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The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy

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"THE PHANTOM CHILDREN OF THE REPUBLIC"[1]: INTERNATIONAL SURROGACY AND THE NEW ILLEGITIMACY

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INTRODUCTION

A powerful legal, social, and religious construct grounded in the disapproval of sexual intercourse outside of marriage, illegitimacy[2] of birth

1. *See* Charlotte Rotman, Gestation pour autrui: les enfants fantômes de la République, LA LIBÉRATION, May 20, 2009, http://www.liberation.fr/societe/0101568271-gestation-pour-autrui-les-enfants-fantomes-de-la-republique.

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2. I am sensitive to the fact that this archaic and harsh term has been the source of much injustice and psychic harm. I use it in this Article to emphasize how damaging it is to attach any legal disability to families or children created without marriage. Thus, I do not use the term in the "morally neutral" way a sociologist might, *see, e.g.*, LEWELLYN HENDRIX, ILLEGITIMACY AND SOCIAL STRUCTURES: CROSS-CULTURAL PERSPECTIVES ON NONMARITAL BIRTH 2 (1996), but recognize that any term used to describe children born out of wedlock as a class will inevitably have "moral overtones," especially when used in the context of establishing or justifying differential

has been a source of abiding concern and fascination throughout history. Essentially a badge separating insiders from outsiders, illegitimacy as a category has been promoted by the church, nation states, and society at large to encourage marriage as the only appropriate locus for family formation.[3] Parents of nonmarital children have been branded licentious reprobates, their children vilified as interlopers, subhuman, unworthy of civil status, and even loathed by their own parents.[4] The harshest means of exclusion have been the imposition of disabilities in the establishment of legal parentage,[5] naming,[6] and support and inheritance rights,[7] and the institutionalization of infant abandonment,[8] and even banishment.[9] These disabilities have had a disproportionate impact on women and the poor[10] and are understood today to have been the tools of a patriarchal order

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treatment of children. *Id.* In addition, I agree that it is best to employ historically accurate terminology in an effort to confront the very real stigma that has always attached, in some cases despite our best intentions, to the use of terms like "bastard," "illegitimate child," "born out of wedlock," and "nonmarital." *See* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION xiii (1998).

3. *See* CARP, *supra* note 2, at 4; Kathleen Kiernan, *European Perspectives on Nonmarital Childbearing*, *in* OUT OF WEDLOCK: CAUSES AND CONSEQUENCES OF NONMARITAL FERTILITY 77, 105-06 (Lawrence L. Wu & Barbara Wolfe eds., 2001); THE CHILD: AN ENCYCLOPEDIC COMPANION 237 (Richard A. Shweder ed., 2009) (commenting on the work of sociologist Kingsley Davis); JOHN WITTE, JR., THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED 4 (2009).

4. *See* Richard F. Storrow, *Equal Protection for Human Clones*, 40 FAM. L.Q. 529, 542 (2006) [hereinafter Storrow, *Equal Protection*].

5. *See* Stanley v. Illinois, 405 U.S. 645, 646 (1972) ("Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother."). Now that highly accurate and inexpensive means of genetic testing are easily available, the establishment of paternity has become an area fraught with difficult questions. *See* Ira Ellman, *Thinking about Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 55 (2002); Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 252-53 (2006). As a constitutional matter, where a marital presumption of paternity applies, the law does not require that parentage between a child and his biological father be recognized. *See* Michael H. v. Gerald D., 491 U.S. 110, 129 (1989).

6. *See* THE CHILD, *supra* note 3, at 711 (emphasizing the lack of rights of illegitmate children including the right to their father's last name).

7. *See id*.; Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 600-01 (2001) [hereinafter Storrow, *Family Privacy*] (discussing how several states have passed legislation denying fathers inheritance rights unless they acknowledged their children).

8. *See generally* JOHN BOSWELL, THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE 2 (1988); DAVID KERTZER, SACRIFICED FOR HONOR: ITALIAN INFANT ABANDONMENT AND THE POLITICS OF REPRODUCTIVE CONTROL 4 (1993).

9. JOEL FRANCIS HARRINGTON, THE UNWANTED CHILD: THE FATE OF FOUNDLINGS, ORPHANS, AND JUVENILE CRIMINALS 44 (2009); JOHN WITTE, GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 420 (2006).

10. *See* THE CHILD, *supra* note 3, at 591.

variously committed to extolling marital nuclear families,[11] genetic essentialism,[12] and ethnic and religious purity.[13]

Whatever deterrent effect the legal disabilities of illegitimacy may once have had appears to have slackened considerably, as the social stigma attached to premarital sexuality, cohabitation and the birth of children out-of-wedlock has waned.[14] Demographic data on fertility in the United States indicates a steady increase of births to unmarried women since the 1960s. As of 2005, out-of-wedlock births comprised 37% of all births.[15] Of these, 40% are born to cohabiting parents.[16] Today, the majority of children born to American women under the age of 30 are nonmarital.[17] In parts of Europe the percentage of couples who are not officially married is as high as 25% (Norway) and is expected to increase "along with the tendency for nonmarital unions to become more prone to the birth of children . . . ."[18] Although some see these as disturbing trends, today it may simply "be reductionist to view child and family welfare merely as a function of marriage or illegitimacy."[19]

As a result of the work of committed advocates, children born to single women and to unmarried heterosexual couples labor under far fewer constraints than they did when nonmarital fertility was considered a more

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11. *See* Storrow, *Equal Protection*, *supra* note 4, at 541-42; Storrow, *Family Privacy*, *supra* note 7, at 530, 620; Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 348 (2006) [hereinafter Storrow, *Rescuing Children*] (addressing how the American marriage movement views heterosexual marriage as central to social integrity and aims to deter any forces that threaten its primacy).

12. *See* THE CHILD, *supra* note 3, at 24 (describing the church's reverence for the consanguineous nuclear family).

13. *See* R. Charli Carpenter*, Surfacing Children: Limitations of Genocidal Rape Discourse*, 22 HUM. RTS. Q. 428, 492-30 (2000) (describing how forced impregnation and the birth of children of mixed ethnicity was aimed at "corroding the victimized culture" in the former Yugoslavia).

14. *See* THE CHILD, *supra* note 3, at 341; STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 186 (1992).

15. *See* THE CHILD, *supra* note 3, at 245. Stephanie Coontz found that the rate of out-of-wedlock births was similar in the Puritan community of Concord, Massachusetts before the Revolutionary War. *See* COONTZ, *supra* note 14, at 184.

16. THE CHILD, *supra* note 3, at 591.

17. Jason DeParle & Sabrina Tavernise, *For Women under 30, Most Births Occur Outside Marriage*, N.Y. TIMES, Feb. 17, 2012, at A1.

18. THE CHILD, *supra* note 3, at 590.

19. Wolfgang Hirczy de Mino, *From Bastardy to Equality: The Rights of Nonmarital Children and their Fathers in Comparative Perspective*, 31 J. COMP. FAM. STUD. 231, 233 (2000); *see also* Richard F. Storrow, *Marginalizing Adoption Through the Regulation of Assisted Reproduction*, 35 CAP. U. L. REV. 479, 507-10 (2006) [hereinafter Storrow, *Marginalizing Adoption*] (criticizing a proposal to bestow a preferred status on married couples in the adoption process); Storrow, *Rescuing Children*, *supra* note 11, at 320-23, 342-44, 367-69 (criticizing presumptions of parental fitness and child welfare that are based on marital status).

serious threat to social stability than it is today. Although the reforms of the latter half of the twentieth century were among the most sweeping in dismantling legal distinctions based on legitimacy of birth,[20] the injustice of disadvantaging children born out of wedlock was recognized long before rates of out-of-wedlock births increased.[21] Significant improvement in the legal position of children born out of wedlock actually occurred decades earlier in Europe, when Norway, for example, began to permit children born out of wedlock to inherit from their biological fathers in 1916[22] and Sweden banned the use of "illegitimate" in official documents in 1917.[23] In the same year, illegitimacy as a status was abolished in Russia following the Bolshevik Revolution.[24] More recently, even families headed by gay and lesbian couples who have adopted children or used assisted reproductive technologies have achieved a level of recognition previously unimagined.[25]

Strides toward equal legal and social treatment have been of enormous benefit to children born out of wedlock, but discrimination and harassment against "illegitimate families" linger and thrive, whether in rules about who can marry[26] and why,[27] attitudes about who should be excluded from reproducing or adopting,[28] perspectives on citizenship,[29] and the fact that

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20. *See* Storrow, *Equal Protection*, *supra* note 4, at 541-42 (describing reforms that erased some of the stigma surrounding illegitimacy and how illegitimacy as a status fell out of favor). *See generally* Storrow, *Family Privacy*, *supra* note 7, at 600-10.

21. *See, e.g.*, James Kidd, *The Law of Bastardy*, 8 JURID. REV. 180, 180 (1896) (emphasizing the injustice and harshness of the law towards children born out of wedlock).

22. *See* Kiernan, *supra* note at 3, at 106. A different source gives this date as 1915. *See* HENDRIX, *supra* note 2, at 149.

23. Kiernan, *supra* note 3, at 106.

24. *See* THE CHILD, *supra* note 3, at 2.

25. *See id.* at 592 (noting States where parentage determinations apply equally to same-sex couples or where stepparent adoption is available to same-sex couples to establish legal parentage in a de facto parent); Storrow, *Marginalizing Adoption*, *supra* note 19, at 512 n.218 (cataloging European countries that grant recognition to gay- and lesbian-headed families with children).

26. *See* JUNE CARBONE & NAOMI CAHN, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 132-38, 159-61 (2010) (discussing the role of debates over same-sex marriage in the culture wars).

27. Marriage is generally permitted for any reason or for no reason; however, a marriage entered into for the purpose of obtaining permanent resident immigration status is considered fraudulent. *See* Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537.

28. *See* Richard F. Storrow, *Medical Conscience and the Policing of Parenthood*, 16 WM. & MARY J. WOMEN & L. 369, 372-75 (2010) [hereinafter Storrow, *Medical Conscience*] (discussing case of lesbian refused intra-uterine insemination by religious doctors); Storrow, *Marginalizing Adoption*, *supra* note 19, at 499-511 (critiquing the argument that married couples should receive preferential treatment in adoption); Storrow, *Rescuing Children*, *supra* note 11, at 367-69 (arguing that marriage is too faulty a proxy for parental fitness to adequately promote the best interests of children); Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper*

not all children receive the same entitlements. As Barbara Stark has put it, "[w]hile laws renouncing illegitimacy are widespread, in practice the stigma remains strong in some parts of the world."[30] Even the United Nations' Convention on the Rights of the Child, boasting 140 signatories,[31] does not explicitly outlaw discrimination against nonmarital children;[32] moreover, some countries that adopted the convention did so "without prejudice to national law provisions that discriminated between marital and nonmarital children."[33]

Lingering prejudicial attitudes toward and disparate treatment of children born out of wedlock can be traced to intractable notions of the importance of marriage for children and society.[34] Despite the progress made toward dismantling disparate treatment based on "illegitimacy" of birth, a new strain of disparate treatment of "illegitimate" children is emerging in response to the widespread use of reproductive technology to have children, particularly when it is used by families not headed by heterosexual couples. Since reproductive technology removes sex from the reproductive process, this new form of illegitimacy has nothing to do with the fear that illicit sexual behavior will result in children. It arises from the fear that children will be created *without* sex and in some cases will be born to gay and lesbian couples or single individuals, all with the participation and contribution of third parties. This new illegitimacy is not reserved for

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Standard for Gatekeeping in Infertility Clinics, 28 CARDOZO L. REV. 2283-84 (2007) (discussing patient-selection screening practices in infertility clinics).

29. *See* ANN LAQUER ESTIN AND BARBARA STARK, GLOBAL ISSUES IN FAMILY LAW 92 (2007) ("Rules about legitimacy and paternity are grounded in assumptions about identity and citizenship that may be so deeply ingrained that they are unquestioned, accepted as 'natural,' in a particular culture."); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 361-63 (2011) (discussing how, in ascribing citizenship, immigration law discriminates against nonmarital children on the basis of birth status).

30. Barbara Stark, *Baby Girls from China in New York: A Thrice-Told Tale*, 2003 UTAH L. REV. 1231, 1295.

31. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf.

32. *See id.* at art. 2, 7.

33. D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY 26 (2d ed. 2009).

34. *See* Storrow, *Rescuing Children*, *supra* note 11, at 351-56 (discussing arguments about the value of marriage in marriage movement rhetoric). The value of marriage in marriage movement argumentation is often associated with financial or sexual benefits. *See, e.g.*, Robert Rector, *How Not to Be Poor*, 57 NAT'L REV. 26 (2005), *available at* http://www.heritage.org/research/commentary/2005/10/how-not-to-be-poor (higher income and superior standard of living). The argument that marriage should carry a status superior to other relationships is not limited to those who oppose same-sex marriage. *See* Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL. F. 353, 359-62.

nontraditional families, however.[35] The participation of third parties in the reproductive process calls into question the legitimacy of even the family of a married husband and wife who choose to reproduce in this fashion. The essence of the new illegitimacy, then, is what Elizabeth Bartholet has termed "biologism," the view that those families in which the rearing couple have also made the gestational and genetic contribution to their children are more legitimate.[36] Biologism, of course, means that married couples, unmarried couples, and single individuals who employ reproductive technology are all at risk of being seen as illegitimate and will suffer whatever disabilities the new illegitimacy might entail.

Both the old and new illegitimacy are the tools of a politics of exclusion. Although the new illegitimacy is preoccupied with matters of citizenship[37] to a degree the old illegitimacy was not, both approaches to labeling a child or a family illegitimate reflect efforts to exclude them from the prerogatives legitimate families are deemed to merit. This is particularly salient in the context of international commercial surrogacy in the same jurisdictions that have rejected the very notion of illegitimate children as archaic and

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35. Professor Elvia Arriola objects to the term "nontraditional" as applied in this context because it creates the impression that the family in question is itself illegitimate. *See* Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691, 694 (1997). At the risk of reinforcing it, I use the term in this Article to underscore this unfortunate usage. "Alternative" is sometimes used instead of "nontraditional." *See, e.g.*, D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 361 (3d ed. 2006).

36. *See* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 48, 93, 170 (1999) (noting that the law structures adoption in imitation of biology); CARP, *supra* note 2, at xiii, 4 (describing societal suspicion about parenting in the absence of genetic and gestational connections).

37. Citizenship also figures prominently in contemporary examples of other "outlawed children." *See, e.g.*, Nobue Suzuki, *Outlawed Children: Japanese Filipino Children, Legal Defiance and Ambivalent Citizenships*, 83 PAC. AFF. 31, 41 (2010) (reporting on Japan's practice, only recently dismantled, of disadvantaging children of Korean heritage).

Like Europe, the United States is currently in the throes of battles over immigration. *Compare* MARK KRIKORIAN, THE NEW CASE AGAINST IMMIGRATION 1-2 (2008) (emphasizing that current immigration is not compatible with modern society), *with* JASON L. RILEY, LET THEM IN: THE CASE FOR OPEN BORDERS 2 (2008) (discussing that the targets of immigration have changed but the same concerns of the past persist). Birthright citizenship is a particularly contentious issue in the debate. Some want to deny birthright citizenship to children born to illegal immigrants. J. Richard Cohen, *Campaigning to Rewrite 14th Amendment Based on Fearmongering Politics, Not Facts*, HUFFINGTON POST (Mar. 28, 2011, 2:01 PM), http://www.huffingtonpost.com/j-richard-cohen/campaign-to-rewrite-14th-_b_841480.html. They equate birthright citizenship in this context to "maternity tourism." *See* Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y. TIMES, Mar. 28, 2011, http://www.nytimes.com/2011/03/29/us/29babies.html. In response to this concern, several European countries have ended birthright citizenship. *See* Daniel González & Dan Nowicki, *Birthright Citizenship Change Would Have Wide Effects*, ARIZ. REPUBLIC (Mar. 20, 2011, 12:00 AM), http://www.azcentral.com/arizonarepublic/news/articles/2011/03/20/20110320birthright-citizenship-illegal-immigration.html. Thirty countries still have birthright citizenship; none are in Europe. *Id.*

discriminatory. Citizens of several European and Asian countries, including the United Kingdom, France, Germany, Spain, Belgium, and Japan have been refused travel documents for their newborn children by consular officials upon suspicion that they have engaged in international commercial surrogacy in the United States, India, or the Ukraine. Upon arriving home (the children sometimes using passports issued by the countries in which they were born and at other times traveling on special humanitarian visas), parents have met with official refusal to recognize their parent-child relationships or to bestow citizenship upon the children.[38] In France alone, these refusals befall an estimated 400 French couples each year,[39] leading lawyer Valérie Depadt-Sebag to designate the children "a new category of pariahs"[40] that reintroduces a distinction between legitimate and illegitimate long ago expunged from the law.[41] The response of several European and Asian nations to surrogate births reflects the tenacity of illegitimacy as a social and legal construct and proves that this most irresistible form of "othering"[42] cannot simply be wiped out by commitment to equality and expungement of "illegitimacy" from the statutes of enlightened jurisdictions.[43] The idea lingers on in "marriage movement" rhetoric deploying the message that children are better off with married parents and advocating preferential treatment for heterosexual married couples in matters of adoption and assisted reproduction.[44]

This Article examines the new illegitimacy in Europe, a continent that, like the United States, has rejected discriminatory treatment of children born out of wedlock, but that embraces a much more robust commitment to marriage equality than we find in the United States.[45] The new illegitimacy

38. *See generally* Rotman, *supra* note 1.

