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Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality

ABSTRACT. The twentieth-century equality revolution established the principle of sex neutrality in the law of marriage and divorce and eased the most severe legal disabilities traditionally imposed upon nonmarital children. Formal equality under the law eluded nonmarital parents, however. Although unwed fathers won unprecedented legal rights and recognition in a series of Supreme Court cases decided in the 1970s and 1980s, they failed to achieve constitutional parity with mothers or with married and divorced fathers. This Article excavates nonmarital fathers' quest for equal rights, until now a mere footnote in the history of constitutional equality law.

Unmarried fathers lacked a social movement of their own, but various groups and interests fought for their own causes on the battleground of nonmarital parenthood. Nonmarital fathers' claims posed a particular dilemma for feminists, who promoted gender-egalitarian parenting within marriage but struggled over the implications of unmarried fathers' rights for women's autonomy and for substantive sex equality. The Justices' deliberations, in contrast, focused on the rights of men and on ensuring the smooth functioning of adoption procedures. The Court largely avoided the feminist dilemma, instead framing cases as disputes between husbands and unwed fathers. Denying nonmarital fathers' request to be treated as "de facto divorced fathers," the Court reaffirmed the legal supremacy of marital families.

The Court's failure to engage difficult questions about substantive sex equality reverberated beyond the parental rights cases to leave its mark on the twenty-first century jurisprudence of citizenship. As nonmarital parenthood becomes the American norm, recovering its constitutional history illuminates how and why marital status still delimits the boundaries of equality law.

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INTRODUCTION

The twentieth-century constitutional equality revolution transformed the laws of marriage, divorce, and parenthood. As a matter of formal law, though not social reality, husbands and wives turned into spouses with identical rights and duties; divorcing mothers and fathers became parents with sex-neutral obligations of care and support. Formal equality under the law eluded nonmarital parents, however. Marital status remained a legitimate basis of legal differentiation. The legal primacy of marriage endured, even as rates of nonmarital cohabitation and childrearing soared.

Today, sex neutrality in the law of parenthood depends upon marital status. Mothers and fathers generally enjoy formally equal rights to the custody, care, and control of their marital children. In contrast, a nonmarital father does not possess the same parental rights—or responsibilities—as his female counterpart. And although nonmarital fathers won unprecedented legal rights and recognition as parents, they never achieved parity with married and divorced fathers.

Traditionally, fathers had few rights or responsibilities to their nonmarital children. In the early 1970s, nonmarital fathers seized upon emerging constitutional equality principles to challenge their inferior parental status. Over the next two decades, the Supreme Court decided a series of cases that first expanded and then contracted "unwed fathers'" constitutional rights. Behind the scenes, the Justices wrestled with, but to a surprising degree ultimately avoided, a central question presented by these cases: how the evolving jurisprudence of equal protection, which made marriage and divorce formally sex-neutral, should apply to the parental rights of nonmarital fathers. The Court also declined advocates' invitation to treat nonmarital fathers like "de facto divorced fathers" and to condemn discrimination based on marital status. Today, the unwed fathers cases are a mere footnote to the story of the constitutional equality revolution.

In the twenty-first century, as a widening "marriage gap" separates the well-off, highly educated haves from impoverished, less educated, have-nots, nonmarital parenthood is the dominant reality of American family life.[1] Yet, as Clare Huntington observes, "the marital family serves as a misleading synecdoche for all families," leaving family law ill equipped to address the

1. *See, e.g.*, JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014) (describing the causes and consequences of the marriage gap).

needs of many families and communities.[2] An economically stratified legal regime reproduces fault lines based on race, class, gender, and marital status: many elite, college-educated couples seek relatively egalitarian partnerships and negotiate under a default rule of shared parenting, while the state's efforts to privatize dependency through stringent child support enforcement discourage parental involvement by poor fathers.[3]

The anomalous legal treatment of unmarried fathers looms large for commentators who decry family law's failure to protect nonmarital families.[4] Because parental rights and responsibilities are inextricably intertwined, mothers who bear the default burden of care and support also endure the consequences of sex and marital status inequality in parenthood.[5] Nonmarital

2. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 167 (2015).

3. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1222-24. Between these two poles are nonmarital families who operate in the "shadows" of the law. *Id.* at 1189. In these economically precarious families, mothers act as "gatekeepers," often maintaining a modicum of control over family life by avoiding a formal paternity determination and acting as primary breadwinners and caregivers for their children. *Id.* at 1207. For a discussion of maternal "gatekeeping" in impoverished urban communities, see KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY 169-74 (2013).

4. *See, e.g.*, Huntington, *supra* note 2, at 203-05 (focusing on nonmarital fathers' inferior status as a paradigmatic example of how family law ill-serves the never-married); Solangel Maldonado, *Perspective: Shared Parenting and Never-Married Families*, 52 FAM. CT. REV. 632 (2014) (describing barriers to shared parenting among the never-married); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 387 (2012) (critiquing the Court's bias toward fathers who act like husbands). The unequal treatment of nonmarital fathers has made headlines recently. *See, e.g.*, Clare Huntington, *What Unmarried Fathers Have To Worry About*, N.Y. TIMES: ROOM FOR DEBATE (July 8, 2015, 2:34 PM), http://www.nytimes.com/roomfordebate/2014/06/13/fathers-rights-and-womens-equality/what-unmarried-fathers-have-to-worry-about [http://perma.cc/KDQ4-BGDL] (arguing that it is "much harder" for unmarried than for married fathers "to sustain a relationship with their children" over a mother's objection); Kevin Noble Maillard, *A Father's Struggle To Stop His Daughter's Adoption*, ATLANTIC (July 7, 2015), http://www.theatlantic.com/politics/archive/2015/07/paternity-registry/396044 [http://perma.cc/GVE6-S9BN] (recounting the travails of a nonmarital South Carolina father in gaining custody of his daughter); *see also* Child Welfare Info. Gateway, *The Rights of Unmarried Fathers*, U.S. CHILDREN'S BUREAU 2 (2014), http://www.childwelfare.gov/pubPDFs/putative.pdf [http://perma.cc/E2CH-52DZ] ("[I]n cases involving unmarried fathers whose legal relationship to a child has not been established, States have almost complete discretion to determine the parental rights for the purposes of termination or adoption proceedings.").

5. *See, e.g.*, Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 66 (1995) (explaining that giving custody of nonmarital children to mothers reflects not "hostility to biological fathers" but the "patriarchal roots of family law," which produce "devastating social and economic consequences" for women); Kristin Collins, Note, *When Fathers' Rights Are*

children, who are disproportionately poor and of color, suffer from the use of marital status as a proxy for parental legitimacy.[6] Yet concerns about substantive sex equality left hardly a mark on the Court's decisions, and marital status remains a legitimate determinant of parental rights. This Article investigates how and why this came to be.

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Before midcentury, the parental rights of nonmarital fathers barely registered as a question, much less a moral and constitutional dilemma. Unwed fathers, long deprived of legal rights and usually liberated from legal obligations, seemed largely irrelevant, except to the extent the state could call upon them to support children who otherwise would depend on public assistance.[7] Profound legal and societal changes recast the problem of nonmarital fatherhood in the 1960s and early 1970s. Rates of nonmarital childbearing rose; women's workforce participation grew; and divorce rates climbed. Whereas in earlier decades, most unmarried white mothers had relinquished their infants for adoption, more now raised them alone or with nonmarital partners. African-American women had long cared for nonmarital children with the support of extended families, largely excluded from public aid to the presumptively white "deserving poor" and from adoption opportunities. Now, poor women of color gained access to public assistance benefits, heightening anxieties about "promiscuity," "illegitimacy," and

Mothers' Duties: The Failure of Equal Protection in Miller v. Albright, 109 YALE L.J. 1669 (2000) (arguing that divesting nonmarital fathers of parental rights harms mothers who are exclusively charged with the care and support of children). Denigrating the rights of nonmarital fathers in the context of adoption may also redound to mothers' detriment by furthering policies that prioritize speedy adoptions by affluent couples of poor children of color, and "condemn[ing]" or rendering "invisible" birth mothers. Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 345 (2015) (citing LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 16-17 (2012)).

6. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011).

7. On early efforts to hold poor fathers responsible for child support, see Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123 (1999).

"welfare dependency."[8] Efforts to hold nonmarital fathers financially responsible for their children intensified.[9]

In this golden age of social movements, previously disenfranchised groups organized and fought for recognition and redistribution. Civil rights advocates dismantled de jure racial segregation.[10] Feminists attacked discrimination in education and employment, and sought reproductive freedom and equality in public and private life.[11] Anti-poverty activists fought for welfare rights.[12] Defenders of a more traditional social order found these claims deeply threatening. Conservatives charged feminists with destroying the very foundation of American society. Punitive welfare regulations such as "suitable home" and "substitute father" exclusions sought to deter nonmarital sex, limit welfare expenditures, and force poor men and women of color into low-wage work.[13] Many anti-illegitimacy laws were thinly veiled attacks on civil rights activism,[14] but even those who embraced African-American civil rights often believed a patriarchal family structure essential to racial progress.[15]

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8. For a discussion of the evolving politics of Aid to Families with Dependent Children (AFDC) at midcentury, see, for example, JENNIFER MITTELSTADT, FROM WELFARE TO WORKFARE: THE UNINTENDED CONSEQUENCES OF LIBERAL REFORM, 1945-1965 (2005).

9. *See* JOCELYN ELISE CROWLEY, THE POLITICS OF CHILD SUPPORT IN AMERICA 97-105 (2003).

10. For a review of the literature on the civil rights movement's impact on the law, see, for example, Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312 (2013) (reviewing KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012)).

11. *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).

12. For a sampling of the rich scholarship on welfare rights advocacy, see MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993); FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007); PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES (2005); KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972 (forthcoming 2016).

13. *See* ELIZABETH H. PLECK, NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION 47-70 (2012); Alison Lefkovitz, *Men in the House: Race, Welfare, and the Regulation of Men's Sexuality in the United States, 1961-1972*, 20 J. HIST. SEXUALITY 594 (2011).

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

15. *See* MAYERI, *supra* note 11, at 41-42.

"Fatherlessness," the corollary of "matriarchy," emerged as a perceived threat to family and social stability.[16]

Unlike divorced fathers, who mobilized to influence family law reform,[17] nonmarital fathers generally did not form organizations to advocate for their parental rights during this period. The plaintiffs in the unwed fathers cases were not handpicked for their sympathetic characteristics by advocacy organizations. Indeed, many of these men had checkered histories as partners or as parents and were represented by organizations with goals orthogonal to their own objectives and motivations. Various legal and social movements and interests buffeted the men who claimed the role of father outside of marriage. Feminists, civil libertarians, adoption advocates, child welfare organizations, lawmakers, and judges offered competing visions of the relationship between marriage, parenthood, and sex equality.

For feminists, the question of sex neutrality in nonmarital parenthood was especially fraught. Many influential feminist advocates—most prominently, law professor and ACLU lawyer Ruth Bader Ginsburg—promoted an egalitarian model of marriage in which mothers and fathers shared caregiving and breadwinning responsibilities.[18] In cases such as *Weinberger v. Wiesenfeld*, which extended Social Security "mother's insurance benefits" to widowed fathers, Ginsburg and her allies insisted on the importance of fathers' roles as nurturers of children.[19] The resulting constitutional sex equality canon primarily featured married couples or widowers seeking equal rights for husbands and wives.[20] How this gender-egalitarian model applied to nonmarital families remained an open question and one about which feminists increasingly disagreed.

The paramount importance of shared parenting to sex equality within marriage seemed evident. When feminists argued over the best way to promote

16. *See* LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA (Cynthia R. Daniels ed., 1998). On the racial dimension of "fatherlessness" in the late twentieth century, see Dorothy Roberts, *The Absent Black Father*, *in id.* at 145.

17. *See* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 101 VA. L. REV. (forthcoming 2016).

18. On Ginsburg's constitutional strategy, see MAYERI, *supra* note 11; Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010); Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008).

19. 420 U.S. 636 (1975).

20. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating Social Security provisions that required widowers but not widows to prove financial dependence on their spouses); *Wiesenfeld*, 420 U.S. 636; Frontiero v. Richardson, 411 U.S. 677 (1973) (overturning discrimination against military servicewomen and their spouses in the provision of housing and health benefits).

egalitarian marital parenting through post-divorce custody rules, they disagreed primarily about means rather than ends. When feminists challenged laws and policies that withheld public benefits and private rights from nonmarital families, they differed over matters of strategy but agreed that such practices subordinated women, who most often cared for and supported nonmarital children.[21] Feminists' dissension over sex equality in nonmarital parental rights was more profound. When parents had never married, a mother's consent to a biological father's relationship with her children could not so easily be assumed. Nonmarital parenthood crystallized a larger feminist dilemma: how to balance aspirations for a sex-neutral world with a social reality of persistent inequality.

Feminist debates centered upon the consequences of nonmarital fathers' rights for women's autonomy and equal status and implicated growing concerns about the unjust termination of poor parents' parental rights. The Justices, too, disagreed about nonmarital fatherhood but for very different reasons. Court deliberations focused on the rights of men who fathered children outside of marriage and on the smooth functioning of adoption procedures. The robust debate among feminists about the meaning of nonmarital fathers' rights for substantive sex equality barely penetrated the Justices' internal deliberations, much less the Court's opinions.

This Article excavates the history of nonmarital fathers' constitutional equality claims. Part I explores the renaissance of interest in unwed fathers in the 1960s and early 1970s, as social scientists, social workers, and legal professionals reexamined longstanding assumptions about their rights, roles, and responsibilities. Using archival and other primary sources, this Part examines the landmark case of *Stanley v. Illinois*[22] to reveal the surprising openness of the constitutional field for unwed fathers' rights on the eve of the sex equality revolution. *Stanley* came to the Court as an equal protection case, and early draft opinions embraced expansive visions of sex and marital status equality. But the ruling focused primarily on due process and left uncertain the scope of this "revolution" in unmarried fathers' rights.

