner, and the sperm donor—who had taken an active role in the children's lives—as the children's three legal parents); Appleton, *supra* note 110.

234. *See* Appleton, *supra* note 110, at 27.

235. On such dismantling, see Murray, *supra* note 110, at 453-54.

236. *See supra* note 2 and accompanying text.