39. *Id.* (estimating that 400 couples each year go abroad to use surrogacy).

40. Charlotte Rotman, *"Filles fantôme" en mal de noms* [*Girl Ghosts in Need of Name*], La Libération, Feb. 18, 2010 (Fr.), http://www.liberation.fr/societe/0101620002-filles-fantomes-en-mal-de-nom.

41. *Id.* (quoting lawyer Nathalie Boudjerada).

42. *See* JENNY TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY 12-13 (1982) ("[B]y ostracizing illegitimate individuals and unmarried mothers, one demonstrates one's own legitimacy and one's loyalty to the sexual and property laws of the community.").

43. In the United States, several jurisdictions have revised their statutes to remove the term "illegitimate" to describe children born out of wedlock. *See, e.g.*, Illegitimate Children, S.B. 65, 2004 Reg. Leg., (La. 2004). In Europe, as early as 1917, the Swedish government banned the use of the term "illegitimate" in official documents. *See* Kiernan, *supra* note 3, at 106.

44. *See* Storrow, *Rescuing Children*, *supra* note 11, at 353-55 (discussing marriage movement arguments that children raised by married parents are better off than those not raised by married parents); *see also* Storrow, *Marginalizing Adoption*, *supra* note 19, at 499-511 (discussing the argument that married heterosexual couples should receive preferential treatment in adoption).

45. *See generally* Nancy D. Polikoff, *Recognizing Partners but Not Parents /*

in Europe results from the entrenchment of the principle that the legal mother of a child is always the gestational mother and the concomitant widespread disapproval and legal prohibition of surrogacy. When citizens of countries that ban surrogacy choose to pursue surrogacy elsewhere, they and their children meet with hostility, opprobrium, and exclusion upon their return. The resort to surrogacy abroad subjects these families to legal disabilities that recall the disadvantageous treatment of children born out of wedlock received under what are now considered discriminatory legal regimes that violate human rights norms. This Article also explores the resurgence of illegitimacy in Europe and reflects on the practice implications for attorneys advising couples and individuals who wish to use surrogacy in other countries.

This Article unfolds in several parts. Part I explores illegitimacy in legal history and includes a discussion of how assisted conception has very often been associated with adultery and illegitimacy. With this history as a backdrop, Part II will explore the new illegitimacy in Europe and will trace in particular the cases that have forced France to reopen the national dialogue that in the 1990s resulted in the outright rejection of surrogacy. Part III will examine various responses to the problem of international commercial surrogacy. Finally, this Article will consider the practice implications for attorneys assisting couples and individuals who wish to pursue surrogacy either in the United States or abroad.

I. ILLEGITIMACY IN LEGAL HISTORY

Historically, the legal treatment of nonmarital children has been unkind. At its most egregious, canon and common law treated nonmarital children as the children of no one, meaning they had no connection to society or to any enforceable means of support and suffered a host of heavy legal disabilities.[46] Roman law was not originally quite so harsh, requiring mothers who kept their illegitimate children to support them,[47] but the later Christian emperors denied certain classes of illegitimate children all support.[48] Roman law also developed grades of illegitimacy, separating nonmarital children into classes according to the gravity of the sexual offense that led to their birth. Thus, children born of fornication were natural;[49] those resulting from adultery were spurious.[50] Natural

Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States, 17 N.Y.L. SCH. J. HUM. RTS. 711, 719-28 (2000).

46. *See* TEICHMAN, *supra* note 42, at 60 (referring to canon law and the common law); WITTE, *supra* note 3, at 122, 124.

47. WITTE, *supra* note 3, at 52.

48. *Id.* at 55.

49. *Id.* at 60; *see* TEICHMAN, *supra* note 42, at 54.

illegitimates "had certain legal claims on the father for support."[51] Since natural illegitimates were considered to arise from "natural" lapses of sexual judgment, it was determined that they should not suffer,[52] and ways were devised for them to be legitimated.[53] One of these was for the biological father to marry the biological mother.[54] Formerly, if they did not marry during the pregnancy, the opportunity for legitimation of the child by marriage of his parents was lost.[55] These methods of legitimation were described as "gifts" from both nature and law,[56] nature providing the category of natural illegitimacy and the law providing the methods of legitimation.

The treatment of spurious illegitimates was harsher. The methods of legitimation available to the parents of natural illegitimates were unavailable to them. Nonetheless, a spurious legitimate could be legitimated if the husband of the adulterous wife accepted the child as his own.[57] There was a debate, however, about whether adoption could legitimate the spuriously illegitimate. Justinian tried to abolish adoption, believing that if it were available as an avenue to the legitimation of spurious illegitimates it would encourage adultery and incest.[58] The use of adoption to legitimate the spurious was affirmed, however, by Justinian's successor Leo III. Leo III wanted adoption to be available to everyone because of the benefits it bestowed upon parents and children alike; an adoptee's rights were the same as other children or family members.[59] This question of whether adoption could legitimate an illegitimate child continued to perplex jurists well into the twentieth century. In 1959, a county court judge in England refused to allow the adoption of a child by his natural mother because "it could not be anything but contrary to the public interest to make it easier to remove the stigma of illegitimacy . . . ."[60] The decision appears to have been based in part on the

50. WITTE, *supra* note 3, at 55

51. TEICHMAN, *supra* note 42, at 54.

52. WITTE, *supra* note 3, at 60.

53. *See id.* at 61. The distinction between natural and spurious illegitimates lingered in the laws of certain countries well into the Twentieth Century. *See, e.g.*, Johnston v. Ireland, 9697/82 Eur. Ct. H.R. ¶ 28 (1986) (describing a statute that limited legitimation to children whose parents "could have been lawfully married to one another at the time of the child's birth or at some time during the period of ten months preceding such birth").

54. WITTE, *supra* note 3, at 61; TEICHMAN, *supra* note 42, at 54.

55. WITTE, *supra* note 3, at 55.

56. *Id.* at 62.

57. *Id.* at 53.

58. *Id.* at 62.

59. *Id.* at 64.

60. *See* TEICHMAN, *supra* note 42, at 73 (describing the case of *In re D.*).

notion that "only a man can legitimate a child" and the concern, similar to that voiced by Justinian, that adoption would become an avenue toward "universal legitimacy."[61]

The idea that the harsh treatment of illegitimate children was needed to deploy a strong message against illicit sexual conduct created a tension for policymakers from very early times. Imposing vicarious liability on an employer is one thing, but relegating a child to an inferior status based on the sinfulness of the sexual act that led to his conception, all in an attempt to deter illicit sexual behavior, strikes us today as extraordinarily unjust and exceedingly naïve. It would not be until the twentieth century, that disapproval of differential treatment of children born out of wedlock would be enshrined in international human rights documents and judicial decisions.

Disagreement about what direction the law of illegitimacy should take has led to a waxing and waning of the opprobrium directed at illegitimate children across the centuries. The early Jewish teaching sharply limited those who could be labeled illegitimate and preferred to warn individuals that a child born out of wedlock, while he might not be illegitimate, could well suffer undesirable social consequences.[62] Early Christian teachings on sex, marriage, and family relations laid the groundwork for the more expansive doctrine of illegitimacy that would emerge later. The early Christian view was that marriage was the only appropriate locus for sex and that even non-procreative sex within marriage should be avoided.[63] But this instruction did not lead inexorably to the condemnation of illegitimate children. To the contrary, certain early church figures denounced such treatment. The blame for illicit sex, according to this view, properly lay with the parents, not the children.[64] Thus, like the early Jewish teachings, the early Christian teachings, taking account of the ill treatment that illegitimates would face due to the prevailing cultural norms, preferred to warn individuals away from extramarital sex.[65]

We owe the more highly developed law of illegitimacy to the melding of the early Christian church's concern with stamping out illicit sexual conduct with the Roman law's complex doctrine of illegitimacy and its ramifications.[66] The medieval mind found it quite easy to understand how children could be made to pay for the sins of their parents.[67] The resulting

61. *Id.* at 74.
62. *See* WITTE, *supra* note 3, at 25.
63. *Id.* at 28.
64. *Id.* at 38-39.
65. *Id.* at 42.
66. *Id.* at 47.
67. *Id.* at 101.

children were, after all, the witnesses or evidence of that evil.[68] The extent to which the common law jurists bristled against what they saw as an internally inconsistent Roman system[69] laid the groundwork for what today appears to have been "a Christian theology of sin run amok."[70] The Judeo-Christian legal tradition desired above all that proscriptions on illicit sexual relations and their evidence—illegitimacy of birth—appear simply to be natural-law borrowings from the Bible. There is some disagreement about this, but the point is that eventually the doctrine of illegitimacy was until very recently one of the most important tools used for expressing the importance of and channeling people into marital relationships.[71]

A. The European Court of Human Rights

It was the judiciary that played the most significant role in addressing the discrimination against nonmarital children that lingered in the latter half of the twentieth century. Most of this discrimination was deployed by laws governing inheritance. Inheritance by nonmarital children was forbidden because it would legitimate illicit sexual relations. As a result, allowing nonmarital children to inherit was deemed contrary to a decedent's presumed intentions.

The European Court of Human Rights is considered Europe's de facto constitutional court and the European Convention on Human Rights its de facto Bill of Rights. The Court was created by a treaty, enacted at Rome in 1950 and entered into force in 1953, to which all forty-seven members of the Council of Europe are bound.[72] Membership in the Council of Europe, established to guarantee human rights,[73] is obligatory for all states that wish to join the European Union.[74]

The Court is vested with the duty to limit member states' discretion to

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68. *Id.* at 123.

69. One example would be the Roman law prohibition on parental support for spurious illegitimates, *id.* at 125, but permitting spurious illegitimates to hold office because "[they have] committed no crime." *Id.* at 53.

70. *See id*. at 8 (commenting on the differences between today's illegitimate children and those of the past).

71. *See id.* at xii (examining the history of illegitimacy and its relationship to the doctrine of marriage).

72. *See* A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 3 & n.1 (Helen Keller & Alex Stone Sweet eds., 2008) (claiming the European Convention on Human Rights is the most effective of its type in the world) [hereinafter A EUROPE OF RIGHTS].

73. *See* MICHAEL D. GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 3 (2007) (providing that the guarantee of human rights defines European values and identity).

74. *See* A EUROPE OF RIGHTS, *supra* note 72, at 19 & n.44 (providing that membership in the European Court of Human Rights has been mandatory for all European Union states since the early 1990s).

interfere with the human rights enumerated in the Convention. Although the effect of its jurisprudence is frequently contested, given that it "does not possess the authority to invalidate national legal norms judged to be incompatible with the Convention,"[75] it nonetheless commands broad allegiance thanks to "the goodwill and good faith of most states."[76] The Court's growing political legitimacy has earned it a sterling international reputation as "the most effective human rights regime in the world."[77] Despite this reputation, the Court's function can be tricky to carry out given the forces that led to its creation. The reality is that the Court was created by a group of nations loathe to relinquish power to a supranational body, except in the area of human rights, which were on everyone's mind in the post-World War II era. Thus, the Court's legitimacy may be due in part to the discretion or, in its parlance, the margin of appreciation, it grants states in matters about which a strong consensus has not yet emerged. When evaluating whether a country's laws violate the Convention, the Court applies the doctrine of proportionality. As its name suggests, proportionality refers to the balance member states must strike between the objectives of their laws and the means they choose to realize those objectives.[78] Proportionality requires that the restriction align closely with the goal the restriction is intended to achieve.[79] This standard does not prohibit a state from passing laws in order to achieve ethical objectives about which there may be disagreement, but it does prevent a legislature from imposing restrictions that have too little to do with the achievement of those normative goals.[80] As the margin of appreciation narrows and the demands of the proportionality standard increase, too loose a fit between a law's objective and the legal means chosen to bring that objective about

75. *See id.* at 13 (arguing that the European Court of Human Rights remains internationally focused and fails to take up a form of constitutional authority in dealing with certain Convention rights).

76. *See id.* at 14 (indicating the European Court of Human Rights would fail without the support of the States).

77. *See id.* at 3 (referring to the Court's consistent upgrades in areas of new rights, increased powers, and improved communication); *see also* GOLDHABER, *supra* note 73, at 2 (citing several leading jurists who praise the Court and Convention as the most developed and best in the world).

78. *See* Arturas Panomariovas & Egidijus Losis, *Proportionality: From the Concept to the Procedure*, 2 JURISPRUDENCE 257, 263 (2010) (defining proportionality in jurisprudence as a means of justice focused on protecting individual rights).

79. *See* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 225 (2002) (providing that the goals of restrictions change over time, as does the proportionality used to evaluate such restrictions).

80. *See* Richard F. Storrow, *The Pluralism Problem in Cross Border Reproductive Care*, 25 HUMAN REPRODUCTION 2939 (2010) (indicating that proportionality is required in order to achieve a balance between the goals and methods used to achieve those goals).

will constitute a violation of the Convention. Proportionality, then, prevents majoritarian perspectives on volatile issues from automatically smothering alternative points of view. By insisting on proportionality, democracy respects autonomy in matters of great human importance and strives to avoid the oppression of minority points of view. As R. Beddard sees it, "[t]he difficulties of balancing the wishes of the individual and those of the community as a whole are not to be underestimated and may seem to encapsulate the major decision decision-making complexity of human rights law."[81] The most difficult cases, in the view of one judge, are cases involving conceptions of the family based in deeply rooted religious, ideological, or traditional convictions.[82]

A case brought against Ireland on the question of illegitimacy of birth probably best illustrates the difficulty of the Court's task. Roy Johnston was legally separated from his wife and had been living with his domestic partner Janice Williams-Johnston and their daughter Nessa for a number of years. In Ireland at the time of *Johnston*, only families based on marriage received protection under the Constitution.[83] Ireland also prohibited divorce, the law reflecting a religious position in favor of permanent marriage. In doing so, it ignored the reality of dependency that was so evident in the Williams-Johnston's living arrangement,[84] requiring them to take additional steps "to regularize their situation."[85] Furthermore, the law denied them any means of solidifying their bond to account for their interdependency or to remove the legal disabilities and stigma of illegitimacy placed upon Nessa.

The law treated Nessa differently from children born in wedlock in a number of significant ways. Although Janice Williams-Johnston was recognized as Nessa's legal mother for all purposes under the doctrine of *mater semper certa est*,[86] Tessa could inherit in intestacy from her mother only if her mother had no legitimate children.[87] Roy Johnston's position vis-à-vis Nessa was more tenuous. Although he was registered as the child's father, he had no "paternal affiliation" with Nessa and thus was

81. *See* RALPH BEDDARD, HUMAN RIGHTS AND EUROPE 99 (3d ed. 1993) (suggesting that the Strausbourg Court has a difficult responsibility in evaluating the complex issues related to private life).

82. *See* Kroon and Others v. Netherlands, 19 E.H.R.R. 263, 287 (1995) (Morenilla J., dissenting) (arguing cohesion of the family and preservation of the family unit should not be overly interfered with by the State when recognizing natural father rights).

83. Johnston v. Ireland, 9 Eur. Ct. H.R. 203, ¶ 28 (1987).

84. *Id*. ¶ 12.

85. *Id*. ¶¶ 12, 66, 71.

86. *Id*. ¶ 25.