The half-dozen years after *Stanley* brought rapid and deeply contested legal and social change. Part II examines developments in constitutional law, marriage and divorce, and social movements such as feminism, antifeminism, and fathers' rights that set the stage for conflict among feminists over the meaning of sex equality for nonmarital parenthood. As Part III recounts, these disagreements occurred largely behind the scenes in the 1970s, influencing

21. On the 1970s feminist campaign against illegitimacy penalties, see Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

22. 405 U.S. 645 (1972).

amicus participation in Court cases about stepfather adoption but remaining below the Justices' radar.

In the 1980s, feminists' disagreement about nonmarital fathers' parental rights surfaced in two cases that reached the Court but produced no decision on the merits. These cases concerned biological fathers' right to object to a mother's decision to place her newborn infant up for adoption, and feminists filed briefs on both sides. As Part IV describes, the Court instead decided, on due process grounds, two other cases framed as contests between husbands and nonmarital fathers. The winner, by the end of the 1980s, was marital supremacy, as the Court rejected nonmarital fathers' rights in favor of husbands' and ignored feminists' arguments both for and against sex neutrality.

Part V examines how and why nonmarital fathers'—and feminists'—campaigns for constitutional equality fell short. Whereas divorced fathers successfully mobilized to make child custody law formally sex-neutral, nonmarital fathers lacked comparable resources, cultural capital, and social movement support. Feminists and their allies attempted to shape the law of nonmarital parenthood, but the Justices' debates and resulting jurisprudence reflected instead the values of the divorced fathers' rights movement and traditionalist conservatism. After 1989, the Court largely withdrew from the constitutional regulation of nonmarital fathers' parental rights, leaving states to go their own way.

The Justices' failure to engage difficult questions about the relationship between formal sex neutrality and substantive equality reverberated beyond the parental rights cases to leave its mark on equality jurisprudence. At the turn of the twenty-first century, when the Court considered discrimination against fathers in their ability to transmit citizenship to nonmarital children, the majority imported principles from the parental rights cases to reject fathers' claims. More broadly, the unwed fathers cases helped to enshrine marital supremacy in constitutional law. Marital status still delimits the boundaries of constitutional equality in parenthood, even as nonmarital families become the American norm.

The constitutional law of the family today stands at a critical turning point. The advent of marriage equality marks the final triumph of formal sex neutrality in the law of marriage, discarding archaic assumptions about the proper roles of husbands and wives. Same-sex relationships have also disrupted conventional definitions of parenthood, demoting formal indicia such as marriage and biology in favor of more intent-based and functional

criteria.[23] Whether marriage equality heightens or diminishes the legal and constitutional significance of marital status, however, remains to be seen. For those who hope to reshape the law to meet the needs of nonmarital families, unwed fathers' attack on marital supremacy illuminates the challenges ahead.

I. A LEGAL RENAISSANCE FOR UNWED FATHERS, 1960-1972

The social and legal revolutions of the 1960s and early 1970s transformed unwed fathers from personae non gratae into individuals with constitutional rights and obligations. An array of social movements, animated by issues from civil rights to reproductive freedom to women's equality, provided new constitutional weapons for men who resisted the presumption that nonmarital fathers were at best, irrelevant, and at worst, irresponsible derelicts. Challenging decades of exclusive focus on unwed mothers, a small but influential cadre of social work professionals and social scientists sought to rehabilitate unmarried fathers and show them worthy of study and support.

On the eve of the constitutional sex equality revolution, when the Supreme Court considered its first unwed father lawsuit, observers and litigants viewed *Stanley v. Illinois*[24] as presenting fundamental questions about equality between men and women, and between marital and nonmarital parents. The field was wide open: the Court had just begun to question "illegitimacy"-based classifications and had yet to hold that any legal distinction between men and women violated equal protection. Early draft opinions challenged discrimination based on sex and marital status head-on, suggesting that any differential treatment of mothers and fathers or of married and unmarried parents might be constitutionally suspect. In the end, *Stanley* was decided primarily on due process grounds. And while even the ultimately narrower decision in *Stanley* initially seemed "revolutionary," its implications for unwed fathers' rights and for the development of equality jurisprudence remained uncertain.

A. "An [E]lusive Ghost": Social Workers and Lawyers Discover the Unwed Father

Nonmarital parenthood poses a conundrum in a society that privatizes dependency in the nuclear family, channels government benefits through marriage, provides minimal state support for caregiving, and engages in

23. For pathbreaking work on this phenomenon, see Douglas NeJaime, *Marriage and the New Parenthood*, 129 HARV. L. REV. (forthcoming 2016).

24. *Stanley*, 405 U.S. 645.

limited wealth redistribution. By the middle decades of the twentieth century, American policymakers had constructed a social and legal infrastructure that presumed wives and mothers would provide primary care for children and other dependents, while husbands and fathers furnished financial support and social insurance benefits through gainful employment.[25] "Unwed mothers" who kept and raised their children without a man's support threatened not only the public fisc, but also a political and legal system that assumed that marital households are the basic economic unit of society and the primary site of social provision. Thus the ideal cure for the "problem of illegitimacy" was the marriage of the child's parents or adoption into a two-parent marital family.

At common law, an "illegitimate"[26] child was *filius nullius*, a "child of no one," and her parents largely escaped legal responsibility for her care and financial support. Whereas guardianship and custody of marital children belonged to the father (eroded in practice by the "tender years" presumption),[27] nonmarital children traditionally were mothers' responsibility by default. In the nineteenth-century United States, legal reforms afforded nonmarital children the right to support and to inheritance from their mothers.[28] Fiscal concerns spurred the enactment of statutes imposing some financial liability on "natural" fathers when paternity was proven, though enforcement was sporadic at best.[29] But in the mid-twentieth-century United States, illegitimate children's paternal inheritance rights remained limited,[30] and nonmarital fathers enjoyed parental rights decidedly inferior to those of unmarried mothers and of married or divorced fathers.[31] To many, this seemed

25. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA (2001).

26. I use the terms "legitimate" and "illegitimate" because they describe distinctive legal categories not captured by neutral terms such as "marital" and "nonmarital." However, I do not endorse their denigration of nonmarital families. *See* Mayeri, *supra* note 21, at 1279 n.4.

27. The tender years doctrine held that during a child's early development the mother should have custody, despite competing doctrines entrenching paternal primacy. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 248 (1985).

28. *See id.* at 207-15.

29. On child support enforcement generally in nineteenth-century America, see Hansen, *supra* note 7.

30. *See* Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 854-56 (1966).

31. For a contemporaneous account of nonmarital fathers' inferior legal rights with respect to custody, visitation, adoption, and parental status, see Freda Jane Lippert, *The Need for a Clarification of the Putative Father's Rights*, 8 J. FAM. L. 398, 403-14 (1968).

unremarkable: after all, if nonmarital fathers bore little or no responsibility for their nonmarital children, then awarding sole rights to mothers was only fair compensation for their social and economic burdens. Some feminists, in contrast, had long protested the default assumption of maternal responsibility, noting that it enabled nonmarital fathers to escape both the moral opprobrium and the financial obligations of unwed parenthood.[32]

As rates of "illegitimacy" rose and became politically salient at mid-century,[33] social scientists and social work professionals focused their efforts on studying and "rehabilitating" unwed mothers.[34] Experts analyzed young women who became pregnant outside of marriage in racially differentiated terms, often explaining nonmarital childbearing among young white women as an individual neurosis and among young black women as cultural pathology.[35] Fathers seemed largely irrelevant, except to the extent they could financially support children not relinquished for adoption.[36] Social worker and adoption expert Leontine Young's 1954 book *Out of Wedlock* devoted a single, short chapter to "the unmarried father," calling him "in almost every case a counterpart of the neurotic personality of the mother."[37] In 1960, sociologist Clark E. Vincent estimated the ratio of studies probing unmarried motherhood versus fatherhood at twenty-five to one.[38] With adoption by strangers the favored solution to nonmarital childbearing among young white women, fathers were cast as shadowy villains who had little to offer the women they

32. *See* Collins, *supra* note 5, at 1694-97.

33. *See, e.g.*, Serena Mayeri, *Historicizing the "End of Men": The Politics of Reaction(s)*, 93 B.U. L. REV. 729 (2013) (describing reaction to the 1965 Moynihan Report, which posited a "tangle of pathology" in the "Negro family").

34. On these efforts, see REGINA G. KUNZEL, FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890-1945 (1993); RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* (1992). *See also* REUBEN PANNOR ET AL., THE UNMARRIED FATHER: NEW HELPING APPROACHES FOR UNMARRIED YOUNG PARENTS 2 (1971) ("The mother is the person who has stood out in bold relief—subject to pity, scorn, mysterious disappearance, even casual acceptance and, in some measure, to professional care and mature attention.").

35. *See* SOLINGER, *supra* note 34; Regina G. Kunzel, *White Neurosis, Black Pathology: Constructing Out-of-Wedlock Pregnancy in the Wartime and Postwar United States*, *in* NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945-1960, at 304 (Joanne Meyerowitz ed., 1994).

36. *See, e.g.*, *Education Is Urged for Unwed Parents*, N.Y. TIMES, Dec. 18, 1961, at 5 ("The Federal Government . . . says unmarried fathers should be found and given educational help with the aim of making them able to assume family responsibilities.").

37. LEONTINE YOUNG, OUT OF WEDLOCK: A STUDY OF THE PROBLEMS OF THE UNMARRIED MOTHER AND HER CHILD 134 (1954).

38. Clark E. Vincent, *Unmarried Fathers and the Mores: "Sexual Exploiter" as an Ex Post Facto Label*, 25 AM. SOC. REV. 40, 40 (1960).

impregnated or the children their illicit liaisons produced. As social worker Linda Burgess wrote in 1968, "[T]he unmarried father has remained an illusive ghost in most adoption placements."[39]

The problem of unwed fatherhood gained prominence in the following decade, thanks to a confluence of factors. As previously excluded families of color gained access to Aid to Families with Dependent Children, growing concerns about welfare expenditures and illegitimacy spurred punitive attempts to hold the sexual partners of impoverished African-American women financially responsible for their nonmarital children, including through "substitute father" provisions withholding public assistance from households containing a "man in the house."[40] At the same time, norms surrounding nonmarital childbearing shifted: unmarried, middle-class white women less frequently entered maternity homes and relinquished their infants for adoption.[41] Gradually, sociologists and social workers began to investigate the emotional, psychological, and social needs of young unmarried fathers. An early pilot program in Los Angeles, launched in 1963 and supported by the U.S. Children's Bureau, studied close to one hundred unmarried fathers receiving services formerly reserved for mothers from a Jewish social service agency. The results purported to defy "stereotypes" about feckless unwed fathers, finding many young men to be receptive to counseling and interested in participating in decisions about their child's life.[42] Other programs began to serve young unmarried fathers of color in urban, high-poverty areas. In 1969, a Harlem social worker told the *New York Times* that "working with putative fathers is very fashionable now."[43]

Unmarried fathers, long typecast as sexual exploiters of vulnerable, young women who abandoned their children,[44] began to appear in more varied guises: the cohabiting parent-partner, functionally indistinguishable from his

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39. Linda C. Burgess, *The Unmarried Father in Adoption Planning*, 15 CHILDREN 71, 71 (1968).

40. *See* Lefkovitz, *supra* note 13, at 597.

41. *See, e.g.*, REUBEN PANNOR ET AL., THE UNMARRIED FATHER: NEW HELPING APPROACHES FOR UNMARRIED YOUNG PARENTS xii (1971) (reporting that in 1970 "[m]any, including an increasing number of middle-class Caucasian girls, chose to keep their babies outside of marriage").

42. *See id.* at 44-63.

43. Judy Klemesrud, *The Unwed Father, Long Ignored, Now Gets Counseling, Too*, N.Y. TIMES, July 25, 1969, at 56.

44. *See, e.g.*, PANNOR ET AL., *supra* note 41, at 15 ("When the father is thought of at all, he is often imagined to be an older sophisticate who has lured a young innocent girl into a compromising situation . . . . Or, perhaps the father is viewed as a sower of wild oats, and as such is surreptitiously regarded as having behaved in a manner that is to be expected of red-blooded youth.").

married counterpart but barred from a licit relationship because of an inability to end a prior marriage; the well-intentioned young man willing to marry the mother of his child but rejected by her; the poor but sympathetic teenaged boyfriend, suffering from a dearth of parental supervision and paternal role models;[45] the father genuinely interested in maintaining a relationship with his child after the breakdown of a nonmarital romance; the eager father bereft over a mother's decision to give up her child for adoption.[46] One 1966 study concluded that "[a] majority of young men who get girls pregnant out of wedlock are neither irresponsible nor casual about their obligations to the girls and their babies," prompting a reporter's observation that "unwed fathers are more emotionally involved with the women they impregnate than is popularly believed."[47] A 1969 article reported caseworkers' newfound perception that nonmarital pregnancies often "resulted not from a casual encounter but from a long-term, meaningful relationship in which the young people expressed love and affection for each other."[48] And social workers at a 1970 workshop on unmarried teenage parents "testified that not only did the mothers want to keep their babies but that unmarried fathers were also very concerned about what happened to the children."[49]

As social scientists and social work professionals began to show greater interest in unmarried fathers, Vincent warned that legal rights could not be far behind. "[A]s the father is given greater public visibility and receives some services," Vincent wrote, "greater attention will be given to his 'rights,' legal and otherwise."[50] Vincent proved prescient, forecasting a development aided by

45. *See, e.g.*, Lynn Lilliston, *Now What About the Unwed Father?*, WASH. POST, Aug. 27, 1967, at H2.

46. *See, e.g.*, Lynn Lilliston, *Father Vies for Custody of His Baby*, L.A. TIMES, Aug. 31, 1972, at G1 (describing case of twenty-seven-year-old man who sought custody of baby born to his seventeen-year-old former girlfriend, who declined to marry him).

47. *Unemployment a Factor in Illegitimate Births*, N.Y. AMSTERDAM NEWS, Mar. 18, 1967, at 11; *see also* Klemesrud, *supra* note 43 ("In unmarried pregnancies, people often think it's the poor girl and the ruthless seducer . . . . But very often it's a frightened boy and an aggressive girl.").

48. Klemesrud, *supra* note 43.

49. Deirdre Carmody, *Council Studying Teen-Age Parents*, N.Y. TIMES, Feb. 8, 1970, at 39.

50. Clark E. Vincent, *Illegitimacy in the Next Decade: Trends and Implications*, 43 CHILD WELFARE 513, 518 (1964); *see also* Rita Dukette & Nicholas Stevenson, *The Legal Rights of Unmarried Fathers: The Impact of Recent Court Decisions*, 47 SOC. SERV. REV. 1, 1 (1973) (quoting Vincent, *supra*); Harry D. Krause, *Legitimate and Illegitimate Offspring of* Levy v. Louisiana – *First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 358 (1969) ("No rational legislative reason justifies not hearing the interested father who fairly and regularly contributes to the support of his child on issues such as the child's general welfare, including his custody and education.").

larger social and legal shifts in the late 1960s and early 1970s. The no-fault divorce revolution created a growing contingent of noncustodial fathers whose varying levels of post-divorce contact with their children raised questions about the presumed correlation between marital status and paternal engagement. Pressure began to build for more robust child support enforcement efforts as divorce and nonmarital childbearing produced more impoverished single-parent households.[51]

At the same time, feminist attacks on sex-based stereotypes about women's natural superiority as mothers and inferiority as economic and political actors undermined the notion that only mothers could nurture and form strong psychological bonds with children. Some feminists, including leading legal scholars and strategists, envisioned a more gender-neutral approach to the family and to family law, arguing that men and women should be free to defy traditional gender roles and build egalitarian marriages where both partners shared breadwinning and caregiving responsibilities. Fatherhood itself "lost cultural coherence," in the words of historian Robert Griswold, as feminism and the entrance of married women and mothers into the workforce in unprecedented numbers "prompted a far-reaching cultural debate about fatherhood never before known in American history."[52]

Further, as the "best interests of the child" standard began to displace the traditional maternal preference in child custody determinations at divorce, the definition of children's best interests evolved. A small but growing body of literature suggested that a child's relationship with his "natural" father was crucial as a matter of psychological health as well as financial stability.[53] Influential illegitimacy expert Harry Krause, a law professor at the University of Illinois, declared in 1967 that it was "time that the matter be considered from the standpoint of the child!"[54] In the late 1960s, Krause collaborated with the ACLU, the NAACP Legal Defense Fund, and other advocates to attack legal classifications based on illegitimacy. As I have described in detail elsewhere, plaintiffs in these early illegitimacy cases were African-American women and their children; opponents of illegitimacy penalties argued that laws excluding illegitimate children from wrongful death and workers' compensation payments, from public assistance benefits, from parental inheritance, and from

51. *See generally* CROWLEY, *supra* note 9 (describing efforts by social workers, conservatives, and feminists to enact and enforce child support laws).

52. ROBERT L. GRISWOLD, FATHERHOOD IN AMERICA: A HISTORY 244-45 (1993).

53. In her history of child custody, Mary Ann Mason notes that, until the 1970s, "the literature on fatherhood had been scant." MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 171 (1994).

54. Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 484 (1967).

child support laws constituted discrimination based on race and poverty. They also argued that children should not be penalized based on the marital status of their parents, a matter wholly outside their control. By 1972, the Court had decided a handful of illegitimacy cases in the plaintiffs' favor, on decidedly child-focused grounds. Without questioning the legitimacy of promoting marriage and discouraging nonmarital childbearing, the Court ruled that "hapless" and "innocent" children should not suffer for their parents' transgressions.[55]

The emerging consensus that punitive anti-illegitimacy measures should not be permitted to harm blameless children papered over profound disagreement about sex, gender, and the problem of illegitimacy. Whereas some civil libertarians, anti-poverty advocates, and later feminists questioned marital supremacy, championed sexual liberation, and viewed illegitimacy penalties as unjustly subordinating women, Krause and other more conservative reformers set out to rescue children from the scourge of fatherlessness. The nonmarital child's best interests, Krause believed, required eliminating the legal disabilities that prevented illegitimate children from calling upon their fathers' resources. His proposed Uniform Parentage Act, ultimately promulgated in 1973, recommended presumptions for determining paternity with the aim of establishing legal relationships between nonmarital children and their fathers.[56] The fiscal imperative to secure all available private sources of support for nonmarital children fused with a growing sense that nonmarital fathers could provide less tangible benefits to their offspring—an intact sense of self, a stable authority figure, even a sometime caregiver.[57]

By the early 1970s, many policymakers and social work professionals agreed that previously overlooked nonmarital fathers warranted further study and regulation.[58] But there was little consensus about how to approach legal or social reform of nonmarital fatherhood. Most could agree on the desirability of securing paternal financial support from nonmarital fathers, though they struggled over the practicalities of holding impecunious fathers responsible.

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55. *See* Mayeri, *supra* note 21, at 1280.

56. On Krause's involvement in drafting the Uniform Parentage Act, see Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73 (2003). For more on Krause and his critics, see Mayeri, *supra* note 21, at 1288-89.

57. *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971) (setting out a comprehensive case for judicial and legislative reform of the law governing illegitimacy).

58. *See* PANNOR ET AL., *supra* note 41; Harry D. Krause, *The Bastard Finds His Father*, 3 FAM. L.Q. 100 (1969); Deborah Shapiro, *Effective Services for Unmarried Parents and Their Children: Innovative Community Approaches*, 43 SOC. SERV. REV. 109 (1969) (book review); Pearl S. Weisdorf, *Illegitimacy: Data and Findings for Prevention, Treatment, and Policy Formulation*, 40 SOC. SERV. REV. 112 (1966) (book review).

But custody and control of children were another matter entirely. Should the law continue to assume that nonmarital fathers would routinely shirk their parental obligations, rendering them presumptively unfit to participate in their children's upbringing? Or did changing family structures warrant a rethinking of nonmarital fathers' roles? What would nonmarital fathers' rights mean for adoption law and practice? How should disputes between unmarried parents be adjudicated? And if feminists hoped to remake marital families in a gender-egalitarian image, what did sex equality require in the absence of marriage?

B. *"Much is Not Challenged Until Now": The Court Confronts Equality for Unwed Fathers in* Stanley v. Illinois

In the spring of 1970, less than two years after the death of his "common-law wife" of eighteen years, Peter Stanley looked on helplessly as a judge declared his two young children wards of the state, condemning them to a series of foster placements and their father to years of legal turmoil. Illinois's definition of "parent" excluded "natural" fathers of illegitimate children, thus denying Stanley even a hearing to determine whether he was fit to parent the children he loved and had helped to raise from birth.

These were the stark facts that Peter Stanley's lawyers presented to the U.S. Supreme Court in 1971. The reality of Stanley's legal status and of his record as a father was more complicated.[59] But if Stanley had been a woman, married or unmarried, or if he had been able to produce proof of a valid marriage to the children's mother, he would have been their legal parent and would almost certainly not have lost his parental rights.

Stanley's inability to produce a marriage certificate made him a legal stranger to Kimberly, age two-and-a-half, and Peter Jr., age one-and-a-half.[60] In some states, Stanley could have presented proof of a common law marriage, but Illinois abolished that institution early in the twentieth century.[61] Instead, Stanley's attorneys argued that Stanley "did build up and develop a father

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59. For one thing, Stanley's fitness as a parent had in fact been questioned. *See infra* note 63 and accompanying text.

60. Claiming that he and Joan had married in November of 1950, Stanley asked his attorneys to request a continuance in order to search the public records of Illinois and Indiana for evidence. *See* Appendix at 12, Stanley v. Illinois, 405 U.S. 654 (1972) (No. 70-5014) [hereinafter *Stanley* Appendix].

61. On the decline of common law marriage in the twentieth century, see LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 44-55 (2005). *See also* Cynthia Grant Bowman, *A Feminist Proposal To Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 711 (1996) (arguing that common law marriage protected the interests of women, especially poor women and women of color).

relationship" with his children. "[W]e feel," said Fred Meinfelder of Legal Aid, that "while he was not legally married to his wife that that should not be a basis for removing those children from him . . . ."[62] State officials told the judge that Stanley was "not in a position to provide financial support" for his children but that "if he did have some progress and was to marry and establish an orderly family situation" he might be able to petition for custody later.[63] His lawyers emphasized that if Stanley were not a legally recognized parent, he would have no standing to petition later for custody or any other rights. And while he might be able to find a wife and "establish an orderly family situation" in the future, under Illinois law Stanley could do nothing to change his legal parenthood status with regard to Kimberly and Peter, Jr. As an amicus brief later put it, "there is no way to marry a dead person."[64]

Before the Illinois Supreme Court, Stanley's lawyers argued that the exclusion of fathers of illegitimate children from the category of "parent" violated the Fourteenth Amendment.[65] In a cryptic opinion, the Illinois court ruled that unmarried fathers had no rights to their natural children unless such rights were granted to them by a court in an adoption or guardianship proceeding.[66] Stanley had not sought guardianship or custody of his children, preferring to leave them in the care of a married couple whom he had asked to look after Kimberly and Peter Jr. a few months earlier. Pursuing an adoption would have been risky, as Stanley would have been required to meet a much higher standard than mere fitness—he would have had to prove himself a "suitable" parent.[67] As a practical matter, then, the court's ruling meant that he could be denied all access to the children—and indeed, he later petitioned for visitation to no avail.[68]

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62. *Stanley* Appendix, *supra* note 60, at 14.

63. *Stanley* Appendix, *supra* note 60, at 29-30.

64. Brief for Center on Social Welfare Policy and Law as Amicus Curiae at 8, *Stanley*, 405 U.S. 654 (No. 70-5014).

65. *In re* Stanley, 256 N.E.2d 814, 815 (Ill. 1970), *rev'd*, *Stanley*, 405 U.S. 654.

66. *Id.*

67. *See* Brief for the Petitioner at 7, *Stanley*, 405 U.S. 654 (No. 70-5014) (noting that suitability to parent was "no where defined").

68. Stanley's visitation rights were apparently restored after he appealed to the Illinois Supreme Court, but his lawyer reported that "[e]ach time the children would finish seeing their father, they would become upset and complain to the foster parents that they wanted to stay with their real father." Fredric Soll, *Father Has Hopes of Getting Kids Back*, CHI. TRIB., Apr. 4, 1972, at 3. Kimberly and Peter, Jr. lived in five different foster homes in three years. *See id.* According to Peter Stanley's attorney, they were eventually reunited with their father and his new wife, after several years of instability. *See* Josh Gupta-Kagan, Stanley v. Illinois' *Untold Story*, 24 WM. & MARY BILL RTS. J. (forthcoming 2016).

1. *Sex and the Single Father:* Stanley *Before the Supreme Court*

Stanley's case reached the Supreme Court at a turning point in the law of sex equality. The Court's most recent ruling on a sex-based equal protection claim had upheld Florida's exemption of women from jury duty on the ground that the "woman is still regarded as the center of home and family life."[69] In 1971, the Court had yet to extend the umbrella of equal protection to forbid sex discrimination against women, much less against men.[70] But lower courts were beginning, in fits and starts, to rule for sex discrimination plaintiffs, and with the women's movement resurgent, the political climate seemed increasingly hospitable. The Equal Rights Amendment (ERA) was before Congress; advocates for abortion law reform argued that reproductive freedom was central to sex equality;[71] Ginsburg brought a lawsuit on behalf of a man who cared for his elderly mother but was denied Social Security benefits awarded to similarly situated female caregivers;[72] and feminist lawyers from the Center for Constitutional Rights demanded equal parental-leave benefits for a husband who wished to stay home to care for his newborn child.[73] Although feminists who had long challenged women's legal, political, and economic disabilities were beginning to represent male plaintiffs disadvantaged by sex stereotypes, nonmarital fathers' claims under the Constitution were new.[74]

Illinois's custody statute discriminated based on both marital status and sex: the category of "legal parent" included unmarried mothers but not unmarried fathers; marital fathers were parents, but nonmarital fathers were not. Peter Stanley's case, argued the same day as *Reed v. Reed*,[75] a sex equality challenge to Idaho's preference for male estate administrators, struck many as primarily involving a question of sex discrimination—or "sex discrimination in reverse,"[76] in one reporter's characterization. A typical headline the day after

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69. Hoyt v. Florida, 368 U.S. 57, 62 (1961). For more on *Hoyt*, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 177-83 (1998).

70. For more on this pivotal period, see MAYERI, *supra* note 11, at 9-75; and Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 801-19 (2004).

71. *See* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 815 (2007).

72. On *Moritz*, see Franklin, *supra* note 18, at 122-24.

73. *See* Danielson v. Bd. of Higher Educ., 358 F. Supp. 22, 24-25 (S.D.N.Y. 1972).

74. Constitutional sex equality arguments against illegitimacy penalties had yet to emerge fully in the early 1970s. *See* Mayeri, *supra* note 21, at 1344-45.

75. 404 U.S. 71 (1971).

76. John P. MacKenzie, *Supreme Court Rules for Working Mothers*, WASH. POST, Jan. 26, 1971, at A2. Justice Blackmun's clerk Robert E. Gooding, Jr. initially characterized the question

oral arguments announced, "Supreme Court Asked to Upset 'Sexist' Laws in Illinois, Idaho."[77] Justice Blackmun's clerk Robert E. Gooding, Jr. thought Stanley should have argued that sex was a suspect classification as Ginsburg and her ACLU colleagues were contending in *Reed*.[78] Stanley's briefs instead focused on a "biological and cultural" father's fundamental interest in his children as triggering the compelling state interest test. Illinois's interest, the lawyers argued, was not sufficiently compelling to justify the "drastic means" of extinguishing an unmarried father's parental rights upon the death of his children's mother.[79] Even under rational basis review, Stanley's lawyers argued, exclusion of unwed fathers from the legal definition of a parent did not serve the interests asserted by the state – protecting the welfare of illegitimate children and promoting "the procreation of the species by and through the marriage relationship."[80] And if the state sought to promote marriage, why were unmarried mothers not similarly excluded?[81]

Although Stanley's supporters did not use the language of stereotyping that soon would become prevalent in the Court's sex equality jurisprudence,[82] they did contend that individuals should not be judged by group-based

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presented in *Stanley* as "whether the Ill statutory scheme, which discriminates . . . solely on the basis of the parent's sex, denies the surviving natural father equal protection of the law." Memorandum from Robert E. Gooding, Jr., Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun (Nov. 18, 1970) (on file with Harry A. Blackmun Papers, Library of Congress, Box 143, Case No. 70-5014 [hereinafter Harry A. Blackmun Papers]).