87. *Id.* ¶ 31.

recognized as her father only for very limited purposes.[88] For Nessa, this meant that she was barred by law from inheriting in intestacy from her father, a rule intended "to strengthen the protection of the family."[89] Perhaps the most distressing aspect of the law relating to Nessa was that it provided that she could *not* be legitimated since her parents could not have been married to each other at either the time she was born or the time she was conceived.[90]

The parties claimed violations of their right to private and family life and to be free from discrimination. Although the Court made clear that, unlike the Irish Constitution, the protections of the Convention extended to the "'illegitimate' family,"[91] it nonetheless determined that the Convention guaranteed no right to divorce.[92] This determination did not dispose of Nessa's claims, however. Quoting from its opinion in *Marckx v. Belgium*, decided before the European consensus in favor of doing away with the disparate treatment of nonmarital children was as solid as it was at the time *Johnston* was decided, the Court reiterated the importance of state's establishing legal safeguards geared toward integrating nonmarital children into their families. It held that Ireland's affording Nessa and her parents no means whatsoever to bring her treatment under the law into line with the legal treatment of legitimate children amounted to a failure to respect the Williams-Johnston's family life.[93] This was not meant to convey that member states cannot go about expressing respect for family life in different ways, just that they cannot allow a legal presumption to prevail over a "biological and social reality."[94]

A later case against the Netherlands, *Kroon*, raised the claim that the rule disallowing a biological father from establishing his paternity of a child where the mother of the child was married to a man who did not deny paternity was a violation of the right to family life guaranteed by Article 8 of the Convention. In this case, the child Samir was born to Catharina and Ali at a time when Catharina was still married to Omar, from whom she

88. *Id.* ¶¶ 11, 26.

89. *Id.* ¶ 31.

90. *Id.* ¶¶ 28, 70(c). Note the similarity of this rule to the treatment of "spurious" illegitimates under Roman law. WITTE, *supra* note 3, at 53.

91. *Johnston*, 9 Eur. Ct. H.R. 203, ¶¶ 55(b), 56. Note the similarity to the statement made in *Michael H. v. Gerald D.* that "[t]he family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children." 491 U.S. 110, 124 n.3 (1989).

92. *See Johnston*, 9 Eur. Ct. H.R. 203, ¶¶ 54, 57 (providing there is no right to divorce, although divorce is recognized under the Convention).

93. *See id*. ¶¶ 75, 76.

94. *See* Kroon and Others v. Netherlands, 297-C Eur. Ct. H.R. (ser. A) (1994).

was separated.[95] Catharina thereafter divorced Omar,[96] but neither she nor Ali wished to be married.[97] They thus could not pursue the option of Omar's adopting Samir as a stepparent. The government thereafter rejected Catharina and Ali's attempts to establish Ali's paternity of Samir.[98] Under these circumstances, the law permitted Samir's paternity to be established only if Omar denied paternity,[99] but Omar's whereabouts were unknown.[100] Ali and Catharina subsequently had three other children.[101] Although the Court was sensitive to the margin of appreciation that the state enjoys in these matters and that a "fair balance must be struck between the competing interests of the individual and of the community as a whole," nonetheless "[w]here the existence of a family tie with a child has been established, the state must act in a manner calculated to enable that tie to be developed" and for the child to be integrated within the family.[102] In Netherlands' refusal to do so, the Court found far too rigid an application of the marital presumption of paternity.[103] The possibility of adoption was deemed not to be "sufficient to eliminate the effects on their private and family life created by the impossibility to contest the legal paternity."[104]

The *Kroon* and *Johnston* cases stand for the proposition that "Article 8 is not confined solely to marriage-based relationships"[105] because family life may have biological and social realities and components that have nothing to do with marriage.[106] Among these may figure, living together[107] and "other factors [that would] serve to demonstrate that a relationship has sufficient constancy."[108] These cases illustrate the robust protection the European Convention on Human Rights guarantees children born out of

95. *See id.* ¶¶ 7-9.

96. *See id.* ¶ 9.

97. *See id.* ¶ 30.

98. *See id.* ¶¶ 10, 11-14.

99. *See id.* ¶¶ 10, 18.

100. *See id.* ¶ 8.

101. *See id.* ¶ 15.

102. *See id.* ¶ 36.

103. *See id*. ¶ 31. We can readily see how *Kroon* stands in opposition to *Michael H.,* since it essentially holds that a natural father has the right to challenge the presumption undergirding a legal father's paternity.

104. *See id*. ¶ 42.

105. *See id.* ¶ 31.

106. *See id.* ¶¶ 30, 40.

107. *See* Berrehab v. The Netherlands, App. No. 10730/84 Eur. Ct. H.R. (1988) (establishing that cohabitation is not required for family life between parents and minor children).

108. *See* Khan v. United Kingdom, App. No. 47486/06 Eur. Ct. H.R. (2010) (recognizing that the existence of family ties in the United Kingdom meant that a Pakistani national who had moved to the United Kingdom could not be deported).

wedlock and their families against discriminatory laws. Indeed illegitimacy now constitutes a "suspect category" calling for the most intense level of review.[109] Yutaka Arai comments:

> Another area in which an audacious approach is consistently applied is in discrimination against "illegitimate" children. As in issues of gender quality, the effective use of evolutive interpretation and the stringent examination of justifications for any differential treatment demonstrate an assertive policy of review. The Strasbourg organs are willing to impose a weighty burden of proof on a respondent State. In relation to this suspect category as well, the scope of the margin shrinks to the vanishing point.[110]

B. The United States Supreme Court

The law in the United States has evolved in the last twenty-five years to recognize that innocent children should not suffer disinheritance as a result of their parents' indiscretions.[111] This reform in the law arose largely due to a mandate from the United States Supreme Court making clear that classifications based on a child's nonmarital status that do not substantially relate to important legislative goals violate the Equal Protection Clause of the Fourteenth Amendment.[112] Legislatures responded to this mandate by enacting statutory frameworks that align the treatment accorded nonmarital children with that accorded marital children.[113] Despite this sea change in the inheritance rights of nonmarital children, the law continues to favor marital relationships in this context. Only parents unwed at the time of their child's birth are deprived of the opportunity to inherit from that child unless they recognize or support the child. The law continues to disadvantage nonmarital children in other ways as well.[114]

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109. *See* TAKAHASHI, *supra* note 79, at 225.

110. *Id*. at 224 (citations omitted).

111. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise.").

112. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").

113. *See, e.g.*, Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM. L.Q. 647, 659 (1999) (stating that illegitimacy is not a suspect constitutional classification, so that children of unmarried parents enjoy most of the benefits available to those whose parents are married).

114. *See, e.g.*, ALA. CODE § 43-8-48(2) (2012); DEL. CODE ANN. tit. 12, § 508(2)

Under the common law, a nonmarital child could inherit from neither her mother nor her father.[115] Most states have passed laws allowing nonmarital children to inherit from their mothers,[116] but, by and large, nonmarital children still face legal obstacles to inheriting from their fathers.[117] This disparate treatment was not ameliorated, as some courts claimed,[118] by the existence of the father's power at any time to execute a will naming his nonmarital child a beneficiary.[119] Not only was the use of "children" in a will construed so as to exclude illegitimate children,[120] but state statutes deprived a nonmarital child of specific bequests from his parents either per se[121] or upon challenge by the testator's surviving spouse and marital children.[122] The Supreme Court, in *Labine v. Vincent*,[123] rejected a constitutional challenge to these statutes, reasoning that it had no authority

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(2012); IDAHO CODE ANN. § 15-2-109(b) (2012); KY. REV. STAT. ANN. § 391.105(1)(c)(2) (West 2012); ME. REV. STAT. ANN. tit. 18-A, § 2-109(2)(iii) (West 2012); MISS. CODE ANN. § 91-1-15(3)(d)(i) (2012); MO. REV. STAT. § 474.060.2(2) (West 2012); NEB. REV. STAT. § 30-2309(2)(ii) (2012); S.C. CODE ANN. § 62-2-109(2)(ii) (2012); TENN. CODE ANN. § 31-2-105(a)(2)(B) (2012); VA. CODE ANN. § 64.1-5.1(3)(b) (2012) (denying fathers' inheritance rights through their nonmarital progeny unless they support or acknowledge them); Maldonado, *supra* note 29, at 345 (documenting the continuing social stigma of illegitimacy and the continuing legal discrimination in the area of postsecondary education support, immigration and intestate succession).

115. *See In re* Estate of Karas, 329 N.E.2d 234, 236 (Ill. 1975) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *456 ("Under the common law an illegitimate was considered *filius nullius* [the child of nobody].")); JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 115 (2009).

116. *See In re Karas*, 329 N.E.2d at 237 (quoting Smith v. Garber, 121 N.E. 173, 175 (Ill. 1918)).

117. *See* DUKEMINIER, *supra* note 115, at 115. In *Trimble*, the Court described these new laws as attempting to establish a system of intestate inheritance more just to illegitimate children and, at the same time, protecting against spurious claims of paternity. Trimble v. Gordon, 430 U.S. 762, 776 (1976).

118. *See, e.g.*, *In re Karas*, 329 N.E.2d at 240.

119. *See In re* Brown, 388 So. 2d 1151, 1153 (La. 1980), *cert. denied sub nom*. Brown v. Brown, 450 U.S. 998 (1981).

120. *See* Brisbin v. Huntington, 103 N.W. 144, 147 (Iowa 1905) ("The decisions are unanimous that, in the absence of statutory provisions modifying the common law with respect to illegitimate children, the words 'issue,' 'child,' or 'children,' found in a will or statute, whether qualified by the word 'lawful' or not, are to be construed as only those who are legitimate, and, if others are intended, this must be deduced from the language employed, without resort to extrinsic facts.").

121. *See, e.g.*, Labine v. Vincent, 401 U.S. 532, 537 n.13 (1971) (citing LA. CIV. CODE ANN. art. 1488 (1870) (repealed 1978) (noting the alimentary limitation for adulterous or incestuous children).

122. *See* Gore v. Clarke, 16 S.E. 614, 616 (S.C. 1892) (citing a statute declaring void any bequest of more than one-fourth of a testator's estate to that testator's illegitimate child "provided the wife or child alone can raise the question"); Bennett v. Toler, 56 Va. (15 Gratt.) 588 (1860) ("[I]n a great majority of cases the testator is presumed to prefer, as objects of his bounty, legitimate children to bastards.").

123. *See Labine*, 401 U.S. at 532 (holding that a state's interest in promoting family life rationally supports its disallowance of an intestate share for an unacknowledged illegitimate child).

to interfere with a state's intestate succession laws[124] and that these laws were rationally based on the desire of states to encourage family relationships.[125]

After deciding no fewer than nine disputes involving wrongful death and public benefits statutes containing classifications based on illegitimacy,[126] the Supreme Court, in *Trimble v. Gordon*,[127] reviewed an Illinois intestate succession statute that disallowed illegitimate children from inheriting from their biological fathers.[128] The case was an appeal by a nonmarital child from the probate court's rejection of her petition to be declared an heir of her father's estate.[129] The Supreme Court of Illinois, ruling orally from the bench immediately after oral argument, affirmed the decision.[130]

While not overruling *Labine*, the *Trimble* Court indirectly disapproved of it,[131] stating that other decisions had expressly provided that no "State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."[132] The Court also hinted that *Labine* may have gone too far in approving, based on the state's asserted interest in the orderly administration of estates, the *complete* exclusion of nonmarital children from intestate inheritance.[133] Likewise, the Court expressed its view that proof problems in inheritance claims by nonmarital children should not be used to excuse invidious discrimination against them.[134] Finally, the *Trimble* Court deemed the fact that the father could have made a will and the claim that the intestacy statute reflected his "presumed intent" wholly irrelevant to the question at hand.[135]

As radical as *Trimble* seemed, it, nonetheless, did *not* stand for the proposition that, to inherit from their intestate fathers, nonmarital children must have precisely the same rights as marital children. The Court

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124. *Id.*

125. *See id.* at 536 n.6.

126. *See* Trimble v. Gordon, 430 U.S. 762, 767 n.11 (1976) (citing cases). *See generally* Susan E. Satava, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 939-69 (1996) (summarizing cases and contexts).

127. *See Trimble*, 430 U.S. at 762.

128. *See id.* at 764-65 (citing ILL. REV. STAT. ch. 3, § 12 (1975) (current version at 755 ILL. COMP. STAT. ANN. 5 / 2-1 (West 2012)).

129. *See id.*

130. *See id.* at 765.

131. *See id.* at 777 (Rehnquist, J., dissenting). Note, however, that four justices dissented in *Trimble*, deeming *Labine* dispositive.

132. *See id.* at 769 (majority opinion).

133. *See id.* at 767 n.12.

134. *See id.* at 772.

135. *Id.* at 774-75.

admitted that difficulties in proving paternity "might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."[136] The Court, thus, left room for a veritable welter of new litigation presenting the question of when the different standard would become *too* demanding to pass constitutional muster.[137]

Both New York and Texas defended their particularly demanding standards in cases reaching the Supreme Court. New York's statute provided that nonmarital children could not inherit in intestacy from their fathers unless, during the father's lifetime, a court issued an order of filiation initiated during the mother's pregnancy or before the child's second birthday.[138] This provision was challenged in *Lalli v. Lalli*[139] by the son of an intestate father who openly had acknowledged his paternity.[140] In declaring New York's statute constitutional,[141] albeit imperfect,[142] the Court noted that its purpose was not to steer people into legitimate relationships[143] but to promote the orderly administration of estates.[144] The Court commented that, because the unexpected appearance of a nonmarital child claiming a share of an estate could disrupt the stability of orderly administration,[145] New York's restriction on the ability of nonmarital children to inherit was justified. Also compelling to the Court were the peculiar proof problems that paternity posed. Whereas maternity is a foregone conclusion in most cases, questions of paternity invite fraudulent claims and harassing litigation[146]—especially where fathers and their nonmarital children do not constitute "a formal family unit."[147] The Court felt that these important concerns were addressed appropriately by New York's statutory scheme because it required the filiation order to be issued during the putative father's lifetime.[148] This circumscribed the time within

136. *Id.* at 770; *cf.* Reed v. Campbell, 476 U.S. 852, 855 (1986) ("[T]he state['s] interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child.").

137. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259, 266 (1978).

138. *See id.* at 261 n.2 (citing N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(2) (McKinney 1998)).

139. *Id.* at 259.

140. *Id.* at 262-63.

141. *Id.* at 276.

142. *Id.* at 272-73.

143. *See id.* at 267 ("[T]he marital status of the parents is irrelevant.").

144. *Id.* at 267-68.

145. *Id.* at 270.

146. *Id.* at 271.

147. *Id.* at 269.

148. *See id.* at 271 (arguing that the accurate resolution of paternity claims is

which illegitimate children could present their claims and allowed the putative father to defend himself against false claims of paternity.[149] The *Lalli* Court did not address the constitutionality of the statute's two-year limitation specifically,[150] a choice Justice Blackmun, in his concurrence, suggested would haunt the Court as legislatures questioned whether their particular statutes were more like the one in *Trimble* or the one in *Lalli*.[151]

In dissent, four justices argued that the decision was an unjustified retreat from *Trimble* in that it made it likely that nonmarital children would never inherit from their fathers in intestacy.[152] As if responding to this dissent, later New York cases specifically found the statute's two-year requirement unconstitutional.[153] Since its amendment in 1981, New York's statutory scheme has allowed, in addition to the court order of filiation,[154] a nonmarital child to inherit from his natural father if the father: (1) "has signed an instrument acknowledging paternity,"[155] (2) "paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own,"[156] or (3) "paternity has been established by clear and convincing evidence . . . derived from a genetic marker test."[157] These criteria incorporate some of the suggestions Justice Brennan made in his dissent in *Lalli* and reflect the statutory scheme that many states, including Texas, subsequently have adopted.[158]

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enhanced by adjudicating these claims during the putative father's lifetime).

149. *See id.* at 271-72 (showing that permitting the putative father to "defend his reputation" and respond to a paternity claim facilitates the administration of his estate and minimizes the success of fraudulent assertions of paternity).

150. *See id.* at 267 n.5 (explaining that the constitutionality of the two-year limitation is not at issue because the appellant never commenced a paternity proceeding).

151. *See id.* at 277 (Blackmun, J., concurring) (stating that until *Trimble* is overruled, the validity of related statutes is questionable until courts evaluate them one by one).

152. *See id.* at 277-78 (Brennan, J., dissenting) (explaining that it is unimaginable under the New York statute that nonmarital children who are acknowledged and voluntarily supported by their fathers "would ever inherit intestate").

153. *See, e.g.*, *In re* McLeod, 430 N.Y.S.2d 782, 785 (Sur. Ct. 1980); *In re* Harris, 414 N.Y.S.2d 612, 615 (Sur. Ct. 1979) ("[I]f a literal and stringent application of the two year limitation . . . were accepted, it would require a finding that this portion of the statute is constitutionally offensive to the right of the infant to equal protection of the law."); *In re* Angelis, 410 N.Y.S.2d 521, 524 (Sur. Ct. 1978).

154. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(A) (McKinney 2012).

155. *Id.* § 4-1.2(a)(2)(B).

156. *Id.* § 4-1.2(a)(2)(C)(ii).