77. Glen Elsasser, *Supreme Court Asked To Upset "Sexist" Laws in Illinois, Idaho*, CHI. TRIB., Oct. 20, 1971, at D6; *see, e.g.*, *Father of 2 Asks Court for Children*, CHI. TRIB., Jan. 26, 1971, at 5; Fred P. Graham, *High Court Bars Sex Bias in Hiring in Test of '64 Act*, N.Y. TIMES, Jan. 25, 1971, at 1; MacKenzie, *supra* note 76, at A2.

78. Gooding observed that it was "not always clear whether pet[itione]r is complaining of discrimination as between sole surviving fathers of illegitimate children and sole surviving mothers, or as between fathers of illegitimate children and married fathers, or both." Memorandum from Robert E. Gooding, Jr., Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun, *supra* note 76.

79. Brief for the Petitioner, *supra* note 67, at 19.

80. *See id.* at 23-36. Some saw this test of "means-ends rationality" as a way for the Court to avoid difficult substantive questions in equal protection cases. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21-24 (1972).

81. As one Justice told Illinois Attorney General Morton Friedman during oral argument in *Stanley*, "[Y]ou still have to reach the question of why does Illinois treat the man different from the woman in this respect? I mean, this is sort of a bootstrap argument. We do not make him responsible, therefore, we treat him differently and because we make the woman responsible we can treat her differently?" Oral Argument at 28:45, Stanley v. Illinois, 405 U.S. 654 (1972) (No. 70-5014) http://apps.oyez.org/player/#/burger3/oral_argument_audio/16813 [http://perma.cc/K9BV-NRBE] [hereinafter *Stanley* Oral Argument].

82. *See* Franklin, *supra* note 18, at 91-114.

generalizations. Even if most unmarried fathers did not develop stable and caring relationships with their illegitimate children, some did, and presuming otherwise was unjust and unconstitutional. And even married fathers frequently did not develop strong and sustained bonds with their children, especially if the marriage had dissolved. Why, they asked, should divorced fathers who had not seen their children in years enjoy parental rights while devoted, never-married fathers were legal strangers?

Stanley's lawyers resisted attempts to frame the equal protection issue as one of simple sex discrimination, emphasizing that Illinois singled out *unwed* fathers for discriminatory treatment.[83] Illinois's defense, too, inextricably intertwined marital status and sex. Mothers, the state maintained, generally assumed legal and social responsibility for their children regardless of legitimacy.[84] A mother who abandoned her child at birth without arranging for its care committed a crime; fathers of nonmarital children did the same with impunity.[85] Imposing "the full range of parental duties" on mothers and on married fathers warranted granting them "the full range of parental rights."[86] Mothers, by definition, were present from birth. And "[m]othering," the state contended, "is the result of the primary sexual drives of females."[87]

Fathers, on the other hand, required a state-sanctioned legal structure to impress them into the bonds of parenthood. To accomplish this feat, Illinois concluded, "[t]he chosen institution of the state is marriage."[88] To earn equal status with a child's mother, the state reasoned, a father must demonstrate his commitment to the family by marrying her.[89] Under Illinois law, in fact, marriage was the only way, short of adoption, for a man affirmatively to assume parental duties and obtain parental rights. Tying fatherhood to marriage, Illinois had developed a "comprehensive statutory pattern" designed to ensure that children were cared for by fit and responsible adults.[90] Marriage conferred parental rights, the state argued, because it entailed non-negotiable

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83. At oral argument, one Justice asked whether the equal protection argument boiled down to the father/mother distinction, and Legal Aid attorney Pat Murphy replied, "That is the narrow equal protection argument. We think it is broader than that. We think the lines are just so arbitrarily drawn, in other words why treat Stanley any different than you would a wed father in similar circumstances?" *Stanley* Oral Argument, *supra* note 81, at 14:31.

84. Brief for Respondent at 26-27, *Stanley*, 405 U.S. 645 (No. 70-5014).

85. *See id.* at 15-16 (noting that under then-current Illinois statutes unmarried fathers were not "parents" and so could not be held criminally liable for abandonment).

86. *Id.* at 27 n.25.

87. *Id.* at 25.

88. *Id.* at 26.

89. *Id.* at 27-29.

90. *Id.* at 32.

duties. Married fathers assumed responsibility for children by virtue of the marital bond—indeed, most states conclusively presumed husbands to be the fathers of their wives' children regardless of biology. In contrast, "[t]he putative father normally does not live with the mother of his illegitimate children on a permanent basis," the state contended.[91] "He establishes no fixed family unit, but only a transient relationship . . . ."[92] Moreover, unlike a legitimate father, he "often has no responsibilities" to his children or their mother.[93] Even imposing the "pecuniary obligation of support" required legal action by the mother.[94]

Illinois defended marital primacy both as consonant with children's best interests and as an end in itself. Unmarried fathers rarely took an interest in their children, Illinois contended, and when they did, their motives were suspect: in Stanley's case, the state suggested that he wanted access to his children's Social Security survivors benefits but had no desire to assume responsibility for their care.[95] To ensure that unfit fathers could not manipulate the system at their children's expense, the state required them affirmatively to demonstrate commitment and fitness by adopting their children.[96]

Stanley's case against the exclusion of unwed fathers from parental status challenged the Court to overturn decades, even centuries, of precedent denying any legal relationship between a father and his illegitimate child. He attacked the premise that marital status was a proxy for parental fitness. But in another sense, Stanley did not radically challenge marital supremacy. His attorneys emphasized how Peter and Joan Stanley had lived together in a marriage-like relationship, referring to Joan as Peter's "common-law wife."[97] Peter's relationship with Joan and their children was no different from that of a husband and legitimate father, they said, and it was irrational to treat him as if he were uninterested and irresponsible. "The fact [that] Peter Stanley was a voluntarily acknowledging and supporting father who had created and

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91. *Id.* at 24.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 6 ("Peter Stanley . . . expressed his interest in continuing to receive the Social Security benefits due Peter Jr. and Kimberly Stanley. No question of custody was raised.").

96. The Child Care Association of Illinois worried that giving unwed fathers equal rights with mothers would impede the efficiency and finality of adoption proceedings, to the detriment of children. *See* Brief for the Child Care Ass'n of Illinois as Amicus Curiae Supporting Respondents at 2, *Stanley*, 405 U.S. 645 (No. 70-5014).

97. *E.g.*, Brief for the Petitioner, *supra* note 67, at 9. Illinois had abolished common law marriage in 1905. *See Stanley*, 405 U.S. at 663-64 (Burger, C.J., dissenting).

maintained a family is not changed by the mere presence or absence of a marriage certificate."[98]

Indeed, Stanley's lawyers suggested, couples who cohabited without marriage were different from men and women whose casual liaisons produced children.

> Except for the legal factor, this may be a family like any other. . . . The very fact that they are parents in the social and emotional as well as the biological sense distinguishes them immediately from the unmarried mother and the unmarried father who establish no real or lasting relationship with each other.[99]

In other words, the brief implied, the quality of a father's relationship to the mother of his children was indeed relevant to determining his parental fitness, but sociological reality, rather than legal formality, should guide recognition of family status. Notably, such a functional definition of family still relied on marriage as a model, maintaining the privatization of dependence and linking parental rights to obligations. Even so, Stanley challenged fundamental assumptions about sex and marital status as determinants of legal parenthood.

2. *"The Mother-Father Dichotomy": Sidestepping Sex Equality in the Supreme Court*

Internal correspondence reveals how much was up for grabs as the Justices grappled with questions of sex equality, the significance of marital status, and contested assumptions about unmarried fatherhood. Some early drafts of Justice Byron White's opinion in *Stanley* decried the Illinois law as sex discrimination, pure and simple.[100] A draft opinion by Justice Thurgood Marshall excoriated the equation of nonmarital fatherhood with paternal dereliction.[101] Ultimately, however, White's sex equality analysis did not survive, Marshall never filed his opinion attacking marital status discrimination, and *Stanley*'s legacy for equal protection law remained

98. *Id.* at 22; *see also* Murray, *supra* note 4, at 399-413 (arguing that fathers who acted like husbands elicited more sympathy from the Court than those who never lived with their children's mothers).

99. Brief for the Petitioner, *supra* note 67, at 22 (quoting YOUNG, *supra* note 37, at 147) (internal quotation marks omitted).

100. *See* sources cited *infra* notes 131-132 and accompanying text.

101. *See* sources cited *infra* notes 115-121 and accompanying text.

ambiguous.[102] In the end, a case that seemed clearly to present questions of discrimination based on sex and marital status became a due process case only nominally decided on equal protection grounds.

The *Stanley* Court was a Court in transition. Since the first illegitimacy cases in 1968, President Richard Nixon had replaced Earl Warren with Warren Burger as Chief Justice. Abe Fortas, who, like Warren, voted with the plaintiffs in those cases, resigned from the Court; Harry A. Blackmun took his place in late 1970. Hugo Black and John Marshall Harlan, two of the Justices who voted against the illegitimacy plaintiffs, retired from the Court in September 1971, and Lewis F. Powell, Jr. and William H. Rehnquist were confirmed for their seats in December. Because *Stanley* was argued in October 1971, neither Powell nor Rehnquist participated; the case was heard and decided by a seven-member Court.[103]

Framing *Stanley* as a sex discrimination case might have seemed a promising strategy to overcome the Court's apparent ambivalence about nonmarital fatherhood. In the 1971 case *Labine v. Vincent*, the Court appeared to retreat abruptly from its 1968 decisions in *Levy v. Louisiana* and *Glona v. American Guarantee & Liability Co.* recognizing the rights of illegitimate children to equal protection of the laws.[104] Newly minted Justice Blackmun had cast one of his first Supreme Court votes in *Labine* to uphold an inheritance law that distinguished between the legitimate and illegitimate children of fathers who died intestate. Yet Blackmun was inclined to sympathize with Stanley's plight. "This is a very appealing case on its facts," he wrote in an internal memo. "Those facts, of course, make it difficult to affirm if one is going to be at all emotional." After reading his clerk's bench memo, Blackmun tentatively changed his mind, but noted that he could "be persuaded otherwise."[105]

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102. The Court's decision in his favor did not guarantee Stanley parental rights. The day after the ruling, the *Chicago Tribune* reported that Stanley had married a divorcée with three children of her own and that his lawyer believed his "chances of regaining custody of [his] children are good." Soll, *supra* note 68. Almost a year later, he had not regained custody, as the State of Illinois tried to prove Stanley was an unfit parent. *See Father's Custody Fight Continues*, CHI. TRIB., Feb. 8, 1973, at 5. In July 1973, a judge "declared the children were neglected . . . after Karen Stanley, 21, another daughter, charged that Stanley assaulted her and made sexual advances after the mother's death in 1969." Joseph Sjostrom, *Unwed Dad Loses Rights to Children*, CHI. TRIB., Sept. 14, 1973, at A16. In September of that year, Kimberly and Peter became wards of the state. *Id.*

103. The same was true of *Reed v. Reed*, 404 U.S. 71 (1971).

104. Labine v. Vincent, 401 U.S. 532, 537-39 (1971); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968). For more on *Labine*, see Mayeri, *supra* note 21, at 1300-05.

105. Memorandum from Justice Harry A. Blackmun 1-2 (Aug. 17, 1971) (on file with Harry A. Blackmun Papers, *supra* note 76). At various points, Blackmun was persuaded otherwise,

At first, it seemed this "close and interesting" case would be dismissed on procedural grounds.[106] At conference, four of the seven sitting Justices—Chief Justice Burger and Justices Blackmun, Brennan, and Stewart—voted to dismiss the petition as improvidently granted due to uncertainty about the Illinois Supreme Court's vague opinion interpreting the state law. Brennan drafted a brief per curiam opinion to this effect.[107]

However, the other three Justices soon circulated dissents from the proposed dismissal, some advancing views of the case not presented by the litigants. Justice William O. Douglas, recently the author of the Court's first decisions invalidating illegitimacy-based discrimination,[108] initially saw the Illinois law not as "an invidious discrimination against unwed fathers, but rather a protection of illegitimate children." Most unmarried fathers, Douglas opined, "are not present at their children's births and like hit-and-run drivers are difficult to locate."[109] Most unmarried mothers did not remain involved in their children's lives, either, he believed, but rather "decide[d] to place their offspring in the care of the state."[110] Given children's interest in "swift and certain placement in adoptive homes," and prospective parents' likely reluctance to adopt if a father might "later demand custody or visiting privileges," Douglas thought the Illinois scheme reasonable.[111] Even when unwed fathers volunteered for parental duty, Douglas, like Illinois's lawyers, suspected their motives might be more pecuniary than paternal.[112] In any event, he could not imagine "an alternative system which might more meticulously tailor [the challenged law] to its legislative objective of ensuring the welfare of illegitimate offspring."[113]

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though he eventually joined Burger's dissent. *See generally* Memorandum from Justice Harry A. Blackmun to Justice Byron R. White (Nov. 18, 1971) (on file with Thurgood Marshall Papers, Library of Congress, Box 91, Folder 6 [hereinafter Thurgood Marshall Papers]).

106. Memorandum from Justice Harry A. Blackmun, *supra* note 105.

107. Josh Gupta-Kagan suggests that Brennan may have voted to dismiss the petition as improvidently granted to avoid a ruling against Stanley. Gupta-Kagan, *supra* note 68, at 5.

108. *Levy*, 391 U.S. at 68; *Glona*, 391 U.S. at 73.

109. Justice William O. Douglas, First Draft Dissent in Stanley v. Illinois 4 (Nov. 4, 1971) (on file with William O. Douglas Papers, Library of Congress, Box 1556, Case No. 70-5014(d) [hereinafter William O. Douglas Papers]).

110. *Id.* The reality was more complicated and varied significantly by race and class. *See generally* SOLINGER, *supra* note 34.

111. Justice William O. Douglas, First Draft Dissent in Stanley v. Illinois, *supra* note 109.

112. Justice William O. Douglas, Second Draft Dissent in Stanley v. Illinois 4 (Nov. 5, 1971) (on file with William O. Douglas Papers, *supra* note 109).

113. *Id.* at 5.

Douglas's draft cast unmarried fathers as callous, irresponsible, and opportunistic, in implicit contrast to married fathers, whose legal responsibility for their legitimate children presumptively entitled them to parental rights. His focus on adoption suggests that the mothers and children Douglas had in mind were white (as the Stanleys were).[114] Marshall likely perceived the legal treatment of nonmarital parenthood as particularly affecting African-American families. His draft opinion[115] called the use of marital status as a proxy for parental fitness an "overinclusive stereotype."[116] To presume that an unwed father was "most likely to have weak emotional and practical ties to his children, and little ability or willingness to assume parental responsibilities" was to make a "judgment" that "suffers from the deficiencies

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114. Douglas, who authored the Court's opinion in the first two "illegitimacy" cases in 1968, may have been aware that adoption rates for nonwhite nonmarital children, especially African Americans, were much lower than those for white nonmarital children. *See* Mayeri, *supra* note 21, at 1291 (discussing, inter alia, the NAACP LDF's brief in *Levy v. Louisiana*, which pointed to the disparity in adoption rates to underscore the racially disparate impact of anti-illegitimacy laws).

115. Marshall's draft apparently was initially conceived as a dissent from Brennan's per curiam opinion dismissing the opinion as improvidently granted, but by the time it circulated, White's draft dissent from the dismissal had become the majority opinion.

116. Justice Thurgood Marshall, Draft Opinion in Stanley v. Illinois 6 (Nov. 1971) (on file with Thurgood Marshall Papers, *supra* note 105, at Box 91, Folder 5). At oral argument, Marshall had pressed Illinois Attorney General Morton Friedman on the relevance of marriage to a father's relationship with his children:

> Marshall: Mr. Friedman, suppose Stanley had married this woman he had been living with two days before she died, what would his position be?
>
> Friedman: Mr. Justice Marshall, he would then be classified as a legal parent and entitled automatically to custody and control of them.
>
> Marshall: The same man?
>
> Friedman: Yes, sir. He would be–
>
> Marshall: But he changed, when he married he changed?
>
> Friedman: No, he did not change one bit. He performed a legal act that imposed on him by law responsibility for the children beyond mere money payments by the act of marriage.
>
> Marshall: I do not see any change of anything.
>
> Friedman: He changed not at all but by the act the marrying the woman he became liable under law for more responsibilities than he had before. He became liable for the schooling, for sending the child to school.
>
> Marshall: That makes him [a] more fit parent? . . . [Y]ou said primary interest of the child, I thought I understood you.
>
> Friedman: That is correct sir.
>
> Marshall: Well as to the child, what difference?

Stanley Oral Argument, *supra* note 81, at 43:09.

of any stereotype."[117] The leap from illegitimacy to unfitness, Marshall argued, was wholly unwarranted. "There are many reasons for illegitimacy in our society . . . ," he wrote, including incentives created by welfare programs.[118] A father "might decline to marry the mother of his children in order to maximize the family's eligibility for financial assistance," in which case "the fact of illegitimacy provides no support whatever for the inference that the father lacks concern for his children; indeed, it may tend to suggest the contrary conclusion."[119] Or, like Stanley, a father might have lived with his children and their mother in what would, in some states, be a common-law marriage.[120] Given the "enormous magnitude" of the deprivation suffered by fathers who developed relationships with their children, and the low cost of giving fathers notice and an opportunity to be heard, Marshall argued that Illinois law denied unwed fathers equal protection.[121]

Of the three draft dissents from dismissal, only White's survived, though his eventual majority opinion in *Stanley* differed significantly from earlier versions. White's first draft castigated the state for "impos[ing] the presumption that if a father did not engage in the formal ceremony which would have bound his relationship with the now deceased mother until death or divorce, that therefore he is now unfit to raise his children."[122] That presumption, White insisted, "risks running roughshod over the interests of both the surviving father and the children."[123] It also violated Stanley's right to due process, since "there is nothing in this record lending any assurance, much less substantial assurance, to the proposition that Peter Stanley, having lived with and supported his children all their lives, is an unacceptable father solely because of his failure to participate in a marriage ceremony."[124] Before Stanley

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117. Justice Thurgood Marshall, Draft Opinion in Stanley v. Illinois, *supra* note 116, at 5.

118. *Id.*

119. *Id.*

120. *Id.* at 5-6.

121. *Id.* at 6.

122. Justice Byron R. White, First Draft Dissent in Stanley v. Illinois 4-5 (Nov. 8, 1971) (on file with Byron R. White Papers, Library of Congress, Box 227, Folder 8 [hereinafter Byron R. White Papers]). The first part of White's draft opinion explained why the per curiam opinion was wrong to suggest that Stanley could just adopt, or that he could seek custody and control. Adoption, for a poor father without a plan to change his circumstances, was not a real option, and custody and control (guardianship) would not give Stanley full parental rights. In any event, White wrote, "[T]o give an unwed father only 'custody and control' while an unwed mother or a married father retained the rights of natural parenthood, would still be to leave the unwed father prejudiced by reason of his status." *Id.* at 4.

123. *Id.* at 5.

124. *Id.* at 6-7.

could be deprived of his children, White wrote, he must at least have "the opportunity . . . to demonstrate that he has not been a neglectful parent."[125]

Unlike his final opinion, White's first draft also tackled Stanley's equal protection claim head-on, framing the Illinois law as discriminating against unmarried fathers as compared with all other biological parents. "It may be," White wrote,

> that in general there is some relationship between unwed fathers and incompetent fathers. It is plausible that the relationship between the set of unwed mothers and the set of incompetent mothers is weaker than the relationship between the counterpart sets of fathers. It even may be that separated or divorced fathers are more likely to be competent than are unwed fathers.[126]

White "doubt[ed] all these propositions. But even if they are all in general well taken, some unwed fathers are fit parents, some married fathers and unmarried mothers totally unfit."[127] The stereotype might have some basis, in other words, but "convenient administrative discrimination of this nature cannot be tolerated when the issue at stake is the potential dismemberment of a family."[128]

White's draft apparently persuaded Douglas, who circulated a new draft of his own, much shorter than the first, agreeing that Illinois's presumption of unfitness violated procedural due process.[129] Douglas did not agree with White's equal protection analysis, however: he read White's draft to forbid states from "requir[ing] a stricter showing of parental fitness" from unwed fathers than from other parents.[130]

White's second draft—now styled as an opinion for the Court—possibly appealed even less to Douglas, for it framed the equal protection claim as a sex discrimination issue:

> [O]n the death of a spouse, unwed fathers lose their children but unwed mothers suffer no diminution of control. This discrimination between natural parents according to the superficial mother-father

125. *Id.* at 7.

126. *Id.* at 8.

127. *Id.*

128. *Id.* at 9.

129. Justice William O. Douglas, First Draft Dissent in Stanley v. Illinois 20, *supra* note 109.

130. *See id.*; Memorandum from William H. Alsup, Clerk, U.S. Supreme Court, to Justice William O. Douglas (Nov. 10, 1971) (on file with William O. Douglas Papers, *supra* note 109).

> dichotomy unnecessarily ignores and impermissibly overrides the relevant criterion of a parent's capacity to raise his child. Under this standard, capable men . . . are separated from [their children], simply because they are men. Such a division of the class of biological parents into two groups, each defined by an immutable characteristic that does not reliably reflect the underlying realities with which the State is concerned, cannot pass muster in the face of constitutional standards long established and recently reiterated by this Court.[131]

White's draft went on to quote at length from Chief Justice Burger's yet-to-be-released opinion in *Reed v. Reed*, which struck down Idaho's preference for male estate administrators and for the first time invalidated sex discrimination under the Equal Protection Clause.[132]

White's sweeping sex discrimination argument was risky, as it implied that mothers and fathers should have equal rights to their children, perhaps regardless of marriage or other factors. Neither Stanley nor his amici had gone this far, and it seemed unlikely that this view could command a plurality, much less a majority of the Court. Indeed, in his never-published draft opinion, Marshall did not opine on whether nonmarital fathers were entitled to equal rights with mothers in a custody dispute between parents; Stanley's suit was, crucially, "a contest with the state," not with a mother or a married father.[133]

Neither White's full-blown sex neutrality rationale nor Marshall's emphasis on marital status equality garnered a majority.[134] In the end, White's

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131. Justice Byron R. White, Second Draft Opinion for the Court in Stanley v. Illinois 8 (Nov. 18, 1971) (on file with Byron R. White Papers, *supra* note 122, at Box 227, Folder 8).

132. 404 U.S. 71, 74 (1971). *Reed v. Reed* was handed down several days later, on November 22, 1971. *Id.* at 71.

133. Justice Thurgood Marshall, *supra* note 116, at 7 n.4. Marshall wrote:

> This case does not present the question whether the father and the mother are entitled to equal rights in a custody contest between them, and we intimate no views on that question, which may involve considerations quite different from those presented by this case. Here we are concerned only with the question whether the father of an illegitimate child, in a contest with the State, is entitled to the same recognition as a parent that would be afforded by the State to the father of a legitimate child, or to the mother of any child.

Id. In Justice Marshall's second draft, the text of this footnote appeared in the body the opinion. Justice Thurgood Marshall, Second Draft Opinion in Stanley v. Illinois 3-4 (Nov. 1971) (on file with Thurgood Marshall Papers, *supra* note 105, at Box 91, Folder 6).

134. The stronger due process holding in Justice White's final opinion apparently persuaded Marshall to join him and leave his own draft opinion unpublished. *See* Gupta-Kagan, *supra* note 68, at 38; Memorandum from Barbara Underwood, Clerk, U.S. Supreme Court, to Justice Thurgood Marshall 1 (Feb. 4, 1972) (on file with Thurgood Marshall Papers, *supra* note 105, at Box 91, Folder 5) ("I think Justice White's revised opinion is a great

opinion for the Court focused almost entirely on due process, affirming Stanley's "interest . . . in the children he has sired and raised" but leaving open many questions about the ruling's scope.[135] A lengthy passage about parental rights consigned to a footnote in earlier drafts appeared prominently in the text of the finished opinion. "The rights to conceive and to raise one's children have been deemed 'essential,'" White wrote.[136] The interest of a "man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[137] White used the early illegitimacy cases to support the extension of this solicitude to unmarried fathers. "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony," he wrote, characterizing the "familial bonds" of nonmarital families as "often as warm, enduring, and important as those arising within a more formally organized family unit."[138] Even if granting procedural protections to unmarried fathers would be costly and time-consuming, "the Constitution recognizes higher values than speed and efficiency,"[139] White concluded, and to deprive unwed fathers of a fitness hearing available to all other custodial parents denied them equal protection.[140] As constitutional scholar Gerald Gunther observed, the Court's decision relied only "marginally" on equal protection, a back door through which to decide the case without relying on an argument not raised in the state courts below.[141]

The Court's opinion in *Stanley* sidestepped the questions White had faced head-on in his earlier draft: could states deny unmarried fathers rights they granted to unmarried mothers? How did the nascent jurisprudence of sex

improvement over his first draft. While I still prefer our approach . . . . I see no compelling reason not to join Justice White's opinion.").

135. Stanley v. Illinois, 405 U.S. 645, 651 (1972). Gupta-Kagan suggests that White dropped most of the equal protection language and strengthened his due process holding in an effort to command a majority. *See* Gupta-Kagan, *supra* note 68, at 27-39.

136. *Id.* (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

137. *Id.*

138. *Id.* at 651-52.

139. *Id.* at 656.

140. *Id.* at 649 ("We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.").

141. Gunther, *supra* note 80, at 25. The Court's analysis also avoided wading too deep into substantive due process, a concern Marshall clerk Barbara Underwood expressed about Justice White's earlier drafts. *See* Memorandum from Barbara Underwood, Clerk, U.S. Supreme Court, to Justice Thurgood Marshall 2 (Nov. 22, 1971) (on file with Thurgood Marshall Papers, *supra* note 105, at Box 91, Folder 6).

equality apply, if at all, to unwed parents' rights and duties? Burger—author of the cryptic opinion in *Reed*, which revitalized sex-based equal protection law—made his views clear in dissent. He thought states were "fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter."[142] White's majority opinion did not speak directly to this sex discrimination question, which many believed to be central to the case.[143]

Stanley's effect on marital primacy also remained nebulous. Certainly, granting any rights to unwed fathers made paternal prerogatives less dependent upon marital status than they traditionally had been.[144] As Chief Justice Burger wrote in an early draft of his dissent, "Unmarried fathers are not recognized, they are given no rights, and they are burdened with no responsibilities. . . . This has been the pattern of society's dealing with the support and paternity of illegitimate children for centuries and never challenged until now."[145] In the margin of his copy, Justice Blackmun, who eventually joined Chief Justice Burger's dissent, wrote: "Well, much is not challenged until now," and cited *Reed v. Reed*.[146] Although it opened the door to further erosion, *Stanley* declared an end neither to the "mother-father dichotomy" nor to the privileging of marital families.

Many saw *Stanley* as "revolutionary" in its unprecedented embrace of biological fathers' due process rights, and its declaration that children could not be removed from a parent's custody without a hearing to determine fitness. But whether *Stanley* portended more than nominal parental rights for nonmarital fathers remained to be seen.[147] *Stanley* pitted an apparently involved

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142. *Stanley*, 405 U.S. at 665 (Burger, C.J., dissenting). Justice Burger sarcastically noted in a memo to the conference that his dissent contained "unacknowledged plagiarizing" from Douglas's "excellent" original opinion. Memorandum from Chief Justice Warren E. Burger to the Conference (Dec. 2, 1971) (on file with Thurgood Marshall Papers, *supra* note 105, at Box 91, Folder 6).

143. Contemporaneous commentary recognized this limitation. *See, e.g.*, Fred P. Graham, *Male Lib: No Relief for the Chauvinist Pigs*, N.Y. TIMES, Apr. 9, 1972, at E9.