157. *Id.* § 4-1.2(a)(2)(C)(i).

158. Many of these statutes track the language of the Uniform Parentage Act. *See* UNIF. PARENTAGE ACT § 201(b)(2)-(3) (amended 2002), 9B U.L.A. 309 (2001) (stating a paternity is established through an effective acknowledgement of paternity by the father or through adjudication of the man's paternity).

Texas was particularly recalcitrant in preventing nonmarital children from claiming a paternal inheritance and has had a history of other draconian laws disfavoring illegitimate children.[159] In 1977, the year *Trimble* was decided, Texas still had a statute depriving an illegitimate child of any claim to a paternal inheritance unless her parents had married after her birth.[160] In 1978, Delynda Reed, born out of wedlock, claimed a share of the estate of her father Prince Ricker, who had died four months before *Trimble* was decided.[161] The Texas courts denied her claim, ruling that *Trimble* did not operate retroactively to encompass claims to estates opened *before* the decision in *Trimble* but distributed *afterwards*.[162] The Supreme Court reversed, ruling that, although the claim of a nonmarital child to a share in her father's estate may impose upon the child "special requirements,"[163] the timing of Reed's claim had no impact on the state's interest in the orderly administration of Ricker's estate.

In response to *Trimble* and later cases, the Texas legislature passed a series of amendments to both the Texas Probate Code and the Texas Family Code. In 1977, the Texas legislature amended the Texas Probate Code to allow a nonmarital child to claim a paternal inheritance only if the parents had married after the child's birth or the father voluntarily had legitimated the child.[164] In 1979, the legislature again amended the Texas Probate Code to allow the child to be legitimated by a court order of paternity provided for by the Texas Family Code.[165] Despite this reform, Texas's statute of limitations for a nonmarital child's paternity action required the child to bring the action before her first birthday, a requirement characterized as "less than generous" in *Mills v. Habluetzel*,[166]

159. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) (striking down Texas's rule disallowing illegitimates a right of support from their biological fathers, as an unconstitutional violation of the Equal Protection Clause). In *Mills v. Habluetzel*, the Supreme Court's follow-up to *Gomez*, the Court struck down, as a violation of equal protection, a Texas statute of limitations requiring a nonmarital child to bring a suit for support before reaching his first birthday. 446 U.S. 91, 101 (1982). The Court held that the truncated limitations period afforded nonmarital children no reasonable opportunity to assert their claims and bore no substantial relationship to the state's interest in frustrating stale or fraudulent claims of paternity. *See id.* at 100-01.

160. *See* Reed v. Campbell, 476 U.S. 852, 853 (1986) (citing TEX. PROB. CODE ANN. § 42 (Vernon 1956) (stating that a nonmarital child whose parents never married could only inherit "from his mother and from his maternal kindred . . . .")).

161. *See id.*

162. *See id.* at 853 n.3 (citing Reed v. Campbell, 682 S.W.2d 697, 700 (Tex. App. 1984)). Texas courts apparently had applied *Trimble* to claims pending as of the date of the decision. *See Reed*, 682 S.W.2d at 856 (citing Winn v. Lackey, 618 S.W.2d 910 (Tex. App. 1981); Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. App. 1978)).

163. *See Reed*, 476 U.S. at 855.

164. *See* Dickson v. Simpson, 807 S.W.2d 726, 726-727 (Tex. 1991).

165. *See id.* at 727.

166. 456 U.S. 91, 94 (1982).

a Supreme Court case striking it down as a violation of equal protection.[167] While *Mills* was pending before the Supreme Court, the Texas legislature increased the limit to age four, and, in 1983, the legislature again increased the time frame to two years after a child becomes an adult.[168] The Texas Probate Code was amended in 1987 to provide for post-death determinations of paternity in the probate court,[169] and, finally, in 1989, the legislature again amended the Texas Family Code to make the more liberal statute of limitations passed in 1983 applicable to "children for whom a paternity action was brought but dismissed because a statute of limitations of less than eighteen years was in effect."[170] The present law reflecting this series of amendments allows nonmarital children to bring a paternity suit within two years of their reaching the age of majority or, "without regard to a paternity determination under the Family Code or voluntary legitimization by the father,"[171] to establish paternity by clear and convincing evidence in the probate court[172] either in the course of an existing probate[173] or by attacking a judgment of heirship within four years.[174] These statutes of limitations were, like the limitations imposed by the statute in *Lalli*, justified by Texas's interest in the "orderly administration" of estates and the validity of property ownership.[175]

These legislative reforms suggest that the contemporary view that there are no illegitimate children, only illegitimate parents,[176] has led to abolition of the long-standing bias in favor of nuclear families that perpetuated the stigma of illegitimacy. But instead of completely abolishing this bias,

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167. *Id.* at 101.

168. *See In re* Sicko, 900 S.W.2d 863, 865 (Tex. App. 1995).

169. *See* TEX. PROB. CODE ANN. § 42(b)(1) (West 2012); Turner v. Nesby, 848 S.W.2d 872, 874 (Tex. App. 1993).

170. *In re Sicko*, 900 S.W.2d at 865 (citing TEX. FAM. CODE ANN. § 13.01(b) (West Supp. 1995) (repealed 1995)).

171. *Id.* at 866.

172. *See* TEX. PROB. CODE ANN. § 42(b)(1).

173. *See In re* Chavana, 993 S.W.2d 311, 317 (Tex. App. 1999) (stating that because the right to inherit is separate from the right to establish paternity, and to seek financial support can only be determined after the putative father has died, the action must be brought at the time of probate).

174. *See Turner*, 848 S.W.2d at 878 (holding that the plain language of section 55(a) of the Texas Probate Code necessitates that the four-year statute of limitations for an heir to contest a judgment of heirship begins to run at the time of the judgment).

175. *See* Reed v. Campbell, 476 U.S. 852, 856 (1986) (announcing retroactive application of *Trimble* to the Texas Probate Code).

176. *See In re* Cherkas, 506 A.2d 1029, 1031 (R.I. 1986) ("The sweep of the various opinions of the Supreme Court of the United States in this area may be summarized by a statement of principle widely accepted in the modern era. Although there may be illegitimate parents, there is, in justice, no such person as an illegitimate child. The very term 'bastard' is illustrative of the medieval notion that the sins of the father would be visited upon his hapless offspring. If such a concept was ever accepted, it is time, and past time, that it be wholly discredited and repudiated.").

states have elected to shift the stigma of illegitimacy from illegitimate children to their parents and, in this way, have found a new means of promoting nuclear families. Prevented by the Supreme Court on equal protection grounds from disfavoring nonmarital children, several states have passed legislation denying fathers inheritance rights from or through their nonmarital progeny unless they supported or acknowledged such children.[177] Determining that fathers who do not treat their nonmarital children as their own have no entitlement to inherit from those children's estates, the Georgia legislature enacted such a statute.[178] The statute disallowed the father of a nonmarital child from inheriting from or through that child if paternity had not been established through presumption or court order, or if the father "failed or refused openly to treat the child as his own or failed or refused to provide support for the child."[179] The statute also expressly recognized the right of a nonmarital child's mother to inherit from the child under any circumstances,[180] and it made no mention of married parents who abandon their children.

The statute was invoked by the plaintiff in *Rainey v. Chever*.[181] In that case, Robert Lee Chever's twenty-year-old nonmarital child was killed in an automobile accident.[182] Zenobia Hamilton Rainey, the child's mother, moved the court to deny the child's father heirship status even though his paternity had been established.[183] Chever, who apparently never had supported his son or played any role in his son's life,[184] responded by challenging the statute on federal and state equal protection grounds.[185] The trial court agreed with Chever, and the Georgia Supreme Court affirmed, noting that the statutory means chosen to advance the state's interest in encouraging fathers to take responsibility for their nonmarital children were not substantially related to the classification that penalized fathers but not similarly situated mothers.[186]

The Supreme Court denied certiorari over the strenuous dissent of Justice Thomas, who, joined by Chief Justice Rehnquist and Justice Scalia, described a host of social ills attributable to the high incidence of out-of-

177. *See supra* note 114 and accompanying text.

178. GA. CODE ANN. § 53-2-4 (1997) (amended 2002).

179. *Id.* § 53-2-4(b)(2).

180. *Id.* § 53-2-4(a).

181. 510 S.E.2d 823, 823 (Ga. 1999).

182. *Id*.

183. *Id.*

184. *See* Rainey v. Chever, 527 U.S. 1044, 1045 (1999) (Thomas, J., dissenting) (discussing how Chever did not meet his son until he was fifteen years old and had never initiated a visit with his son).

185. *Rainey*, 510 S.E.2d at 823.

186. *See id.* at 824.

wedlock births.[187] Claiming that the Georgia Supreme Court had failed to adhere to Supreme Court precedent,[188] Justice Thomas declared that the court should have defined the issue as whether a distinction between fathers who do and fathers who do not support and acknowledge their nonmarital children had a rational basis.[189] Based on this statement of the issue, Justice Thomas concluded that the Georgia Supreme Court improperly had applied heightened scrutiny in its review of the statute's constitutionality.[190]

Although the opinion of the dissenting justices has no legal force, it is remarkable that both it and the Georgia Supreme Court's opinion never fully explored the distinction between classifications stigmatizing nonmarital children and those stigmatizing their parents. This distinction was reflected, if not fully appreciated, in two decisions the Supreme Court made early in its history of invalidating legislation denying entitlements because of illegitimacy.

In *Levy v. Louisiana*,[191] the Court struck down Louisiana's denial of standing to nonmarital children who wished to sue for the wrongful death of their parent.[192] The Court found no rational relationship between the prohibition and the lower court's assertion that it discouraged "bringing children into the world out of wedlock."[193] In *Glona v. American Guarantee & Liability Insurance Co.*,[194] recognized as the reverse of *Levy*,[195] the Court struck down a classification disallowing a mother from

187. *See Rainey*, 527 U.S. at 1044 (Thomas, J., dissenting) (providing an expert's view that out-of-welock births can lead to "lower newborn health and increased risk of early infant death; retarded cognitive and verbal development; lowered educational achievement; lowered levels of job attainment; increased behavioral problems; lowered ability to control impulses; warped social development; increased dependence on welfare; increased exposure to crime; and increased risk of being physically or sexually abused").

188. *See id.* at 1046 (claiming the state court decision to be "inconsistent with this court's prior decisions").

189. *See id.* (demonstrating that the Court has analyzed similar cases under rational basis review, therefore the lower court's use of strict scrutiny was in error); *cf.* Parham v. Hughes, 441 U.S. 347, 355 n.7 (1979) ("[T]he Georgia statute at issue here excludes only those fathers who have not legitimated their children."); Alvarez v. Dist. Dir. of INS, 539 F.2d 1220, 1224 (9th Cir. 1976) (asserting that strict scrutiny in the alien context is not required when classifications are made within groups of aliens rather than between aliens and citizens).

190. *See Rainey*, 527 U.S. at 1047 (Thomas, J., dissenting).

191. 391 U.S. 68 (1968).

192. *Id.* at 70 (reasoning that because nonmarital children are "clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment," they have standing to sue for the wrongful death of their parent).

193. *Id.* at 72.

194. 391 U.S. 73 (1968).

195. *See* Burnett v. Camden, 254 N.E.2d 199, 202 (Ind. 1970) (describing how *Levy* involved non-marital children who brought action for the wrongful death of their mother, while *Glona* involved a mother bringing action for the wrongful death of her son).

suing for the wrongful death of her nonmarital child.[196] As in *Levy*, the Court found the prohibition irrational, remarking: "It would, indeed, be farfetched to assume that women have illegitimate children so they can be compensated in damages for their death."[197] Oddly, many courts discussing *Glona* have described it as a decision striking down an illegitimacy classification.[198] But because the nonmarital child in the case had died, the classification was not based on illegitimacy but on the plaintiff's marital status at the time of her child's birth.[199] Such classifications do not receive the heightened scrutiny that illegitimacy classifications do and might have no difficulty surviving rational basis review, the most limited scope of review.[200] Still, although the rational basis standard is highly deferential, "[t]he Equal Protection Clause prohibits 'arbitrary and irrational discrimination' even if no suspect class or

196. *Glona*, 391 U.S. at 76 (holding that when a state withholds relief to a mother because her child was born out-of-wedlock, it denies equal protection under the law).

197. *Id.* at 75; *cf.* Hughes v. Parham, 243 S.E.2d 867, 871 (Ga. 1978) (Hill, J., dissenting) ("The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed."), *aff'd*, 441 U.S. 347, 353 (1979) ("It is thus neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bonds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child.").

198. *See, e.g.*, Alexander v. Whitman, 114 F.3d 1392, 1404 (3d Cir. 1997) (classifying *Glona* as a case addressing a legislative classification based on "having been born out of wedlock"); Jerry Vogel Music Co. v. Edward B. Marks Music Corp., 425 F.2d 834, 836 (2d Cir. 1969) ("In *Levy* and *Glona* the Court had no problem of defeating reasonable expectations that any party had entertained in the past. It held merely that the illegitimacy of the plaintiff or the decedent was not a constitutionally adequate defense to a wrongful death action."); Peterson v. Norton, 395 F. Supp. 1351, 1355 (D. Conn. 1975) (grouping *Glona* with other Supreme Court decisions involving "classifications on the basis of legitimacy of birth"); Poulos v. McMahan, 297 S.E.2d 451, 452 (Ga. 1982) (characterizing *Glona* as "present[ing] with the issue of whether a statutory discrimination against illegitimate children is constitutional"); Burnett v. Camden, 254 N.E.2d 199, 202 (Ind. 1970) (describing the classification in *Glona* by "the fact that the child was born out-of-wedlock").

199. *See Parham*, 441 U.S. at 355 n.7 ("The invidious discrimination perceived in [*Glona*] was between married and unmarried mothers.").

200. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (explaining that rational basis review defers to legislative judgment and demands no evidence or empirical data in support of legislation); Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) (explaining that rational basis review merely requires that a "purpose may conceivably or may reasonably have been the purpose and policy" of the legislature (internal quotation marks omitted)); Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) ("Only in an exceptional circumstance will a statute not be rationally related to a legitimate government interest and be found unconstitutional under rational basis scrutiny."); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 357 (1999) (characterizing rational basis review as "extremely deferential"). Challenges based on rational basis rarely succeed. Farrell, *supra*, at 357 ("In the past twenty-five years, the Court has decided ten such cases, while during the same time period, it has rejected rational basis arguments on one hundred occasions.").

fundamental right is implicated."[201] Accordingly, it is conceivable that the Court would disapprove of a statute that establishes marriage as a proxy for the support of marital children and that requires the unmarried to make an independent showing of support for their children.[202] Marriage is, after all, no guarantee that parents will support their children. Even if an unwed father took steps to legitimate his child, his failure to support his child would have to be addressed by invoking the state's enforcement machinery. The same is true of married fathers who fail to support their legitimate children. Denying one set of parents' inheritance rights for non-support of their children but not similarly depriving married parents who do not support their children stigmatizes the unmarried and runs counter to a broad reading of *Eisenstadt* and other Supreme Court decisions.[203] By failing to recognize the Georgia statute's marital status discrimination in *Rainey*, the Georgia Supreme Court implied that the Georgia legislature could cure the equal protection flaw in the statute by imposing the same deprivation of inheritance rights on women who bear children out of wedlock as was imposed on men. By not granting certiorari in *Rainey*, the United States Supreme Court left several indistinguishable statutes in other states untouched. In so doing, the Court resurrected its former justification for not striking down statutes stigmatizing illegitimate children and thereby

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201. Muller v. Costello, 187 F.3d 298, 309 (2d Cir. 1999) (internal quotation marks omitted); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

202. *See* Labine v. Vincent, 401 U.S. 532, 552-53 (1971) (Brennan, J., dissenting) ("It is also important not to obscure the fact that the formality of marriage primarily signifies a relationship between husband and wife, not between parent and child. Analysis of the rationality of any state effort to impose obligations based upon the fact of marriage must, therefore, distinguish between those obligations that run between parties to the marriage and those that run to others."); JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 99, 117 (1997) (suggesting the Court's position in unwed father cases is driven less by the concern that fathers establish relationships with their children than that they establish a connection to the mothers of their children); Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 342 (1996) ("Although reproduction within marriage serves as the best proxy for responsible reproduction in this discourse, and nonmarital reproduction for irresponsible reproduction, such models prove to be both over- and underinclusive.").

The Supreme Court has declined to analyze such claims. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 116-17 (1989) ("We do not reach Michael's equal protection claim, however, as it was neither raised nor passed upon below."); Caban v. Mohammed, 441 U.S. 380, 394 n.16 (1979) (declining to address an equal protection claim founded on differential treatment of married and unmarried fathers). *But see* Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (finding compelling distinctions between unmarried and married fathers based on the latter's having "borne full responsibility for the rearing of [their] children during the period of the marriage").

203. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citing the illegitimacy classification case, *Levy v. Louisiana*, 391 U.S. 68, 71 (1968) ("[T]he law [has not] refused to recognize those family relationships unlegitimized by a marriage ceremony.")).

perpetuated the law's continued promotion of marital families.

It has been a long road to legislative reforms aimed at advancing the contemporary view that there are no illegitimate children, only illegitimate parents, and erasing the stigma surrounding illegitimacy of birth. Nonetheless, when illegitimacy as a status fell into disfavor, the result was not to strike down laws criminalizing sexual activity between consenting adults but roughly to equalize the treatment of non-marital and marital children. As a quasi-suspect classification qualifying only for intermediate scrutiny, children born out of wedlock are still subject to differential treatment that significantly advances the state's interest in the orderly administration of estates.

The long history of the legal treatment of nonmarital children reveals not only opprobrium aimed at the behavior of their parents but also, at the very least, some measure of hatred and suspicion toward the children themselves. By some accounts, they are interlopers, subhuman, unworthy of civil status, and even loathed by their own parents. There is no question that nonmarital children have suffered stigma by virtue of the lawless circumstances of their birth. Indeed, illegitimacy classifications themselves and the codification of differential treatment based on them have inspired some states to declare nonmarital children a suspect class.[204] At the very least, the courts have recognized that discrimination against nonmarital children is not merely regrettable but is in fact invidious.

II. ASSISTED REPRODUCTION AND ILLEGITIMACY

A. Biblical Roots

Illegitimacy as a status is rooted in an ancient story of assisted reproduction. The biblical story of Abraham, Sarah, and their servant Hagar is essentially the story of an infertile woman who wanted children and invoked the custom of permitting her husband to have children by his slave. Abraham impregnated Hagar, who later gave birth to Ishmael. All was well until Sarah unexpectedly became pregnant and gave birth to Isaac. Her fortunes having turned in a new direction, Sarah prevailed upon Abraham to banish Hagar and Ishmael, who wandered in the desert until they were near death. In this story and other passages of the Bible, "Christian theologians and jurists alike found . . . ample sanction for the legal doctrine of illegitimacy."[205]

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204. *See generally* Gomez v. Perez, 409 U.S. 535 (1973) (noting that Texas had a law separating illegitimate children from legitimate children into a class, which denied right of parental support).

205. WITTE, *supra* note 3, at 4. Although his birth resulted from a custom of the Jewish people, the later Christian church described Ishmael as a spurious illegitimate.

The story of Abraham, Sarah, and Hagar, read in modern terms, has a number of ugly associations that taint our notion of what surrogacy could be. First, it associates surrogates with poor, enslaved women, forced to bear children for others and then discarded. Such visions stoke the concerns about exploitation that have been so prominent in debates about the ethics of surrogacy[206] and resound in news headlines about the darkest manifestation of surrogacy: human trafficking.[207] Second, it supports the stereotypical idea of "greedy" commissioning parents who are incapable of full devotion to children not genetically related to themselves. Sarah manifests perhaps the worst of this quality, rejecting the child she had intended to rear once the opportunity for genetic parenthood presented itself. In short, the biblical surrogacy story is about one-dimensional women toiling in the shadow of patriarchy, either powerless and exploited or demanding and opportunistic. A worse template for surrogacy could scarcely be imagined. The repugnance we bear toward the slavery, oppression of women, child abuse, betrayal, opportunism, and narcissism is undoubtedly the emotional fuel behind certain calls to reject surrogacy as a means of becoming parents.

B. Contemporary Manifestations

Nothing about the biblical surrogacy story resembles modern day surrogacy arrangements. Nonetheless, assisted reproduction has been associated with adultery and illegitimacy since its inception. This association is most salient in cases of alternative insemination by donor and surrogacy.

1. Alternative Insemination by Donor

Although there are reports of alternative insemination being conducted during the eighteenth and nineteenth centuries, alternative insemination began to be more widely used during the 1950s, when, during the Korean War, soldiers banked their sperm for later use by their wives.[208] Artificial

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Id. at 68. The early church, by contrast, presented the story as an allegory instead of a story about illicit sex. *See id.* at 40-42.

206. *See generally* Stephen Wilkinson, *The Exploitation Argument Against Commercial Surrogacy*, 17 BIOETHICS 169 (2003) (exploring the basis for arguments that commercial surrogacy is exploitative and raising the question of whether commercial surrogacy should be prohibited even if it is determined not to be exploitative).

207. *See* Michael Cook, *Surrogate Baby Ring Busted in Bangkok*, BIOEDGE (Feb. 25, 2011, 11:16 PM), http://www.bioedge.org/index.php/bioethics/bioethics_article/9413/ (describing a commercial surrogacy company whose practices included restricting the movement of surrogate mothers and confiscating their passports).

208. MARICRUZ DE LA TORRE VARGAS, LA FECUNDACIÓN IN VITRO Y LA FILIACIÓN 12 (1993).

insemination by donor became more familiar in the 1960s.[209] By the mid-1970s, judicial decisions and, later, legislation[210] began to appear regarding the legality of, the legal requirements for (regulation of practices and access: payment, anonymity, administration by physician or in hospital)[211] or the legal consequences (filiation,[212] illegitimacy,[213] grounds for divorce,[214] and insurance[215]) of what we now call alternative insemination

209. Charles Kindregan, Jr., *Thinking about the Law of Assisted Reproductive Technology*, 27 WIS. J. FAM. L. 123, 123 (2007), *available at* http://www.wisbar.org/AM/Template.cfm?Section=Family_Law_Section&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=75102.

210. 10 ANN. REV. POPULATION L. 181 (1983). There was some case law prior to 1968. *See, e.g.*, Anonymous v. Anonymous, 246 N.Y.S.2d 835, 836 (Sup. Ct. 1964) (citing Gursky v. Gursky, 242 N.Y.S.2d 406 (Sup. Ct. 1963), People *ex rel.* Abajian v. Dennett, 184 N.Y.S.2d 178 (Sup. Ct. 1958), and Strnad v. Strnad, 78 N.Y.S.2d 390 (Sup. Ct. 1948)) (holding husband liable for support for children born via artificial insemination where husband consented in writing to the insemination of his wife with the sperm of a donor); *see also* G. D. Walker, *Legitimacy and Paternity*, 14 ARK. L. REV. 55, 58 (1960).

211. 1977 ANN. REV. POPULATION L. 53 (1977) (Yugoslavia, among other provisions, barring payment to sperm donors), 1978 ANN. REV. POPULATION L. 12; 9 ANN. REV. POPULATION L. 155-56 (1982) (comprehensive regulations promulgated in Czechoslovakia); 9 ANN. REV. POPULATION L. 157-58 (1982) (Hungary Ministry of Health ordinance and obstetrics, gynaecology and urology societies' circular governing "the selection and examination of donors and recipients for artificial insemination").

212. *See* 10 ANN. REV. POPULATION L. 175-76 (1983) (German court determined that time had expired beyond which husband could contest paternity of child born by AID to which husband consented); 9 ANN. REV. POPULATION L. 154-55 (1982) (Czechoslovakia); 1980 ANN. REV. POPULATION L. 168 (Yugoslavia); 1976 ANN. REV. POPULATION L. 105-06 (French court ruled husband could renounce his paternity even if he had consented to his wife's medical insemination by donor); M. Mandofia & M. Buergisser, *Les difficultés de réglementer la procréation assistée*, 13 DÉVIANCE ET SOCIÉTÉ 257, 258 (1989) (Switz.). Such laws coincided with the enactment of similar laws in the individual U.S states and the Canadian provinces. 9 ANN. REV. POPULATION L. 95 (Québec); 1976 ANN. REV. POPULATION L. 114-116 (Connecticut).

213. *See* Gursky v. Gursky, 242 N.Y.S.2d 406, 410-11 (Sup. Ct. 1963) (noting that a child born through heterologous artificial insemination by a third party donor is not considered born in wedlock and is therefore illegitimate); L. v. L., 1 All. E.R. 141 (1949) (Eng.) (holding in an annulment action that the child of a married couple was illegitimate because although the wife became pregnant by intrauterine insemination, the marriage was not consummated); 9 ANN. REP. POPULATION L. 152 (1982) (South African court determines child born via artificial insemination to be illegitimate); Kelly L. Frey, Comment, *New Reproductive Technologies: The Legal Problem and a Solution*, 49 TENN. L. REV. 303, 313-17 (1982) (discussing *Doornbos v. Doornbos* where the court held that "AID, even with the consent of the husband, is an act of adultery and that the offspring of AID are illegitimate" (citation omitted)); M.L. Lupton, *Status of Children Born by Artificial Insemination in South African Law*, 1985 J. S. AFR. L. 277, 279 (1985) ("[T]he father of an AID or IVF . . . child who had treated the child as his own for years and who had given his consent to its conception could assert his non-paternity as a defence to a claim for maintenance.").

214. *See* Orford v. Orford (1921), 58 D.L.R. 251-52 (Can. Ont. Sup. Ct.) (considering artificial insemination without the husband's permission to be adultery); K. Stoyanovitch, *La légitimité des enfants nés par suite de l'insemination artificielle en France et aux Etats-Unis d'Amerique*, 8 REVUE INTERNATIONALE DE DROIT COMPARE 264, 267-68, 270-71 (1956) (Fr.).

215. *See* 10 ANN. REV. POPULATION L. 176-77 (1983) (Germany); 8 ANN. REV.

but what was then widely known as artificial insemination. By the late 1980s we can discern a full-fledged academic discussion about the law and ethics of assisted reproduction.

Alternative insemination (AI) by donor inspired restrictive rules in several countries around the world. Czechoslovakia permitted AI only for "health reasons" such as male-factor infertility, defects of the female organs, risk of hereditary disease, or "evolutionary defects"[216] and barred women over thirty-five years of age from access to the technology.[217] The couple had to submit an application and pay a fee. Donors of semen could not be older than forty, and anonymity was strictly required.[218] Hungary required donors not only to undergo a test for hereditary disease but also a psychological examination.[219]

Significant attention was paid during this early period to whether children born via alternative insemination by donor (AID) would be legitimate, even if born to a married woman.[220] In part, the issue involved the "paradox" of an AID child's being born to the marriage but not being the product of adultery.[221] But courts have reached widely varying decision on both the question of adultery and of illegitimacy. At least two courts sidestepped the paradox by declaring AID to be adultery that causes the resulting child to be illegitimate.[222] The *Orford* court, on this account, reasoned that an adulterous act does not consist of sexual penetration in such cases but lies in "the invasion of the reproductive function."[223] The court, however, suggested that illegitimacy would only follow if the AID had occurred without the husband's consent.[224] A New York court declared flatly that AID children are illegitimate, disapproving as "supported by no legal precedent" an earlier case that had declared an AID child legitimate.[225] The court did not specify whether AID amounted to

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POPULATION L. 188 (1981) (France).

216. 9 ANN. REV. POPULATION L. 155 (1982).

217. *Id.* at 156.

218. *Id.*

219. 9 ANN. REV. POPULATION L. 158 (1982).

220. *See, e.g.*, *Artificial Insemination and Illegitimacy*, 112 JAMA 1832, 1832 (1939); Sidney B. Schatkin, *Artificial Insemination and Illegitimacy*, 11 HUMAN FERTILITY 14 (1946); Stoyanovitch, *supra* note 214, at 267.

221. Schatkin, *supra* note 220, at 14.

222. Orford v. Orford (1921), 58 D.L.R. 251-52 (Can. Ont. Sup. Ct.); Gursky v. Gursky, 242 N.Y.S.2d 406, 410-11 (Sup. Ct. 1963) (citing *Doornbos*).

223. Schatkin, *supra* note 220, at 15 (quoting *Orford*). This reasoning was also adopted in *Russell v. Russell*, [1924] A.C. 687, 721.

224. Schatkin, *supra* note 220, at 15.

225. *Gursky*, 242 N.Y.S.2d at 411 (referring to *Strnad v. Strnad*, 78 N.Y.S.2d 390 (Sup. Ct. 1948)). In an earlier case, the plaintiff, already divorced, was estopped from claiming for the first time that her children were the result of AID in support of her request that her ex-husband be denied custody and visitation. People *ex rel.* Abajian v.

adultery, but instead reasoned that an AID child is "begotten by a father other than the husband of the mother" and is therefore illegitimate.[226] Decisions of a similar nature were handed down in South Africa and Germany, the South African court holding "with regret" that the child was illegitimate despite the consent of the husband to the insemination of his wife with donor sperm and despite the procedure's not amounting to adultery.[227] The German court decided that a husband may challenge the legitimacy of a child born of AID to which he consented.[228] Under Jewish law, the importance of biological parentage caused judges to consider illegitimate "the offspring of a married woman, born to her from another man's sperm."[229] But since illegitimacy is a badge of shame that emanates essentially from adultery proscriptions,[230] some judges had trouble equating AID with illegitimacy,[231] although they nonetheless considered the sperm donor to be the child's father.[232] Contrariwise, the question of legitimacy does not arise if a single women gives birth to a child via AID.[233] The strong association between AI and legitimacy inspired the court in *Zepeda v. Zepeda* to query whether artificial insemination might give rise in some future cases to claims of wrongful life.[234]

Today, when illegitimacy is barely cognizable as a legal category,[235] under all statutes that define the paternity ramifications of artificial insemination by donor, the husband of an artificially inseminated woman is

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Dennett, 184 N.Y.S.2d 178, 182 (Sup. Ct. 1958).

226. *Gursky*, 242 N.Y.S.2d at 410.

227. 9 ANN. REV. POPULATION L. 159 (1982). This approach is similar to that taken in *Artificial Insemination and Illegitimacy*, *supra* note 220.

228. 10 ANN. REV. POPULATION L. 176 (1983).

229. Noam Zohar, *Artificial Insemination and Surrogate Motherhood: A Halakhic Perspective*, 2 S'VARA: J. PHIL. & JUDAISM 13, 14 (1991).

230. *See id.* at 15.

231. *See id.* at 16.

232. *See id.*

233. *See generally* SUSAN MARTHA KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 64, 71 (Arjun Appadurai et al. eds., 2000) (discussing the support of AID, the recognition of its legitimacy, and its impact within society).

234. 190 N.E.2d 849, 859 (Ill. App. Ct. 1963) ("If there are public sperm banks in future years and if there are sperm injections like present day blood transfusions, with donors and donees unknown to each other, will there not be a basis for an action for wrongful life? . . . If such awesome experiments are successfully pursued and their ultimate goal , the abiogenesis of human life achieved, would a being so created have a cause of action for wrongful life against those whose knowledge and skill were so employed?").

235. By this statement, I do not mean to minimize the discrimination and harm that still accrues under law and regulations of questionable constitutionality. *See generally* Maldonado, *supra* note 29, at 360 (cataloging continuing harms against children born out of wedlock).

the father of the resulting child if he consented to the insemination.[236] Public policy favoring legitimacy and support for children creates a strong presumption that a husband consented to his wife's insemination.[237] The typical method of demonstrating consent is through a signed writing,[238] but consent can also be established orally.[239] Where a husband gives no written or oral consent, even in states with no governing statute, he may nonetheless be liable for support under contract theories or equitable principles.[240] Other cases do not reach a final determination of these issues

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236. *See* ALA. CODE § 26-17-703 (2012); ALASKA STAT. § 25.20.045 (2012); ARK. CODE ANN. § 9-10-201(a) (2012); CAL. FAM. CODE § 7613(a) (West 2012); COLO. REV. STAT. § 19-4-106(1) (2012); CONN. GEN. STAT. ANN. § 45a-774 (West 2012); FLA. STAT. ANN. § 742.11(1) (West 2012); GA. CODE ANN. § 19-7-21 (2012); IDAHO CODE ANN. § 39-5405(3) (2012); 750 ILL. COMP. STAT. ANN. 40/2 (West 2012); KAN. STAT. ANN. § 23-129 (West 2012); MD. CODE ANN., EST. & TRUSTS § 1-206 (West 2012); MASS. GEN. LAWS ch. 46, § 4B (2012); MICH. COMP. LAWS ANN. § 333.2824(6) (West 2012); MO. ANN. STAT. § 210.824(1) (West 2012); MONT. CODE ANN. § 40-6-106(1) (West, Westlaw through 2012); NEB. REV. STAT. ANN. § 43-1412.01 (LexisNexis 2011); N.H. REV. STAT. ANN. § 168-B:3(II) (2012); N.J. STAT. ANN. § 9:17-44(a) (West 2012); N.Y. DOM. REL. LAW § 73(1) (McKinney 2012); N.C. GEN. STAT. § 49A-1 (2012); OHIO REV. CODE. ANN. § 3111.95(A) (LEXISNEXIS 2012); OKLA. STAT. tit. 10, § 552 (2012); TENN. CODE ANN. § 68-3-306 (2012); VA. CODE ANN. § 20-158(A)(2) (2012); WIS. STAT. ANN. § 891.40(1) (West 2012); *In re* Adoption of Reams, 557 N.E.2d 159, 163 (Ohio Ct. App. 1989) (conclusive presumption of paternity). *But see* Welborn v. Doe, 394 S.E.2d 732, 733 (Va. Ct. App. 1990) (statute merely created presumption of husband's paternity; adoption was a more certain way of establishing paternity).