144. The Court's contemporaneous decision in *Eisenstadt v. Baird*, extending constitutional protection to unmarried individuals and couples who sought access to contraception, seemed to bode well for equal protection challenges to law that discriminated based on marital status, but it, too, had ambiguous ramifications. 405 U.S. 438 (1972) (applying rational basis review under the equal protection clause).

145. Chief Justice Warren E. Burger, Draft Dissent in Stanley v. Illinois 8 (Dec. 2, 1971) (on file with Harry A. Blackmun Papers, *supra* note 76).

146. *Id.*

147. On the questions left open by *Stanley*, see, for example, KENNETH DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION

father against the state; when the interests of mothers, husbands, marital fathers, or adoptive parents weighed in the balance, granting rights to unwed fathers seemed more like a zero-sum game.[148]

II. THE EMERGENCE OF A FEMINIST DILEMMA: PARENTHOOD, (NON)-MARRIAGE, AND THE SEX EQUALITY REVOLUTION, 1972-77

The 1970s were transformative for feminism, family law, and not coincidentally, the rise of conservative movements to reassert traditional values. This Part describes developments in feminist legal advocacy, sex equality law, marriage and divorce, fathers' rights, and anti-feminism that shaped how advocates and legal decision makers viewed nonmarital fatherhood. Feminists agreed that sex neutrality for married parents served the goals of women's equality and liberation from traditional gender roles, and they persuaded the Court to endorse their egalitarian vision of marital parenthood. However, feminists were ambivalent about sex neutrality in nonmarital parenthood, at least where the interests of mothers and fathers diverged.

Second-wave feminist legal advocates set out to transform the traditional marital bargain in which husbands supported wives and children in exchange for wives' caregiving labor and personal services. In the years after *Stanley*, Ginsburg and her allies largely succeeded in persuading the Supreme Court to require governmental neutrality with respect to the gendered division of labor within marital households. Expanding fathers' caregiving roles was a key component of Ginsburg's vision of egalitarian marriage, in which husbands and wives enjoyed the freedom to choose nontraditional roles and to become interdependent, even interchangeable spouses. A less visible and less successful strand of feminist legal advocacy attacked illegitimacy penalties as an affront to sex equality. Fathers played a more complicated role in this strand of advocacy, depending on the context of the rights or benefits fathers claimed as rightfully theirs. Feminism's relationship to the movement for divorced fathers' rights was similarly complex. And increasingly, feminists disagreed among themselves over the meaning of sex equality for nonmarital parenthood.

366-71 (2d ed. 1981); KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW 73 (1982); and David S. Baron, *Constitutional Law—Fourteenth Amendment Equal Protection—Rights of the Unwed Father—Consent to Adoption*, 61 CORNELL L. REV. 312, 316 (1976).

148. *Cf.* Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 846 (1977) (Brennan, J.) (noting the difficulty of finding a constitutionally protected liberty interest for one individual when doing so would "derogat[e] from the substantive liberty of another").

A. *"An Ideal Case": Married Fathers as Equal Parents in* Weinberger v. Wiesenfeld

In the years following *Stanley*, many of feminists' greatest advances toward constitutional sex equality came in cases involving sex-based classifications in the provision of government benefits to married couples. Ginsburg's "grandmother brief" in *Reed v. Reed* contained a now-famous Appendix that listed hundreds of sex-based distinctions in state and federal marriage laws.[149] Many feminist legal advocates saw marriage as a primary vehicle for the perpetuation of sex and gender roles that confined women to a stifling domesticity and deprived them of political and economic power. Marriage also loomed as a central locus of government complicity in sex inequality. Feminists argued that by casting husbands as breadwinners and wives as dependent caregivers, the state devalued women's wage-earning and men's caregiving work, rewarding gendered division of labor in marital households and penalizing couples who failed to conform to traditional gender roles.

Accordingly, many of the cases in the growing constitutional sex equality canon involved married couples or widowers challenging the government's previously unquestioned prerogative to distinguish between husbands and wives for the purposes of awarding government benefits. Ginsburg's litigation campaign convinced a majority of the Court that the government should remain neutral toward gender roles in the marital family. In cases such as *Frontiero v. Richardson* (1973) and *Califano v. Goldfarb* (1977), the Court struck down government benefit schemes that assumed wives' and widows' dependence and deprived the families of women wage-earners of advantages available to their male counterparts.[150] Backed by a robust social movement seeking equality on many fronts, including legislative and constitutional amendment advocacy at the state and federal levels, these cases helped feminists to achieve through litigation what they had originally sought to accomplish through an equal rights amendment.[151]

Feminists' vision of gender-egalitarian marriage extended beyond breadwinning wives; they took care also to spotlight the abilities and importance of fathers as caregivers and nurturers of children. Ginsburg and her colleagues believed that encouraging husbands to take on greater

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149. Brief for Appellant at 69-88, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4). This appendix was cited in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

150. Califano v. Goldfarb, 430 U.S. 199, 217 (1977); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973); *see also* Orr v. Orr, 440 U.S. 268, 282 (1979) (requiring alimony statutes to be sex-neutral).

151. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323-24 (2006).

responsibilities at home was integral to enabling women to pursue rewarding careers without sacrificing family relationships or well-being. Such active fatherhood also benefited men and children, who would enjoy richer relationships liberated from the traditional gender roles that, as Ginsburg often emphasized, limited men as much as women. In Ginsburg's "ideal case,"[152] Stephen Wiesenfeld, widowed by his wife's death in childbirth, challenged his exclusion from Social Security "[m]other's insurance"[153] benefits, which would have allowed a widowed mother to reduce her working hours and receive government support to care for a child at home.

In a rare unanimous decision, the Justices agreed. Justice Brennan's majority opinion, drafted by his first female law clerk, Marsha Berzon, embraced both of Ginsburg's arguments. Men were, to be sure, "more likely than women to be the primary supporters of their spouses and children," Justice Brennan wrote.[154] "But," he continued, "such a gender-based generalization cannot suffice to justify the denigration . . . of women who do work and whose earnings contribute significantly to their families' support."[155] Paula Wiesenfeld, a schoolteacher and, for a time, the family's primary breadwinner, received fewer benefits from her hard-earned wages than a similarly situated man, whose family could have collected "mother's insurance" benefits, would have. Further, the statute discriminated "among surviving children solely on the basis of the sex of the surviving parent."[156] It was "no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female," Justice Brennan continued.[157] "And," he wrote, quoting *Stanley*, "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, (which) undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[158]

Justice Powell's concurring opinion, joined by Chief Justice Burger, agreed that the "statutory scheme . . . impermissibly discriminates against a female wage earner," but attached "less significance" than the majority did to a father's nurturing role.[159] "In light of the long experience to the contrary," Justice Powell wrote, "one may doubt that fathers generally will forgo work and

152. An Open Discussion with Justice Ruth Bader Ginsburg, 36 CONN. L. REV. 1033, 1037 (2004).

153. Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (quoting 42 U.S.C. § 402(g)(1970)).

154. *Id.*

155. *Id.*

156. *Id.* at 651.

157. *Id.* at 652.

158. *Id.* (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

159. *Id.* at 654 (Powell, J., concurring).

remain at home to care for children to the same extent that mothers may make this choice."[160] Privately, Justice Powell disapproved of fathers who would abdicate the breadwinner role. When his clerk, Penny Clark, speculated that fathers who elected to stay home with children would be "a small class, no doubt," Powell wrote in the margin of her memo, "I would hope so – though the ever-increasing welfare rolls even in prosperous times suggest a high level of indolence."[161] *Wiesenfeld* marked a triumph for the feminist vision of egalitarian marriage and shared parenting, even as it exposed continuing ambivalence among the Justices about the proper roles of mothers and fathers.

B. Fiallo v. Bell *and the Feminist Argument for Nonmarital Parents' Rights*

As Ginsburg and her colleagues sought to encourage an egalitarian division of labor at home and in the workplace, another strand of feminist legal advocacy focused on alleviating discrimination against mothers of nonmarital children. Far less coordinated than Ginsburg's litigation strategy, the campaign against illegitimacy penalties enlisted an assortment of self-identified feminist advocates as well as civil rights, anti-poverty, and legal aid lawyers during the 1970s.[162] Feminists argued that laws, policies, and practices that penalized nonmarital childbearing had particularly devastating consequences for women, who, as a matter of law and of custom, had long borne primary if not exclusive responsibility for the care and support of nonmarital children.[163] They attacked laws that excluded illegitimate children from public benefits, from workers' compensation, from recovery for parents' wrongful death, and from paternal child support and inheritance.[164] And they challenged prohibitions on the employment of "unwed mothers," mandatory paternity disclosure requirements that forced mothers to reveal the names of their nonmarital children's fathers, and the exclusion of never-married mothers from the Social Security survivors' benefits the Court had extended to marital fathers in *Wiesenfeld*.[165]

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160. *Id.*

161. Mayeri, *supra* note 18, at 1813 (quoting Memorandum from Julia "Penny" Clark, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. 3 (Jan. 17, 1975) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 168, Case No. 73-1892, http://law2.wlu.edu/deptimages/powell%20archives/73-1892_WeinbergerWeisenfeld.pdf [http://perma.cc/U9YJ-H27Q] [hereinafter Lewis F. Powell, Jr. Papers]).

162. I have explored feminist and other arguments against illegitimacy penalties in depth elsewhere. *See* Mayeri, *supra* note 21.

163. *See id.* at 1319.

164. *See id.* at 1279-80.

165. *See id.* at 1318, 1323.

Nonmarital fathers appeared in various guises in feminist advocacy against illegitimacy penalties. In litigation challenging Texas's exclusion of nonmarital fathers from civil and criminal liability for child nonsupport, these men were deadbeats who, aided and abetted by the state, avoided the pecuniary responsibilities of fatherhood. In other cases, such as employment bans that singled out women with nonmarital children, advocates noted that mothers who embraced the responsibilities of parenthood suffered while fathers who abandoned their families escaped scot-free. Mandatory paternity disclosure cases painted an especially unflattering picture of unwed fathers, with mothers expressing their reluctance to involve fathers who might resent being called to account, and might even resort to violence.

But in most illegitimacy penalty cases, the interests of nonmarital mothers and fathers were not necessarily opposed. Laws that created obstacles to paternal inheritance for illegitimate children thwarted fathers who might have intended to provide for their nonmarital offspring. Excluding illegitimate children from public benefits or private compensation available to legitimate children injured the parent or parents with primary responsibility for those children regardless of sex. Even employment bans that did not directly affect fathers arguably discouraged them from maintaining potentially salutary relationships with their nonmarital children.

Some of the 1970s cases involved illegitimacy and sex-based discrimination that directly disadvantaged nonmarital fathers and, less obviously, harmed mothers. One such lawsuit, *Fiallo v. Bell*, challenged several laws that denied certain citizenship and immigration privileges to nonmarital fathers and their children, but not to nonmarital mothers and their children.[166] Each of the plaintiff families in *Fiallo* included fathers who had supported and nurtured their nonmarital children.[167] Their briefs used *Stanley*, *Wiesenfeld*, and the growing social science literature on fatherhood to extol the virtues of unmarried fathers who defied stereotypes to participate fully in raising their children, only to be unjustly denied the opportunity to transmit or receive citizenship status on the basis of the parent-child relationship.

Fiallo presented a largely foregone opportunity to advance an explicitly feminist argument for nonmarital fathers' rights. Indeed, a footnote in the plaintiffs' brief in *Fiallo* suggested that eliminating the sex-based discrimination in the challenged laws would actually benefit nonmarital mothers.[168] A U.S. citizen who fathered a child by a noncitizen could rest assured that, if he could not care for his illegitimate U.S.-domiciled child, "that

166. 430 U.S. 787 (1977).

167. *Id.*

168. *See* Brief for Appellants at 24 n.17, *Fiallo*, 430 U.S. 787 (No. 75-6297).

child can be united in this country with the other parent, the mother."[169] But a U.S. citizen mother in the same circumstance "has no similar assurance . . . since the father is effectively barred from entering this country."[170] Just as Paula Wiesenfeld's Social Security benefits were worth less to her family than a husband's would have been, so a mother's U.S. citizenship did not guarantee her and her children the care of their "sole surviving parent."[171] Ginsburg wanted to file an amicus brief in *Fiallo*, presumably in order to make just such an argument, but despite the support of several colleagues, ACLU Legal Director Mel Wulf rejected the idea for reasons that are not clear.[172]

Some jurists did see the challenged distinctions between fathers and mothers in *Fiallo* as constitutionally problematic because of their harm to fathers and nonmarital children, as opposed to mothers. Judge Weinstein dissented from the three-judge district court ruling upholding the laws, and Powell's clerk J. Philip Jordan initially called the laws "totally arbitrary sex discrimination," before concluding that Congress's plenary immigration power nonetheless counseled against striking them down.[173] Powell ultimately wrote the majority opinion upholding the provisions. His clerk Gene Comey recommended that Powell avoid endorsing the government's contention that "natural fathers and illegitimate children" were less likely to have a "strong interest in intimacy" than other parents and children.[174] Comey saw "no reason to rely on this somewhat 'distasteful' argument," which contravened the Court's recent shift toward "a position where legitimate and illegitimate families are generally considered to have a strong degree of family intimacy and unity."[175] Justice Powell rejected Comey's advice, referring in his opinion to "a

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169. *Id.* The footnote continued by noting that a citizen or permanent resident mother "could not be assured that upon her death her children would be supported and cared for in this country." *Id.*

170. *Id.*

171. *Id.* at 35. The brief also cited *Wiesenfeld* throughout. *See, e.g.*, *id.* at 20, 23, 25.

172. For more, see Mayeri, *supra* note 21, at 1329-30, 1329 n.328.

173. *See id.* at 1328, 1330 & n.330 (quoting Preliminary Memorandum to Justice Powell 1 (May 10, 1976) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 186, Case No. 75-6297, http://law2.wlu.edu/deptimages/powell%20archives/FialloBell.pdf [http://perma.cc/F3NH-WRWY])); *see also* Kristin A. Collins, *Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws*, *in* THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL (Kim Rubenstein & Katharine G. Young eds., forthcoming 2016) (describing interbranch dialogue about *Fiallo* and the plenary power doctrine).

174. Memorandum from Gene Comey, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. 4 (Dec. 6, 1976) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 186, Case No. 75-6297, http://law2.wlu.edu/deptimages/powell%20archives/FialloBell.pdf [http://perma.cc/F3NH-WRWY]).

175. *Id.*

perceived absence in most cases of close family ties" between fathers and their nonmarital children as a legitimate rationale.[176] Justice Marshall's dissent in *Fiallo* condemned the challenged provisions, citing the sex equality cases, the illegitimacy cases, and the "fundamental 'freedom of personal choice in matters of marriage and family life.'"[177] He saw the majority's position as sanctioning "invidious discrimination" against nonmarital fathers and children, contrary to precedents such as *Stanley* and *Wiesenfeld*.[178]

In cases such as *Stanley*, *Wiesenfeld*, and *Fiallo*, fathers' constitutional claims dovetailed with feminists' desire to encourage paternal caregiving and to combat sex-stereotypes about maternal superiority that threatened women's status as full citizens. In these cases, the interests of mothers and fathers, married or not, coincided: fathers' rights served mothers' rights. In the increasingly contentious arena of divorce reform and child custody, however, the story was quite different.

C. *"The Cart Before the Horse": Divorce, Fathers' Rights, and the New Nonmarital Bargain*

Although unmarried fathers did not organize in large numbers during the 1970s, divorced fathers did. Legal historian Deborah Dinner has uncovered a robust and influential mobilization of fathers' rights activists intent on shaping a new "divorce bargain" in the wake of the no-fault revolution.[179] As Dinner describes, rising divorce rates and feminist self-assertion threatened the patriarchal ideal to which many fathers' rights leaders subscribed.[180] At the same time, economic recession, wage stagnation, and rising unemployment combined with increasingly vigorous child support enforcement efforts to put financial pressure on divorced fathers.[181] Fathers' rights activists capitalized on the rise of formal sex equality to argue for their own brand of gender neutrality at divorce. Divorced fathers sought to minimize their financial obligations to ex-wives and children, arguing that sex equality meant women should support themselves post-divorce.[182] Ex-wives, they argued, had no claim on their former spouses' income since they were no longer providing the homemaking

176. *Fiallo*, 430 U.S. at 799.

177. *Id.* at 810, 813-16 (Marshall, J., dissenting) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

178. *Id.* at 810.

179. *See* Dinner, *supra* note 17.

180. *See id.* at 93-94.

181. *See id.* at 105, 112.

182. *See id.* at 110-11.

services that underpinned the marital bargain. Moreover, fathers' rights advocates challenged maternal preferences in child custody as unjust sex discrimination that deprived fathers of cherished relationships with children.[183] Many feminists, too, scorned the maternal preference, but for very different reasons. As Dinner recounts, "[f]eminists argued that the [maternal] presumption entrenched gender ideologies that maintained mothers' primary responsibility for caregiving."[184]

Since at least the late 1960s, some feminists had expressed misgivings about the no-fault revolution's consequences for women and children. Fault-based divorce, they believed, gave wives a valuable bargaining chip: the ability to withhold consent if their husbands did not agree to fair financial and custody arrangements. Easier divorce, they worried, would not liberate women so long as courts did not ascribe value to wives' homemaking and caregiving labor when distributing property and fashioning alimony awards. Instead, men would be free to discard their wives, abandon their children, and start life anew while newly single mothers with few marketable job skills languished in poverty. The decline of the maternal presumption in child custody decision making also seemed to undermine women's bargaining position. Whereas maternal preferences placed the onus on fathers who genuinely desired custody, the "best interests of the child" standard apparently penalized the parent who most feared losing custody, pressuring her to trade away financial support in exchange for uncontested custody rights.[185]

Anti-feminist activism also pushed more feminists to address the plight of women who had devoted their lives to homemaking and motherhood, only to find themselves in dire economic straits when their marriages ended. Phyllis Schlafly's campaign against the ERA excoriated the amendment's proponents for abandoning homemakers to the penury of divorce on demand, which, in the colorful rhetoric of opponents, allowed husbands to abandon their wives and children with impunity.[186] Schlafly's core constituency included women who had counted on the traditional marital bargain, only to feel that feminists had pulled the rug out from under them. ERA opponents argued that egalitarian marriage threatened financial and existential insecurity for women who had already chosen to specialize in caregiving. As the ERA ratification battle wore on, proponents increasingly emphasized how fragile the traditional

183. *See id.* at 113-16.

184. *Id.* at 114.

185. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 979 (1979).

186. *See* Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 275-81 (2013).

marital bargain had been under the old regime of title-based property distribution and unpredictable alimony awards. They framed the ERA as a tool for equalizing the financial consequences of divorce by valuing homemakers' contributions to the marital household and enforcing divorced fathers' child support obligations.[187]

By the mid- to late- 1970s, some had begun to question whether feminists had put the cart before the horse, as ACLU Juvenile Rights Project director and self-described feminist Rena Uviller suggested. "If sex-neutral custody laws presently either reflected a reality of pervasive shared child care during marriage or helped eliminate persistent sexual stereotyping in the job market, they would be a legitimate feminist objective," wrote Uviller.[188] But the economic and social reality of the late 1970s and early 1980s was no egalitarian utopia. "The practical fact remains that the male-dominated working world is not yet prepared to receive women on equal terms. Nor are fathers in meaningful numbers assuming equal child care responsibilities during marriage."[189] Fathers' rights organizations might couch their arguments in terms of sex neutrality and children's best interests, but Uviller detected "misogynist[ic] overtones" in their "excoriat[ion]" of wives as "blood-sucking parasites" and alimony as "an undiluted evil."[190] In light of severe and persistent inequalities in the workplace and at home, maintaining the maternal presumption was more like affirmative action than invidious discrimination. "[A]t this point in history," Uviller concluded, "the law should recognize a woman's option to keep the children whose daily care she has so disproportionately assumed."[191]

Rising divorce rates converged with nonmarital childbearing to increase the number and visibility of single mothers and female-headed households in the 1970s, plunging even formerly middle-class women and children into poverty. Some feminists argued that for many poor women shared parenting was a pipe dream. "[T]he vast majority of mothers below the poverty line are single: either never married, separated, or divorced," Uviller wrote in 1978. "For them, the notion of shared child care . . . is sheer abstraction."[192] Others doubted that paternal involvement in nonmarital families would benefit mothers, and resented the state's attempts to privatize dependence by forcing mothers either

187. *Id.*

188. Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 117 (1978).

189. *Id.*

190. *Id.* at 116.

191. *Id.* at 130.

192. *Id.* at 119.

to identify their children's fathers and seek child support from them, or to lose public assistance. Feminists such as Aleta Wallach and Patricia Tenoso challenged the premise that women and children should be dependent upon men for sustenance, insisting that mothers should be "treat[ed] . . . as an economic resource."[193] The focus on ascertaining paternity obscured alternatives, such as "adequate governmental support of all unmarried mothers and their children."[194] Increasingly aggressive measures to secure child support for poor children reduced welfare expenditures but provided paltry financial benefit to mothers. For mothers, the old nonmarital bargain of full parental rights in exchange for sole responsibility was eroding, and some feared that any expansion of nonmarital fathers' rights would come at their expense.

In the context of marriage and divorce, feminists largely agreed on the end goal: to promote gender-egalitarian marriages and fairness at divorce. Their internal disagreement mostly concerned means: how best to achieve the legal and social changes required to transform the gendered division of family labor so that women and men alike could participate fully in breadwinning and caregiving. Feminists' disagreement about unmarried parenthood arguably ran deeper, and the feminist objective was less clear where a mother and father never consented to a legal bond with one another. Should the law encourage paternal involvement in nonmarital child rearing, or merely financial responsibility? Was unmarried mothers' primary responsibility for the care of their children inevitable, or malleable? What role should individual mothers' preferences about paternal involvement play in decisions about a father's rights and responsibilities? Was adoption by a two-parent family, if desired by the mother, a better outcome than giving custody to an unmarried father over the mother's objection? And to what degree should mothers be able to rely on the state for support in the absence of paternal involvement? By the mid- to late-1970s, internal feminist dissension over strategies and priorities in the fight for family equality had just begun to surface in public discourse; these disputes influenced litigation strategy in unwed fathers' cases in ways that would only later become visible.

193. Patricia Tenoso & Aleta Wallach, Book Review, 19 UCLA L. REV. 845, 850 (1972) (reviewing HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971)).

194. *Id.*

III. UNMARRIED FATHERS VS. HUSBANDS IN THE SUPREME COURT, 1978-79

Stanley v. Illinois raised serious questions for established adoption law and practice.[195] Most states had long allowed adoption of illegitimate children without notice to the natural father, and some read *Stanley*'s infamous footnote nine to require a dramatic expansion of unmarried fathers' procedural rights.[196] States scrambled to comply, implementing a patchwork of requirements reflecting the idiosyncratic regulation of parental rights generally. Almost half the states enacted statutes requiring notice only to fathers who were "either known, identified by the mother or ha[d] acknowledged the child."[197] A few states removed formal distinctions between legitimate and illegitimate children for adoption purposes, but in practice procedures developed to bypass paternal consent. In California, for example, a biological father could not object to an adoption if he did not "receive the child into his home and openly hold out the child as his natural child."[198] Adoption expert Ruth-Arlene Howe wrote that despite the initial panic and temporary halt in adoptions post-*Stanley*, by the end of the decade "the vast majority of states" placed on the unmarried father "the burden . . . to affirmatively assert his paternal interests in the child" to earn the right to notice and a hearing.[199] Still, *Stanley* broke ground by giving many unmarried fathers the opportunity to have a say in their children's future.

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195. Adding to observers' sense that a sea change might be at hand, the Court remanded *Rothstein v. Lutheran Social Services*, a case involving an unwed father's opposition to the adoption of his biological child, for reconsideration in light of *Stanley*. 405 U.S. 1051 (1972). For a contemporaneous journalistic assessment, see, for example, Terry P. Brown, *Fathers' Rights: Supreme Court Rulings on Adoption Complicate the Placing of Children*, WALL STREET J., July 9, 1973, at 1.

196. Stanley v. Illinois, 405 U.S. 645, 657 n.9 (1972) ("We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal.").

197. Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 186 (1983).

198. *Id.* at 187 (quoting CAL. CIV. CODE § 7004(a) (West 1975)); *see also* Lynn Lilliston, *Bill Spells Out Unwed Fathers' Rights*, L.A. TIMES, July 8, 1974, at E1 (describing the California legislative debate). Notably, the influential Uniform Parentage Act of 1973 recommended equal status for the parents of marital and nonmarital children, but as Leslie Harris notes, "This equality principle does not dictate a basis for assigning legal parentage status." Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 618 (2009).

199. Howe, *supra* note 197, at 187.

The prospect of enhanced rights for unmarried fathers troubled many observers. If unwed fathers, like their married or divorced counterparts, were entitled to object to their children's adoption, then the difficulty of identifying and locating them might derail the adoption process, consigning nonmarital children not only to the stigma of illegitimacy but to the poverty and instability of life in the care of a reluctant mother or a foster home. This genuine concern for the welfare of illegitimate children also reflected the widely held assumption that adoption into a two-parent marital family was the best alternative for a child born "out of wedlock," assuming her parents were unable or unwilling to marry each other. As the New York Court of Appeals put it in 1975, giving nonmarital fathers the right to veto an adoption meant that "the chances that such a child will have the equal rights and benefits of a home will be immeasurably diminished and the likelihood that he or she will be a pawn for the avaricious and embittered will be greatly enhanced."[200]

The third-best option for nonmarital children, according to the conventional wisdom, was for their mother to marry another man willing to adopt them, thereby legitimating the children, offering them a "normal" family life, and uniting the family under a single surname. The Supreme Court tackled stepfather adoption in two cases decided at the end of the 1970s. Unlike *Stanley*, *Wiesenfeld*, and *Fiallo*, where mothers' and fathers' interests aligned, these cases involved disputes between mothers and fathers, implicating the growing tensions among feminists over the meaning of sex equality for nonmarital parenthood.

A. Not a "De Facto Divorced Father": Rejecting Marital Status Equality in Quilloin v. Walcott *(1978)*

In *Quilloin v. Walcott*, Leon Quilloin sought to prevent the adoption of his eleven-year-old son Darrell by Randall Walcott, Darrell's mother's husband.[201] Quilloin's paternity was not in question, and the court gave Quilloin, unlike Peter Stanley, an opportunity to be heard regarding his request for "partial custody, in the form of visitation privileges."[202]

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200. *In re* Malpica-Orsini, 331 N.E.2d 486, 491-92 (N.Y. 1975).

201. Walcott's petition for adoption, filed in March 1976, averred, "It is not necessary to attach the consent of the father Leon Quilloin to the adoption . . . because he and the mother were not married at the time of the child's birth." Petition for Adoption, *In re* Walcott, No. 8466 (Ga. Sup. Ct. Mar. 24, 1976), *in* Appendix at 3, 4, Quilloin v. Walcott, 434 U.S. 246 (1978) (No. 76-6372) [hereinafter *Quilloin* Appendix].

202. Writ of Habeas Corpus Establishing Visitation Rights to Minor Child, Quilloin v. Walcott, No. C-18672 (Ga. Sup. Ct. May 11, 1976), *in Quilloin* Appendix, *supra* note 201, at 10, 10. Quilloin simultaneously petitioned to legitimate Darrell. *See* Petition for Legitimation,

A hearing revealed that Darrell's mother, Ardell, gave birth to him prematurely on Christmas Day in 1964.[203] He had lived for the first year of his life with his mother and maternal grandmother, and then for four years in Savannah, while his mother worked in New York.[204] Quilloin testified that he had provided some financial support when Darrell was a baby, including paying for surgery to repair a hernia, and that when Darrell had lived in Savannah, the child spent about sixty percent of his time with Quilloin and Quilloin's mother, Mabel Dawson,[205] and the remainder with Ardell's mother, Willie Mae Smith.[206] Quilloin had purchased milk and clothing for Darrell, and had arranged for him to start kindergarten early at the local Catholic school.[207] Quilloin recounted building a soundproof nursery in the Savannah nightclub he managed so that his son could spend time with him at work, and arranging for his employees to drive Darrell to and from school.[208] Dawson testified that the two grandmothers cooperated with Darrell's parents to take care of his needs, and that Quilloin had furnished financial support by purchasing necessities or providing funds.[209]

In 1969, five-year-old Darrell joined Ardell in New York, where she had a new husband and a baby son.[210] In the two and a half years before the adoption hearing, Quilloin had visited Darrell in New York after a period in which the Walcotts "disappeared," and he had paid for transportation by bus and airplane so that Darrell could visit him in Georgia.[211] There was some dispute over the length and frequency of these visits, but all agreed that Quilloin had given Darrell a number of gifts, which his mother felt were "disruptive" to family harmony. Quilloin contended that he had always offered financial support for Darrell and had provided basic necessities for him when Darrell

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Quilloin v. Walcott, No. C-18673 (Ga. Sup. Ct. July 12, 1976), *in Quilloin* Appendix, *supra* note 201, at 12, 12.