237. *See* K.S. v. G.S., 440 A.2d 64, 65, 68 (N.J. Super. Ct. Ch. Div. 1981); *see also* Brooks v. Fair, 532 N.E.2d 208, 212-13 (Ohio Ct. App. 1988) (same policies militate against wife's disavowal of her husband's paternity).

238. *See In re* Marriage of Witbeck-Wildhagen, 667 N.E.2d 122, 125 (Ill. App. Ct. 1996) (written consent is mandatory); *K.S.*, 440 A.2d at 68 (noting that many other states' statutes require written consent); Lane v. Lane, 912 P.2d 290, 296 (N.M. Ct. App. 1996) (there was substantial compliance with writing requirement through pleadings in divorce proceeding); Anonymous v. Anonymous, 1991 WL 57753, at *6, *10 (N.Y. Sup. Ct. Jan. 18, 1991) (recognizing insufficient compliance with writing requirement and thus no grounds for imposition of equitable estoppel); Anonymous v. Anonymous, 246 N.Y.S.2d 835, 837 (Sup. Ct. 1964) (establishing support obligation on implied contract theory); Gursky v. Gursky, 242 N.Y.S.2d 406, 412 (Sup. Ct. 1963) (same).

239. *See* R.S. v. R.S., 670 P.2d 923, 927-28 (Kan. Ct. App. 1983) (oral consent created estoppel to deny paternity); K.S., 440 A.2d at 65 (verbal consent). *But see* K.B. v. N.B., 811 S.W.2d 634, 638 (Tex. App. 1991) (oral consent insufficient).

240. *See* People v. Sorenson, 437 P.2d 495, 499 (Cal. 1968); *In re* Marriage of Adams, 551 N.E.2d 635, 638 (Ill. 1990) (writing requirement might not be so strict as to preclude finding of parent-child relationship or support obligation on other grounds); Levin v. Levin, 645 N.E.2d 601, 604-605 (Ind. 1994) (estoppel to deny support obligation when consented orally and in writing, where the state had no artificial insemination statute); *In re* Baby Doe, 353 S.E.2d 877, 879 (S.C. 1987) (consent implied from conduct establishes paternity); *K.B.*, 811 S.W.2d at 639 (full knowledge and willing participation constituted ratification of parent-child relationship); L.M.S. v. S.L.S., 312 N.W.2d 853, 855 (Wis. Ct. App. 1981) (adopting moral obligation theory); *cf.* Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280, 288 (Ct. App. 1998) (estoppel precluded denial of support obligation to child resulting from consent to gestational surrogacy); Karin T. v. Michael T., 484 N.Y.S.2d 780, 784 (Fam. Ct. 1985) ("The contract and the equitable estoppel which prevail in this case prevent the respondent

on procedural grounds.[241]

2. Surrogacy and the Cult of Gestational Motherhood

In addition to the association of alternative insemination with illegitimacy, , many countries view surrogacy with such suspicion that it is thought to give rise to illegitimate forms of the family. In part, this approach to surrogacy arises from the intractable view of the legal implications of gestational motherhood. "[I]n traditional European-American thinking a mother's identity is understood as [an unwavering] natural fact:"[242] "birth itself is conclusive proof of motherhood."[243] In both the civil law and the common law, this tradition is embodied in the maxim "*mater semper certa est, etiamsi vulgo conceperit, pater est quem nuptiae demonstrant*," or "maternity is always certain even of illegitimate children, paternity follows marriage,"[244] which continues to carry considerable weight, having been enshrined in the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children (1962) and the Convention on the Legal Status of Children Born out of Wedlock (1975).[245]

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from asserting her lack of responsibility by reason of lack of parenthood."). *But see* Shin v. Kong, 95 Cal. Rptr. 2d 304, 305 (Ct. App. 2000) (where consent was not obtained for the procedure, husband could not have parental liability imposed upon him even via equity).

Such principles may also estop a wife from denying the paternity of her husband, *see, e.g.*, State *ex rel.* H. v. P., 457 N.Y.S.2d 488, 492 (App. Div. 1982); *In re* Adoption of Anonymous, 345 N.Y.S.2d 430, 435-36 (Sup. Ct. 1973); People *ex rel.* Abajian v. Dennett, 184 N.Y.S.2d 178, 182 (Sup. Ct. 1958) (wife's conduct estopped her from denying ex-husband's paternal rights); *Brooks*, 532 N.E.2d at 212-13, a surrogate from raising the artificial insemination statute to negate the claim of the intending father, *see, e.g.*, *In re* Matthew B., 284 Cal. Rptr. 18, 34 (Ct. App. 1991) (surrogate stipulated to the paternity of the intending father); *cf.* R.R. v. M.H., 689 N.E.2d 790, 795-96 (Mass. 1998) (stating artificial insemination statute is inapplicable to surrogacy arrangements), or even a known donor from asserting paternity, *see* Leckie v. Voorhies, 875 P.2d 521, 522 (Or. Ct. App. 1994) (donor's signed agreement not to assert paternity constituted effective contractual waiver).

241. *See, e.g.*, Alexandria S. v. Pac. Fertility Med. Ctr., Inc., 64 Cal. Rptr. 2d 23, 33 (Ct. App. 1997) (failure to appeal issue); Hill v. Hulet, 881 P.2d 460, 461-62 (Colo. App. 1994) (collateral estoppel); Kerns v. Schmidt, 641 N.E.2d 280, 284 (Ohio Ct. App. 1994) (failure to raise issue in lower court).

242. DOLGIN, *supra* note 202, at 119-20.

243. Mary Ann B. Oakley, *Test Tube Babies: Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development*, 8 FAM. L.Q. 385, 391 (1974).

244. JOHN GEORGE PHILLIMORE, PRIVATE LAW AMONG THE ROMANS FROM THE PANDECTS 64 (1863); M.T. Meulders-Klein, *Cohabitation and Children in Europe*, 29 AM. J. COMP. L. 359, 376 (1981) (citing the Germanic and Scandinavian countries which have traditionally "given preponderance to the unmarried mother's name, mainly because maternity was always established in application of the *Mater simper certa est* rule . . .").

245. *European Court of Human Rights: Judgment in the* Marckx *Case (Status of Children Born out-of-wedlock; Inheritance Rights)*, 19 INT'L LEGAL MATERIALS 109, 114 (1980) [hereinafter *Judgment in the Marckx Case*] (basing both the Brussels

A Belgian newspaper explains: "The principle is simple: a child's legal mother is she who gives birth to it. Belgian law is extremely clear on this subject."[246] Not only is the law perfectly clear, there simply is no legal way to "break the lines of filiation."[247] This maxim holds even in the United Kingdom, where altruistic surrogacy is legal,[248] but not in Greece, where the law recognizes the intending mother in surrogacy arrangements as the legal mother.[249] Most countries in Europe reject surrogacy, however, so that in this area of assisted reproduction at least, the medical technologies of vitro fertilization and embryo transfer have not successfully eroded the force of the maxim.[250]

Mater semper certa est is not the only reason for rejecting surrogacy, because of course adoption could be employed to transfer motherhood in such cases. Also salient are expressions of worry about exploitation and the best interests of the child. In contrast to the United States, where such concerns have largely been employed to call for greater protection for the surrogate who changes her mind and to develop approaches to surrogacy

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Convention of 12 September 1962 and the Convention of 15 October 1975 on the Legal Status of Children born out of wedlock on the principle "*mater simper certa est*" and in the latter convention, regulating maintenance obligations, parental authority, and rights of succession).

246. *Une vingtaine de cas connus*, LA DERNIÈRE HEURE, May 24, 2005 (Belg.), *available at* http://www.dhnet.be/dhjournal/archives_det.phtml?id=479992.

247. *Id*.

248. Human Fertilisation and Embryology Act 2008 § 33 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2008/22/section/33. Note also the adherence to the maxim in the South African law of surrogacy. *See* Lize Mills, *Certainty about Surrogacy*, 21 STELLENBOSCH L. REV. 429, 432 (2010) (S. Afr.). The statutory regulation of surrogacy allows the commissioning couple to be recognized as the parents of the child if the surrogate does not seek to terminate the agreement within sixty days of the birth of the child. *Id*. at 435-36.

249. Ismini Kriari-Catranis, *Human Assisted Procreation and Human Rights—The Greek Response to the Felt Necessities of the Time*, 10 EUR. J. HEALTH L. 271, 276 (2003) (Neth.) (presuming that the mother of the child is the woman who obtained court permission under the conditions of Article 1458 CC).

250. Note that the maxim appears not to be recognized in France. Jacqueline Rubellin-Devichi, *The Reform Wagon Rolls Again*, 25 J. FAM. L. 127, 134 (1986) (noting that even if one fails to acknowledge their child, *possession d'etat* will be established through proof of treating a child as one's own). Italy, however, abolished its rule requiring the birth mother to establish maternity by recognizing her child in favor of embracing the maxim. Hélène Bauer-Bernet, *Effect of Information Science on the Formation and Drafting of Law*, 14 JURIMETRICS J. 236 (1974). Belgium was forced to do likewise in the case of *Marckx*. *Judgment in the Marckx Case*, *supra* note 245, at 121 ("[We] cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim . . . ."). The laws of all three countries were influenced by the French Civil Code requiring voluntary acknowledgment by a mother of her child born out-of-wedlock. Meulders-Klein, *supra* note 244, at 363-64 (requiring special formalities such as voluntary acknowledgment or judicial order to ascertain a mother-child relationship and finding that such a relationship might not be established even if both parties are living together).

that appropriately lessen that risk, in Europe, the concern has been that a woman should never be a surrogate to begin with. This may ostensibly be because of concerns about exploitation or a desire for legal certainty but may more directly be traceable to an immovable sense of the proper role of gestational mothers. In contrast to the United States, where courts have been willing to "negate absolutely, or minimize seriously, the significance of the biological bases of a surrogate's claims to legal maternity,"[251] in Europe the force of gestational motherhood makes it impervious to such legal maneuvering. As Janet Dolgin has observed:

> The contractualization of maternity represented by surrogacy arrangements provides an especially stark, and therefore especially troubling, instance of the erosion of romantic images of woman and mother first constructed at the start of the Industrial Revolution. That women may negotiate the conditions of their biological maternity before becoming pregnant, and that they may further *choose* to undertake biological maternity without desiring or presuming that social maternity will follow, completely disrupts traditional understandings of motherhood.[252]

Whether because of fears of exploitation, a desire for legal certainty, or an intractable ideology of gestational motherhood, European countries have been unwilling to disrupt those traditional understandings. Their response to citizens who go abroad for surrogacy and bring children home documents that the new illegitimacy may not simply arise out of marriage bias but through bias against the way a child comes into being. Surrogacy is the culprit here, and in Europe, where surrogacy is widely banned, is giving rise to a new illegitimacy that neither international law nor human rights may be able to curb.

III. THE NEW ILLEGITIMACY IN INTERNATIONAL COMMERCIAL SURROGACY

Cross-border reproductive travel has become a more and more common response to the restrictive laws and high prices that individuals and couples encounter when they consider assisted reproduction.[253] The law of assisted

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251. DOLGIN, *supra* note 202, at 122.

252. *Id*. at 120; *see also* Pedro F. Silva-Ruiz, *La Inseminacíon Artificial. Reproducción Asexual. Implicaciones Jurídicas de las Nuevas Tecnologías de Reproducción Humana*, 32 REV. DER. P.R. 45, 50-52 (1992) (raising ethical concerns about surrogacy and finding that certain religions view surrogacy as an offense to the dignity and right of the child through conception).

253. Richard F. Storrow, *Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-border Reproductive Travel*, 23 REPROD. BIOMEDICINE ONLINE 538 (2011); Storrow, *Pluralism Problem*, *supra* note 80, at 2940-41; Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 298 (2005) (positing that reproductive travel arises from "the interplay between member states' individual (some would say idiosyncratic) policies on

reproduction interacts with the growing phenomenon of cross-border reproductive travel in four significant ways. First, legal restrictions on assisted reproductive procedures or limitations on access to them by certain classes of individuals may trigger travel abroad for assisted reproductive services. Such laws may also inspire physicians to travel abroad to provide services outlawed at home or to refer patients to clinics in more permissive countries. Examples of legal restrictions that may trigger cross-border movements or referrals are Germany's ban on in vitro fertilization (IVF) with egg donation;[254] Italy's, Turkey's, and most Muslim countries' ban on any use of third-party gametes;[255] France's exclusion of non-heterosexual couples from infertility treatment;[256] Australia's ban on non-medical sex selection;[257] the ban on surrogacy in many countries;[258] and the Netherlands' and the United Kingdom's ban on anonymous gamete donation.[259] Some of these legal regimes may also prohibit making

responsible procreation and globalist policy of free movement of persons); Richard F. Storrow, *Travel into the Future of Reproductive Technology*, 79 UMKC L. REV. 295, 299 (2010) (stating a desire to acquire treatment not offered in the jurisdiction makes opportunities in permissive or laissez faire jurisdictions more appealing, causing individuals to seek reproductive assistance in these locations).

254. Sven Bergmann, *Reproductive Agency and Projects: Germans Searching for Egg Donation in Spain and the Czech Republic*, 23 REPROD. BIOMEDICINE ONLINE 600 (2011).

255. Marcia C. Inhorn, *'Assisted' Motherhood in Global Dubai: Reproductive Tourists and Their Helpers*, *in* THE GLOBALIZATION OF MOTHERHOOD: DECONSTRUCTIONS AND RECONSTRUCTIONS OF BIOLOGY AND CARE 180, 190-96 (JaneMaree Maher & Wendy Chavkin eds., 2010) (discussing seven discrete but not unrelated factors which promote reproductive tourism); MARCIA C. INHORN, LOCAL BABIES, GLOBAL SCIENCE: GENDER, RELIGION, AND IN VITRO FERTILIZATION IN EGYPT 86 (2003); Zeynep Gürtin-Broadbent, *Banning Reproductive Travel? Turkey's Assisted Reoroduction Legislation and Third Party Assisted Reproduction*, 23 REPRO. BIOMEDICINE ONLINE 555 (2011); Marcia C. Inhorn, *Diasporic Dreaming: Return Reproductive Tourism to the Middle East*, 23 REPROD. BIOMEDICINE ONLINE 582, 588-89 (2011); Marcia C. Inhorn, *Global Infertility and the Globalization of New Reproductive Technologies: Illustrations from Egypt*, 56 SOC. SCI. & MED. 1837, 1847 (2003) (discussing how despite religious and cultural restrictions on donor insemination, new high tech reproductive technologies are rapidly globalizing even to developing countries); Marcia C. Inhorn & Pankaj Shrivastav, *Globalization and Reproductive Tourism in the United Arab Emirates*, 22 ASIA-PAC. J. PUB. HEALTH 694, 695 (2010) (studying how local cultural ideologies and practices not found in Western countries reshape the use of new reproductive technologies in Egypt and how these technologies are being adapted); Giulia Zanini, *Abandoned by the State, Betrayed by the Church: Italian Experiences of Cross-Border Reproductive Care*, 23 REPROD. BIOMEDICINE ONLINE 565 (2011).

256. Petra De Sutter, *Considerations for Clinics and Practitioners Treating Foreign Patients: Lessons from Experiences in Belgium*, 23 REPROD. BIOMEDICINE ONLINE 652 (2011).

257. Andrea Whittaker, *Reproductive Opportunists in the New Global Sex Trade: PGD and Non-medical Sex Selection*, 23 REPROD. BIOMEDICINE ONLINE 609 (2011).

258. Amrita Pande, *Transnational Commercial Surrogacy in India: Gifts for Global Sisters?*, 23 REPROD. BIOMEDICINE ONLINE 618 (2011).

259. De Sutter, *supra* note 256; Nicky Hudson & Lorraine Culley, *Reproductive Tourists? UK Trajectories*, 23 REPROD. BIOMEDICINE ONLINE 573 (2011).

referrals to clinics in countries where the procedures sought are legal[260] or even mentioning prohibited techniques to patients.[261] In some countries, going abroad and receiving treatment where it is legal is itself a criminal offense. Turkey now explicitly prohibits travelling abroad to procure donor gametes.[262] Malaysia and the three Australian jurisdictions prohibit international commercial surrogacy.[263]

Among the reproduction assisting procedures that patients travel abroad to procure, surrogacy, heavily restricted or outlawed by many countries around the world, poses special legal problems owing to its peculiar factual context. Most European countries and some countries in Asia ban surrogacy. In response to these laws, individuals affected by these laws now travel to countries like the United States, Ukraine, and India, where surrogacy is permitted.[264] The children born of international surrogacy tend to be born in the host country,[265] and the intending parents must obtain travel documents to return with their new children to their countries of origin.[266] For this reason, surrogacy is much easier for consular officials to detect than cases of intra-uterine insemination using donor sperm, or IVF with donor eggs, sperm, or embryos that result in the pregnancy of the intending mother abroad but the birth of the child in the home country.[267]

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260. Wannes Van Hoof & Guido Pennings, *Extraterritoriality for Cross-border Reproductive Care: Should States Act Against Citizens Travelling Abroad for Illegal Infertility Treatment?*, 23 REPROD. BIOMEDICINE ONLINE 546 (2011).

261. *See* Bulent Urman & Kayhan Yakin, *New Turkish Legislation on Assisted Reproductive Techniques and Centres: A Step in the Right Direction?*, 21 REPROD. BIOMEDICINE ONLINE 729, 730 (2011) (providing that failure to abide by the restriction on discussing certain reproductive techniques could result in doctors losing their license and facing criminal charges).

262. *Id.* at 730.

263. Jenni Millbank, J., *The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls?*", 35 MELB. U. L. REV. 165 (2011); Dennis Chong, *Police Probe Surrogacy Dad*, THE STANDARD (Dec. 2, 2010), http://www.thestandard.com.hk/news_detail.asp?pp_cat=30&art_id=105592&sid=30489519&con_type=1.

264. FAM. CODE (*Vidomosti Verkhovnoi Rady Ukrainy*, 2002 No. 21-22, at 135) (Ukr.); Nilanjana S. Roy, *Protecting the Rights of Surrogate Mothers in India*, N.Y. TIMES, Oct. 4, 2011, http://www.nytimes.com/2011/10/05/world/asia/05iht-letter05.html (finding that since commercial surrogacy was legalized in India in 2002, it has become key in the country's booming medical tourism market).

265. *Id.*

266. *Born in India, Nowhere to Belong*, TIMES OF INDIA, Dec. 18, 2009, http://www.timesnow.tv/Born-in-India-no-where-to-belong/articleshow/4334611.cms [hereinafter *Born in India*] (relating that because German surrogacy laws did not allow the twins to be treated as German citizens, their father brought an action before the Gujarat high court, seeking Indian citizenship).

267. Esther Farnós Amorós, *Inscripción en España de la filiación derivada del acceso a la maternidad subrogada en California* [*Registration of Filiation Resulting From Access to Surrogacy in California*], 1.10 InDret 7 (2010) (Spain), *available at* http://www.indret.com/pdf/711_es.pdf (describing the development and history of alternative reproductive methods).

After having children in this fashion and seeking to return home, many of these new parents have been refused travel documents for their children by their countries' consular officials upon suspicion of their having engaged in surrogacy.[268] At home, parents have met with official refusal to recognize the parent-child relationship or to bestow citizenship upon the children.[269] Obviously, a government intent on curtailing cross-border surrogacy may refuse to issue a passport or visa to the child, may not bestow citizenship upon the child, and may refuse to recognize the intended parents as the legal parents of the child.[270] Problems can also arise in host countries where the law does not automatically entitle the intending parents to recognition as the legal parents of the child.

The case of the Yamadas, a Japanese couple who traveled to India to hire a gestational surrogate, highlights the problems that can arise in the host country. After the surrogate gave birth to Manji, a baby girl created with Mr. Yamada's sperm and the egg of a third party, the Yamadas divorced.[271] Mr. Yamada and Manji then became "caught between two legal systems" when India refused to allow Mr. Yamada, because he was a single father, to obtain a passport for Manji or to legally establish his fatherhood by

268. *In re* X & Y, [2008] EWHC (Fam.) 3030, [2009] 2 W.L.R. 1274 (Eng.), *available at* http://www.bailii.org/ew/cases/EWHC/Fam/2008/3030.html (holding that under both English and Ukranian law, the children were made both parentless and stateless); Cour de Cassation [Cass.] [supreme court for judicial matters], 1 e civ., Dec. 17, 2008, Bull. civ. II, No. 07-20468, (Fr.), *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_12031.html; KARI POINTS, THE KENAN INST. FOR ETHICS AT DUKE UNIV., COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI 2-3, 8 (2009), *available at* http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf (discussing that India's dominance in reproductive tourism results from its lower costs, the large number of women willing the engage in surrogacy, English speaking providers, an encouraging climate, and the total absense of government regulation); Farnós Amorós, *supra* note 267, at 5-6 (finding that homosexual couples seeking to conceive a child through surrogacy often travel to the United States, specifically California); *Born in India*, *supra* note 266 (noting the failure under German law, to recognize the legitimacy of twins born through surrogacy and preventing them from returning to the country as Indian citizens); G.R. Hari, *Michigan Couple Lose Their Child to Surrogate Mother*, WEB-BLOG OF INDIAN SURROGACY LAW CENTRE (Feb. 04, 2010, 4:08 PM), http://blog.indiansurrogacylaw.com/page/3/ (holding that since Michigan is one of five U.S. states to not recognize surrogacy contracts, the biological mother is considered the legal mother); Patrick Wautelet, *Belgian Judgment on Surrogate Motherhood*, CONFLICT OF LAWS.NET (Apr. 27, 2010), http://conflictoflaws.net/2010/belgian-judgment-on-surrogate-motherhood/ (Belgium) (describing how the authorities in Belgium refused to give effect to the birth certificates of twins born through surrogacy).

269. *See generally* Rotman, *supra* note 1 (noting that in France, surrogacy, "la gestation pour autrui (GPA)," is prohibited and that the parentage of children born to surregates is not recognized France).

270. *See Born in India*, *supra* note 268; Farnós Amorós, *supra* note 268, at 7; Wautelet, *supra* note 268.

271. POINTS, *supra* note 263, at 1 (reporting that even though the couple divorced in 2008, a month before Baby Manji was born, UIkufami still wanted to raise the child without his ex-wife).

adopting her.[272] Appeals to Japan, which does not explicitly ban surrogacy but where the law provides that the gestational mother is the legal mother of a child, were unavailing.[273] Finally, after an Indian court ordered the government to act expeditiously on Mr. Yamada's request for permission to take Manji to Japan, the Indian government issued a transit document, Japan having issued a one-year visa to Manji on humanitarian grounds.[274]

Several cases illustrate what can go wrong when the law of the home country bans surrogacy and intending parents nonetheless pursue it abroad. Surrogacy has been banned in France since 1991.[275] When couples travel abroad to engage a surrogate and return home with a child, their birth certificates are considered falsified and are not recognized by the French government. Only the biological connection between the male partner and the child is recognized.[276] In the case of the Mennessons, consular officials in Los Angeles, suspicious that the couple had employed a gestational surrogate in contravention of French law, refused to issue a passport or a visa for the children.[277] After the children travelled on United States passports back to France with their parents, French prosecutors attempted to charge the French couple with fraud and also attempted to set aside their entry in the official register of parentage, thereby depriving the children of French citizenship.[278] A judge determined that France had no extraterritorial jurisdiction in the case, since commercial surrogacy is legal in the United States.[279] On the citizenship and parentage questions, although the court recognized the Mennessons' parentage, it refused to grant the girls the French citizenship that would normally flow from this recognition. Adoption is not a solution, since under French law, those who have resorted to international surrogacy are not allowed to adopt because they have attempted to circumvent legal adoption procedures.[280] The

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272. *Id.* at 6.

273. *Id.* at 5 (citing the Japanese Civil Code which recognized the mother only as the woman who gave birth to the baby).

274. *Id.* at 6-7 (noting that the first identity certificate issued by the Indian government to a surrogate child born in India was issued to Baby Manji).

275. J. Bo, *La législation sera débattue au Parlement français en 2009* [*Legislation Will Be Debated in the French Parliament in 2009*], LE MONDE, Aug. 5, 2008, at 3 (Fr.).

276. *Id.*

277. SYLVIE MENNESSON & DOMINIQUE MENNESSON, INTERDITS D'ENFANTS: LE TEMOIGNAGE UNIQUE DE PARENTS AYANT RECOURS A UNE MERE PORTEUSE [DENIED CHILDREN: THE STORY OF PARENTS WHO USED A SURROGATE] 90, 86-92, 109 (2008) [hereinafter INTERDITS D'ENFANTS].

278. *Id.* at 143.

279. Gilles Cuniberti, *Flying to California to Bypass the French Ban on Surrogacy,* CONFLICT OF LAWS .NET, (Nov. 5, 2007), http://conflictoflaws.net/2007/flying-to-california-to-bypass-the-french-ban-on-surrogacy/.

280. Myriam Hunter-Henin, *Surrogacy: Is There Room for a New Liberty Between*

public minister had alluded to being favorably disposed to the petition,[281] but finally, after five court decisions in the course of ten years, the Cour de Cassation ruled that the girls were not French citizens.[282] An editorial in *Le Monde* cried:

> How do you justify depriving these children, now strangers in their parents' country, of all the rights connected with citizenship, based solely on the way they were conceived and when there is no dispute over their parentage? What are they guilty of, besides their birth, to merit such sanctions?[283]

The Mennessons now plan to take their case to the European Court of Human Rights[284] where they may rely on cases forbidding disparate treatment of nonmarital children. In the meantime, hundreds of children currently live in France without French citizenship, since their gestational surrogates were not French.[285] This may mean that once they reach the age of majority, they will not be allowed to remain in France.[286]

Cases in Spain and Belgium involve gay male couples. The Belgian couple was involved in two years of legal wrangling related to the birth of their son to a gestational carrier in Ukraine.[287] The child was left stranded in Ukraine during this period.[288] Belgium finally issued a passport to the

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the French Prohibitive Position and the English Ambivalence?, *in* LAW AND BIOETHICS 329, 336-37 (Michael Freeman ed., 2008).

281. Najat Vallaud Belkacem, *Gestation pour autrui: une question de responsabilité morale* [*Surrogacy: A Question of Moral Responsibility*], LE MONDE, Apr. 7, 2011, (Fr.), http://www.lemonde.fr/idees/article/2011/04/07/gestation-pour-autrui-une-question-de-responsibilite-morale_1504228_3232.html ("Even the public minister declared himself in favor of this recognition on behalf of the interest of the child and his or her right to a normal family life . . . .").

282. Cour de Cassation [Cass.] [supreme court for judicial matters], 1 e civ., Apr. 6, 2011, Bull. civ. II, No. 10-19.053, (Fr.), *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civil_568.

283. Belkacem, *supra* note 281.

284. Le Monde, *Gestation pour autrui: "Nos filles resteront toujours des fantômes au regard du droit français,"* LE MONDE, Apr. 6, 2011 (Fr.), http://www.lemonde.fr/societe/article/2011/04/06/gestation-pour-autrui-nos-filles-resteront-toujours-des-fantomes-au-regard-du-droit-francais_1503967_3224.html.

285. Michael Cook, *Children of surrogate mothers are not French, court rules,* BIOEDGE, Apr. 9, 2011,
http://www.bioedge.org/index.php/bioethics/bioethics_article/9480.

286. *See* Le Monde, *supra* note 284 ("When they become adults, they will have none of the rights of residency, work and the vote that French and European citizens have.").

287. *Mères porteuses: Mahous demande un debat parlementaire au plus vite* [*Surrogates: Mahous Requests a Parliamentary Debate as Soon as Possible*], LA DERNIÈRE HEURE (Mar. 1, 2011) (Belg.), http://www.dhnet.be/infos/societe/article/344953/meres-porteuses-mahoux-demande-un-debat-parlementaire-au-plus-vite.html.

288. *Un couple gay récupère son fils adoptif bloqué en Ukraine* [*A Gay Couple Collects Their Adoptive Child Held in Ukraine*], LA DERNIÈRE HEURE (Feb. 26, 2011) (Belg.), http://www.dhnet.be/infos/belgique/article/344546/un-couple-gay-recupere-son-fils-adoptif-bloque-en-ukraine.html (discussing that because the father was unable

young child and now recognizes a parental link between him and his biological father.[289] In a Spanish case, consular officials in Los Angeles refused to recognize the parentage of two male Spanish nationals, married in Spain, who travelled to California to have children with the help of a surrogate mother.[290] Twins were born, and the official birth certificates, in conformity with a pre-birth judgment issued by a California court, listed both men as parents with no reference to the genetic or gestational parentage of the twins. They sought the assistance of Spanish consular officials for the purpose of registering their parentage of the twins in the Spanish civil registry. The consulate refused to issue visas, basing its decision on the Spanish law prohibiting surrogacy in Spain.[291] Upon returning to Spain, the couple met with resistance when they sought official recognition of the California birth certificates. A court hearing the matter declared that it was a violation of Spanish law not to include the gestational mother as a parent in the registry because the primary and most important fact for this purpose was who gave birth.[292] The Ministry of Justice intervened to establish guidelines for the entry into the civil registry of children born to surrogate mothers abroad. The Ministry found it necessary to balance the interests of the children with the interests of the Spanish government in prohibiting surrogacy. This balance could be achieved, it concluded, by obtaining a judgment in a host country court recognizing the legal validity of the birth certificate and making factual findings to the effect that the contract for surrogacy was entered into without fraud, overreaching or exploitation of the surrogate mother.[293]

The Spanish Ministry of Justice's instruction embraces the legal doctrine of comity as the best solution to the family recognition problems that can arise from international commercial surrogacy. The doctrine of comity speaks to whether a country should defer to the judgments and public acts

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to pay for the child's pension with the host family and was unable to smuggle the child into Poland, the child was placed in an orphanage in the Ukraine).

289. *Mères porteuses*, *supra* note 287 (relating that the Belgian couple spent some € 90,000 before the Belgian Government had issued a passport to the child); *Un couple gay*, *supra* note 288.

290. Farnós Amorós, *supra* note 267, at 4.

291. *Id*.

292. Marta Requejo, *Surrogate Motherhood and the Spanish Homosexual Couple*, CONFLICT OF LAWS.NET (Sept. 20, 2010), http://conflictoflaws.net/2010/surrogate-motherhood-and-spanish-homosexual-couple-iii/ ("Spanish law expressly prohibits the parentage in these cases except for registered for the person who has given birth.") (translated by author).

293. Emilio De Benito, *Justicia abre la puerta a la inscripción de los hijos de "vientre de alquiler*", [*Justice Opens the Way to Register the Children of Surrogacy*], EL PAÍS, (Oct. 7, 2010) (Spain), http:www.elpais.com/articulo/sociedad/Justicia/abre/via/inscribir/hijos/vientres/alquiler/elpepisoc/2010007elpepisoc_7/Tes.

of another country.[294] Final judgments of courts of foreign nations, which concern the recovery of sums of money, the status of a person, or determine interests in property, are conclusive and entitled to recognition in the courts of other nations.[295] The judgment must have been rendered under a judicial system providing impartial tribunals and procedures compatible with due process of law, and the issuing court must have had jurisdiction over the defendant and jurisdiction over the subject matter.[296] A court may refuse comity if the foreign judgment in question was obtained by fraud or if extending comity would undermine a strong public policy.[297]

Denying children citizenship and legal recognition of the parentage of the individuals who have travelled abroad to have these children with the intent of raising them seems a particularly draconian and disproportionate response to the problems a country fears may arise from the violation of its surrogacy proscriptions abroad. The response does not appear to be well geared to discouraging international surrogacy, nor does it entail any mechanism by which a nation might express more than a mere symbolic concern for the welfare of children and surrogate mothers.

By contrast, the doctrine of comity seems well designed to afford states some latitude in evaluating whether the transaction abroad has proceeded in a fashion that does not give rise to anxiety about overreaching, exploitation and abuse.[298] The recent instruction of the Spanish Ministry of Justice acknowledges the shortcomings of using the denial of citizenship and parentage recognition as blunt instruments in a battle against international surrogacy. In adopting a measured, middle-of-the-road approach, one that embraces the time-honored international norm of comity, the Ministry has placed the burden equally on the shoulders of the state and of the commissioning parents to ensure that, above all, the transaction not have exploited conditions of poverty in the destination country and not have resulted in parentage determinations that would be anathema to the welfare of the child.

The Mennesson case and others like it have opened the door to the possibility of legislative reform in France. Rumblings in the French Parliament indicate a certain level of discomfort among some Socialist

294. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 cmt. e (1987) (defining comity "as the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protections of its laws").

295. *Id.* § 481(1) (declaring that final judgments of a foreign state are entitled to recognition in courts in the United States).

296. *Id.* § 481 cmt. f (enforcing decisions of foreign tribunals when the fairness and reliability of the proceeding were previously established).

297. *Id.*

298. *Id.* § 101 cmt. e.

Party members who believe "the prohibition on surrogacy doesn't need to result in children who suffer legal instability."[299] Their proposal was to legalize surrogacy so that the offspring would not be deprived of a legal mother.[300] Only heterosexual couples could have recourse to surrogacy, no compensation would be allowed, and it would have to be approved in advance by governmental officials.[301] But others feel that relaxing the strict stance against granting citizenship to children created through international surrogacy would unjustly elevate the right to procreate above the need to safeguard the rights of women and the welfare of children.[302] The right of women to control their own bodies, it is said, does not go as far as undertaking to become pregnant for another.[303] The risks of commercialization and harm to children, including the surrogate's own children, are simply too great.[304] The ongoing debate is so heated that France is probably a long way from reforming its surrogacy laws; questions arising from it will most likely remain with the courts for the time being.[305] In the meantime, the problem of how to treat the children born of surrogacy continues to vex commentators, with some suggesting that there should be no barrier to recognizing the paternity of the biological father while arranging for a sharing of parental authority by his wife or partner.[306] In Belgium, too, there have been calls for legislation in response to the gay couple who had so many problems in Ukraine.[307] The current proposal is to employ adoption procedures to finalize the transfer of parental rights from the surrogate mother to the intending parents, with the proviso that at least one member of the commissioning couple have a biological link to the child.[308] Others believe surrogacy should be banned altogether with strict exceptions for "physiological impossibility."[309]

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299. Charlotte Rotman, *Projecteur sur les bébés fantômes* [*Spotlight on "Ghost Babies"*], LA LIBÉRATION (Feb. 10, 2011) (Fr.), http://www.liberation.fr/societe/01012319068-projecteur-sur-les-bebes-fantomes.

300. Bo, *supra* note 275, at 3.

301. *Id.*

302. Philippe Bas & Luc Derepas, *Une atteinte intolérable à la dignité des femmes* [*An Intolerable Affront to the Dignity of Women*], LE MONDE, at 15 (May 23, 2009) (Fr.).

303. *Id.* at 15.

304. *Id.*

305. Belkacem, *supra* note 281.

306. Bas & Derepas, *supra* note 302, at 15.

307. *Mères porteuses*, *supra* note 287.

308. *Id.* (remarking about how several bills are pending in the Supreme Assembly to set out a gender prohibition of any surrogacy agreement).

309. *Id.* ("When the risk is too great for the mother or infant during pregnancy, or where there is a physiological impossibility for the mother to become pregnant, the use of surrogate motherhood is justified.") (translated by author).

There is a powerful flavor of the new illegitimacy in restrictions on assisted reproduction with donor gametes or surrogate gestation in Europe. When pressed on the policy behind these restrictions, states say they have to do with efforts to prevent "unusual" family relationships from forming. Austria recently defended its restrictions in the European Court of Human Rights by stating it wanted to prevent two-mother families and situations in which a child might be the object of a battle between gestational, genetic, and/or social mothers. A French parliamentary commission, too, has issued a report describing how children are harmed when they have a biological link to only one of their parents.[310] Unlike the old illegitimacy, these restrictions on paths to parenthood have little to do with marriage and much to do with a vision of motherhood that is impossible to harmonize with the families people create through surrogacy. But rendering these families "illegitimate" has done little to deter their formation, as the uptick in the incidence of reproductive tourism makes all too evident. Recognizing this, the Hague Conference on Private International Law is studying the possibility for some form of broader response to the problems arising in the context of international surrogacy.[311] Despite the likelihood of vast differences of opinion on the matter, it seems certain that some form of administrative cooperation will be required to prevent adverse discrimination against children "on the basis of birth or parental status."[312] In the meantime, there will be important work for lawyers to ensure that children are not deprived of a legal connection to their parents and their countries simply because they were born to couples and individuals so committed to becoming parents and raising children that they defied unjust laws.

IV. LEGAL PRACTICE IMPLICATIONS

Refusing to recognize the rearing parents of children born of surrogacy and denying these children citizenship constitute serious legal interference with international surrogacy. In contrast to laws that restrict access to certain forms of assisted reproduction, the policy of which is to interfere with a reproductive project before it commences either in the home country or in a foreign country, the impact of this form of legal interference occurs

310. ASSEMBLÉE NATIONALE, RAPPORT FAIT AU NOM DE LA MISSION D'INFORMATION SUR LA FAMILLE ET LES DROITS DES ENFANTS (2006), *available at* http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf

311. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGMENTS (2011), *available at* http://www.hcch.net/upload/wop/genaff2011pd11e.pdf.

312. *Id.* at ¶¶ 51-53.

after the child is already born.[313] Legal interference at this final stage of the continuum of assisted reproductive care is arguably the most fraught for the intending parents because they have come so close to realizing their goal of becoming a parent. This distinction has led surrogacy attorney Steven Snyder to remark:

> Because of the parentage issues in establishing the legal parentage of the resulting children, the legal issues become paramount and almost primary to the medical issues. Obviously, historically the people that are typically the parents are the woman who gives birth and her husband and when you do a surrogacy you totally shift the legal intended parentage to the genetic parents, neither of whom has anything to do with the gestation; therefore, the law becomes more important than the medicine.[314]

The importance of providing complete, clear, and accurate legal advice to these families in formation will fall to lawyers. United States attorneys specializing in advising such clients can expect to meet with foreign intentional parents arriving in the United States for surrogacy as well as intentional parents from the United States going abroad. Both types of clients might best be served by coordinating with counsel in the foreign jurisdiction, whether it be the home or destination country.

One issue that will be of great interest to clients is what standard of care they are owed by the professionals who undertake to assist them. Malpractice liability results from the breach of a professional standard of care and resulting damages to a patient or client. Malpractice is complicated in the cross-border context owing to the different standards of care that exist in different jurisdictions. Indeed, scholars of medical tourism have expressed concern that patients who travel abroad for medical procedures may have little legal recourse against malpractice in jurisdictions that defer heavily to physicians in determining the standard of care.[315] Moreover, there may be legal and practical barriers to bringing suit against a foreign physician or clinic in a patient's home country.[316] Finally,

313. It is doubtful that the legal approach here has the policy of preventing cross-border travel. Most instances involve consular officials who simply do not know how to proceed. In the Spanish case, we have a legal determination that the consular officials were correct in denying the request to enter the couple as parents in the civil registry.

314. *Fertility Myths Answered*, HEALTHRADIO.NET (Feb. 09, 2010), *available at* http://www.healthradio.net/component/mtree/Health-Radio-Shows/Ask-Dr-2E-DeSilva/Fertility-Myths-Answered-41605/details.

315. Nathan G. Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 IND. L. REV. 71, 73 (2008) (claiming that by opting out of the medical systems within the United States, couples are also opting out of the country's systems for licensing, accreditation, malpractice, and regulatory approval of medical technologies).

316. *See generally* I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467 (2010).

litigation by foreigners in the country where the service was delivered can be notoriously difficult and expensive. Even if a judgment can be obtained, it can be difficult to enforce from a foreign location. [317]

The professional malpractice of attorneys may also play a role in cross-border reproductive care. For example, a patient may contact an attorney for advice about the possible legal complications of engaging in international commercial surrogacy. If the agreement between the attorney and the client encompasses counseling on the possible legal ramifications of pursuing international commercial surrogacy, the attorney risks liability if she provides erroneous information that causes the client to suffer injury.

Intentional parents who proceed with brokers may encounter other perils. Cross-border reproductive travel is an industry that is becoming crowded with brokers, and those who engage in deceptive trade practices may lead clients to harm but be insulated from legal redress.[318] Unlike physicians and attorneys, who are regulated, licensed and have special fiduciary obligations to their patients and clients, a broker normally operates free of regulation and has no obligation to eschew conflicts of interest that would impede her from zealously promoting the interests of the patient. Indeed, a broker's clients may actually be the clinics that have hired her to locate patients. In pursuing her trade, a broker may be tempted to make misrepresentations about the services or level of care the patient can expect from the foreign clinic.[319] Under the law, if the patient is thereafter harmed by the clinic, the broker may not be liable if she, as is typical, has signed a contract with the patient that absolves her from liability. It is of the utmost importance that patients understand that brokers, who provide a valuable service and may have the very best of intentions, are not necessarily advocates for patients but may be interested above all in steering patients to overseas clinics with which they have exclusive agreements.[320]

Judges hearing international surrogacy cases have recognized that lack of good legal advice is no deterrent to proceeding with international surrogacy. In *In re X & Y*, a couple had received legal advice about their

317. *Id.* at 1503-04 (noting foreign courts' reluctance to enforce U.S. court decisions because of their objections to U.S. jurisdictional grounds and punitive damage awards).

318. Cohen, *supra* note 316, at 1495 (finding that foreign hospitals and providers are very rarely satisfy the personal jurisdiction requirement as these groups rarely have the systematic and continuous contacts with the plaintiff's home state to establish general jurisdiction).

319. Nathan G. Cortez, *Recalibrating the Legal Risks of Cross-Border Health Care*, 10 YALE J. HEALTH POL'Y L. & ETHICS 1, 15-16 (2010) (commenting that while patients may sue medical tourism facilitators for failure to obtain informed consent, but it is difficult for U.S. courts to ascertain whether the statements by the facilitators are misrepresentations).

320. Amy Speier, *Brokers, Consumers and the Internet: How North American Consumers Navigate Their Infertility Journeys*, 23 REPROD. BIOMEDICINE ONLINE 592 (2011).

plan to pursue surrogacy in Ukraine.[321] The couple was unfortunately uninformed about the difficulty they would have bringing the child back into the country because they would not have the requisite parental order from an English court.[322] This was not an isolated case; the same difficulty occurred a second time in the case of *In re L*.[323] To be able to receive a parenting order in an international surrogacy case, the commissioning individuals must show that (1) the sum paid was not disproportionate to reasonable expenses; (2) they were acting in good faith without moral taint in their dealings with the surrogate; and (3) they did not attempt to defraud the authorities.[324]

Justice Hedley, who presided over both *X & Y* and *L.*, found that the sum paid in *X & Y* was not disproportionate, recognizing that the sum paid could vary depending on the place of the arrangement.[325] The sum paid in urban California, for example, might grossly outstrip the sum paid in rural India but would nonetheless be in line with reasonable expenses. In contrast, in *In re L.*, Hedley was convinced that the sum paid was clearly in excess of reasonable expenses.[326] Nonetheless, Hedley could not disregard the best interests of the child in a parenting order in these cases. He remarked:

> It's probably always in a child's interests to have a legal relationship with the parents who are raising her. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child would not be gravely compromised by a refusal to make an order.[327]

Even in *In re L.*, Hedley felt the best interests of the child must control, "[I]t will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order . . . ."[328] The most lamentable factor

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321. *In re* X & Y, [2008] EWHC (Fam.) 3030, [2009] 2 W.L.R. 1274 (Eng.), *available at* http://www.bailii.org/ew/cases/EWHC/Fam/2008/3030.html (explaining that the couple entered into a surrogacy agreement which ensured that the payments to the surrogate were lawful under both Ukrainian and English law).

322. On the substantive law and procedure for parental orders, see DEWINDER BIRK, HUMAN FERTILISATION AND EMBRYOLOGY: THE NEW LAW 141-43 (2009).

323. *In re* L, [2010] EWHC (Fam.) 3146 (Eng.), *available at* http://www.nataliegambleassociates.com/assets/assets/RE%20L%20a%20minor%20%282010%29.pdf (recognizing that even careful and conscientious parents are still receiving incorrect information).

324. Millbank, *supra* note 263, at 199 (referring to *In re X & Y*).

325. *Id*. (determining that the payment was not excessive when referencing the comparable cost of living in urban Ukraine and the United Kingdom).

326. *In re L*, [2010] EWHC (Fam.) 3146 (recognizing that even careful and conscientious parents are still receiving incorrect information).

327. *In re X & Y*, [2008] EWHC (Fam.) 3030, [2009] 2 W.L.R. 1274 (Eng.), *available at* http://www.bailii.org/ew/cases/EWHC/Fam/2008/3030.html.

328. *In re L*., [2010] EWHC (Fam.) (recognizing that even careful and conscientious parents are still receiving incorrect information).

of these cases, opined the court, was the fact the most careful and conscientious parents had received erroneous legal advice about what would be required to create their family through international surrogacy.

Counseling may not be the only important role for lawyers to assume in this context. Margaret Brazier, a law professor and advocate for harmonization of the status of children born as a result of assisted conception, has opined that status rules for children born outside their parents' country of origin are necessary.[329] This may be one area where "there are good reasons for achieving a consensus at a European or global level."[330] The Hague Conference has already begun a conversation that will advance this important work. It is critical that any law reform efforts that lawyers choose to undertake forcefully articulate that rendering surrogate children "illegitimate" harms them and furthers no proper public purpose. Bestowing a subordinate status on any child born of surrogacyis every bit as invidious as was the stigma of "illegitimacy" that historically attached to children born to families that did not fit the mold of one biological mother married to one biological father.[331] The work of lawyers advocating for changes in the law will be every bit as crucial as their careful advisement of couples and individuals considering building their families through surrogacy.

CONCLUSION

Throughout history, the doctrine of illegitimacy has been used to heap opprobrium and disparate treatment upon the heads of both children born to an unmarried couple and the couple themselves. But there is far less stigma and legal disadvantage associated with "illegitimacy" of birth today than in previous generations. Nonetheless, new ideas about what makes children and their families illegitimate have begun to emerge in response to new reproductive technologies. Since assisted reproductive techniques do not involve illicit sexual intercourse and are often employed by married couples seeking to have children, it would seem at first blush as if they would not be linked with adultery and illegitimacy. Alternative insemination was, however, associated with adultery and illegitimacy from a very early stage, and, more recently, countries have begun to classify families created through international surrogacy as unworthy of civil status.

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329. HOUSE OF COMMONS, SELECT COMMITTEE ON SCIENCE & TECHNOLOGY, 5TH REPORT para. 382 (2007), *available at* http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/710.htm.

330. *Id.*

331. *Id*. (finding that nationality has significant implications for basic human rights, and therefore, judicial systems must recognize that role performance patterns have changed and differentiating children because of their maternity or paternity should not account for the granting of nationality).

Perhaps it is not surprising that old notions about who belongs and who does not have reemerged in response to new ways of procreating. These unfamiliar technologies seem to threaten settled methods of forming our most important and lasting bonds, the strength of which for millennia have been thought to depend on genetic and gestational connections. To the extent societies are unwilling to accept that similarly powerful bonds can arise from intention to parent and functioning as a parent, and to the extent it appears to governments that the very fabric of society can be undermined by recognizing such bonds, they are acting on similarly powerful notions. A response in proportion to the severe level of opprobrium that children born out of wedlock faced in prior generations is to be expected. This "new illegitimacy," then, is simply the old illegitimacy in new clothing.

Governments, though, must justify their actions with good reasons. Hundreds travel each year from countries where surrogacy is illegal to countries where it is not. Upon their return, these families face prosecution, refusal of recognition and denial of citizenship. To date, governments have justified their actions by expressing worry about the plight of gestational surrogates and the harm that will accrue to children born of surrogacy. The biblical surrogacy-by-enslavement story of Abraham, Sarah, and Hagar bears little resemblance to contemporary surrogacy arrangements, however. Although some believe the exploitation of women happens in every case of surrogacy, the abstract reasoning this notion relies on unravels when individual cases of surrogacy are examined. Without good evidence that the feared harms are present in the majority of cases, it seems more than reckless for governments to proceed by presumption to refuse to allow the children born to their citizens through surrogacy to participate as full citizens. Fortunately, courts in some countries have already begun to recognize that child welfare is very hard to promote when they are relegated to a lesser status than they would enjoy had they been born through "legitimate" channels.

Perhaps most important of all is the reality that, given the importance of reproduction and families to human life, international commercial surrogacy will continue, no matter what bulwarks governments try to erect against the rising tide. This dynamic will create a most important obligation for lawyers to protect their clients against misinformation, the overreaching of brokers, and the malpractice of physicians. Those who desire that international surrogacy be used only for the good can expect to contribute no less.