203. Transcript of Hearing, Quilloin v. Walcott, No. C-18673 (Ga. Sup. Ct. July 12, 1976), *in Quilloin* Appendix, *supra* note 201, at 20, 44, 51.

204. *Id.* at 45.

205. Ms. Dawson apparently was active in Savannah's African-American community, including in voter registration drives. *Id.* at 55. At the hearing, she refuted testimony suggesting that she was too "sickly" to have cared for Darrell when he lived in Savannah. *Id.* at 61.

206. *Id.* at 45.

207. *Id.* at 44-47.

208. *Id.* at 45.

209. *Id.* at 44-47. "On both sides the family has always been agreeable, you know," Dawson testified. *Id.* at 60. Ardell sent part of her salary to her mother each week during this period, and visited Darrell when she could. *Id.* at 24, 26.

210. *Id.* at 48, 71.

211. *Id.* at 27, 49-50.

lived in Savannah.[212] Quilloin "honestly believe[d] that [Darrell's] rightful place is with his mother," and sought only visitation.[213] "I was brought up without a father," Quilloin recalled:

> [M]aybe if I had a father, you know, I [would have gone] on and finished school. . . . I'm not married, so . . . with me, he's in a broken home more or less. I don't have no objection to her keeping him. It's just a matter of, it's a little bond between the kid and myself seldom as it's been.[214]

Quilloin did not seek full equality with Darrell's mother; he simply wished to be treated, as his lawyer put it, like a "de facto divorced father."[215]

The facts on Quilloin's side were arguably stronger than the courts acknowledged: although Darrell's parents had never lived together with him, Quilloin had spent significant time with his son.[216] Darrell himself expressed a desire to continue seeing Quilloin, *and* to be adopted by Walcott; in a poignant exchange at the hearing, he seemed not to understand that the two might be mutually exclusive.[217] Fulton County Superior Court Judge Elmo Holt acknowledged Darrell's wishes, but ruled that Walcott's adoption, not Quilloin's legitimation and visitation, was in the child's best interest.[218] Quilloin argued unsuccessfully to the Georgia Supreme Court[219] that the state law, which considered the mother of an unlegitimated nonmarital child[220] to be

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212. *Id.* at 51-54.

213. *Id.* at 57.

214. *Id.*

215. Brief for the Appellant at 17, Quilloin v. Walcott, 434 U.S. 246 (1978) (No. 76-6372).

216. Quilloin made an effort to visit Darrell, sometimes against Ardell's wishes but apparently with her mother's cooperation. *See Quilloin* Appendix, *supra* note 201, at 49-52.

217. *See id.* at 67-69. Quilloin's lawyer tried to ask whether Darrell understood "that in the event that the Court were to approve the adoption that you might never be able to see Mr. Quilloin again?" *Id.* at 69. But the Walcotts' attorney and the judge did not allow the question. *Id.*

218. *In re* Application of Randall Walcott for Adoption of Child, *in Quilloin* Appendix, *supra* note 201, at 70-72. Incongruously, Georgia amended its law to allow putative fathers to petition for legitimacy after an adoption proceeding was underway, but too late for Leon Quilloin. *See* Philip Hager, *High Court Clarifies Rights of Parents*, L.A. TIMES, Jan. 11, 1978, at B10.

219. Quilloin v. Walcott, 232 S.E.2d 246, 248 (1977). In a case where the biological father had "[taken] no steps to legitimate the child or support him," *Stanley* simply did not apply. *Id.*

220. Under Georgia law, courts applied the best-interests standard to petitions for legitimation, which had to occur prior to a mother's surrender of her child for adoption. *See* Memorandum from S. Elizabeth Gibson, Clerk, U.S. Supreme Court, to Justice Byron R. White 3 (Nov. 10, 1977) (on file with Byron R. White Papers, *supra* note 122, at Box 424, Folder 5).

"the only recognized parent," and entitled her to consent unilaterally to the child's adoption—violated his constitutional rights to due process and equal protection.[221]

Whereas adoption advocates worried that *Stanley* would destabilize the adoption process, civil libertarians lamented the trend toward terminating the parental rights of impoverished parents and relegating their children to adoption by more affluent parents or, worse yet, to the foster care system. In the mid-1970s, the devastating effects of child removal on Native American communities prompted the passage of the Indian Child Welfare Act. ACLU Juvenile Rights Project director Rena Uviller testified before Congress in 1977 about the "tyranny of social work in which poor families are often subjected to the imposition of standards upon them in the rearing of their children which are wholly inappropriate, to say nothing of their questionable constitutionality."[222] Yet feminists like Uviller also worried that equal rights for nonmarital fathers would undermine the autonomy of women who had borne primary or exclusive responsibility for their children.[223]

The tension between these two imperatives—limiting government incursions into the lives of poor families and fighting against women's subordination—came to a head when *Quilloin* reached the Court.[224] ACLU leadership initially voted to file an amicus brief supporting Leon Quilloin, but Uviller wrote to Legal Director Bruce Ennis of dissension among the national office's legal staffers. Siding with the unmarried father was "consistent" with the ACLU's position on sex-based classifications, "seemingly consistent" with the ACLU's position on illegitimacy-based classifications, and in keeping with the view that child-parent relationships "should not be permanently severed

221. Leon Webster Quilloin's Second Amendment to Consolidated Actions, *in Quilloin* Appendix, *supra* note 201, at 16-18. Quilloin's lawyer cited *Stanley* for the proposition that Quilloin's demonstrated interest in Darrell entitled him to the same rights as if he had been married to his son's mother. Transcript of Hearing, *in Quilloin* Appendix, *supra* note 201, at 33. The judge replied, "As I understand that case, what that case says . . . is that the father has a right to be heard. . . . And that is the purpose for this hearing right now." *Id.* at 34.

222. *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the U.S. S. Select Comm. on Indian Affairs*, 95th Cong. 184 (1977) (statement of Rena Uviller, Director, Juvenile Rights Project, American Civil Liberties Union).

223. *See supra* text accompanying notes 188-192.

224. In contrast to other prominent cases involving the rights of nonmarital fathers such as *Stanley*, *Caban v. Mohammed*, *Lehr v. Robertson*, and *Michael H. v. Gerald D.*, *Quilloin* stood out for its lack of amicus participation at the merits stage. *Compare* Michael H. v. Gerald D., 491 U.S. 110 (1989) (two amici), Lehr v. Robertson, 463 U.S. 248 (1983) (two amici), Caban v. Mohammed, 441 U.S. 380 (1979) (four amici), *and* Stanley v. Illinois, 405 U.S. 654 (1972) (two amici), *with* Quilloin v. Walcott, 434 U.S. 246 (1978) (zero amici).

for reasons less serious than abandonment or child neglect."[225] But a majority of the national office legal staff "believe[d] there [were] serious feminist considerations against participating in this case":

> There is concern that we ought not be arguing that adoption decisions of unmarried mothers who have borne sole responsibility for their children be subject to the veto of men who have not assumed any meaningful responsibility. Notwithstanding the rhetoric of equality, the only real advantage that women have in this society is their children and even this advantage was a hard-won feminist battle of the 19th century, since fathers had sole right to custody of their [marital] children until that time.[226]

Further, taking Quilloin's side "could seriously harm the credibility of ACLU with the feminist movement." Moreover, "it could help solidify the opposition of traditional housewives to women's rights, and give them the feeling that "women's lib" is for professional women and against traditional women . . . thus further eroding chances of [the ERA's] ratification."[227]

Ennis was torn. He believed the "civil liberties argument" on behalf of Quilloin was "extremely strong," and that "giving fathers greater control over the adoption and placement of their children (both legitimate and illegitimate) may in fact liberate women." Ennis reasoned: "To the extent that men accept, or are forced to accept, increased responsibility for their children . . . women will be freer to pursue other roles."[228] But he also credited the argument that "as a practical matter, because of pervasive discrimination against women, true

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225. Memorandum from Rena Uviller, Dir., Juvenile Rights Project, ACLU, to Bruce Ennis, Nat'l Legal Dir., ACLU 1-2 (July 7, 1977) (on file with Princeton University, Mudd Manuscript Library, ACLU Records [hereinafter ACLU Records], Box 2881, Folder (unnumbered), "Quilloin v. Walcott (unwed father)").

226. *Id.*

227. *Id.*; *cf. supra* note 188 and accompanying text (questioning the wisdom of seeking equal custody rights for divorced fathers before the actual distribution of parenting responsibilities had caught up with the feminist egalitarian ideal). Uviller continued:

> I find the feminist implications compelling, particularly when I consider that a reversal could give an unmarried father who has had virtually no contact with either the child or the mother, and who is not seeking custody for himself, at least a veto over the mother's (and the child's) future.

Id. The Women's Rights Project's Kathleen Peratis dissented from this position, suggesting that the ACLU file a narrowly written amicus brief supporting Quilloin. *See* Memorandum from Bruce J. Ennis, Nat'l Legal Dir., ACLU, to General Counsel Mailing List 1 (July 6, 1977) (on file with ACLU Records, *supra* note 225, Box 2881, Folder (unnumbered), "Quilloin v. Walcott, 1977)" [hereinafter July 6 Memorandum from Bruce J. Ennis].

228. *Id.* at 3.

equality is not possible at the present time, and theoretical equality between men and women . . . will in fact disadvantage women."[229] Ultimately, the "social and political consequences for women" of a victory for Quilloin were "extremely difficult to predict" and this, combined with internal dissension, counseled against the ACLU's participation.[230]

It is impossible to say whether Quilloin's claims would have fared better with the ACLU's support. Quilloin did earn some sympathy from the Justices' clerks. Powell clerk Jim Alt thought it "irrational to give the divorced father a voice in the adoption decision, but not the father who never married."[231] Georgia allowed nonmarital fathers to legitimate their children unilaterally,[232] but, as Alt wrote, Quilloin "had no reason to go to court when, in practice, his relationship with his son was satisfactory."[233] Alt thought the Georgia Supreme Court's equal protection ruling "extremely questionable." He noted that "[a]ll of the same state policies could be served and the rigid mother/father distinction eliminated" if the state adopted a gender-neutral system "wherein the control over consent to adoption of an illegitimate rests with the parent 'providing for the wants of the child.'"[234]

Nevertheless, Powell alone tentatively voted to reverse the lower court's opinion upholding the statute.[235] At oral argument, the Justices expressed skepticism about Quilloin's commitment to fatherhood. They repeatedly noted the trial court's factual finding that Quilloin had neither provided consistent

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229. July 6 Memorandum from Bruce J. Ennis, *supra* note 227, at 2.

230. *Id.* at 3.

231. Memorandum from Jim Alt, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. 10 (Nov. 7, 1977) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 196, Case No. 76-6372, http://law2.wlu.edu/deptimages/powell%20archives/QuilloinWalcott.pdf [http://perma.cc/5P6G-L6X7]).

232. *See* Parham v. Hughes, 441 U.S. 347, 355 (1979) ("[I]n Georgia only a father can by unilateral action legitimate an illegitimate child.").

233. Memorandum from Jim Alt, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. 10 (Nov. 7, 1977) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 196, Case No. 76-6372, http://law2.wlu.edu/deptimages/powell%20archives/QuilloinWalcott.pdf [http://perma.cc/5P6G-L6X7]).

234. *Id.* at 6.

235. Powell was not impressed with Quilloin's facts, calling them "wholly unmeritorious," and looking askance at the fact that "appellant is in the whiskey business and operates a nightclub," and "when the child visited him he was kept in the nightclub." Memorandum from Lewis F. Powell, Jr. 3-4 (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 196, Case No. 76-6372, http://law2.wlu.edu/deptimages/powell%20archives/QuilloinWalcott.pdf [http://perma.cc/5P6G-L6X7]). He noted that he wished the Court could dismiss the case as improvidently granted, but it could not, since it was an appeal. *See id.* at 1.

financial support for Darrell nor taken the relatively simple step of filing a legitimation petition.[236] Marshall's narrowly written draft opinion won over the previously sympathetic Powell, as well as Blackmun.[237]

In the end, the unanimous decision upheld the Georgia adoption statute as applied to Quilloin, leaving open the possibility of future challenges.[238] But the opinion dealt a blow to the argument that equal protection required similar treatment for marital and nonmarital fathers. Although Quilloin had, under Georgia law, substantially the same support obligation as a separated or divorced father, Marshall wrote, "he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[239] By contrast, "legal custody of children" was "a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage."[240] The state "was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child."[241] Marshall, who had been incredulous that Stanley's lack of a marriage certificate could

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236. *See* Oral Argument at 11:15, Quilloin v. Walcott, 434 U.S. 246 (1978) (No. 76-6372) http://www.oyez.org/cases/1977/76-6372 [http://perma.cc/2JLE-JRQ5].

237. Powell's clerk Jim Alt apologized to Powell after Marshall circulated his opinion:

> To the extent that you were left out on a limb because of my doubts (yours was the only vote at Conference to reverse), I apologize. If the result on the facts of this case seems correct to you—as it does to me—I think you could consider joining the majority.

Memorandum from Jim Alt, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. (Dec. 13, 1977) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 196, Case No. 76-6372, http://law2.wlu.edu/deptimages/powell%20archives/QuilloinWalcott.pdf [http://perma.cc/5P6G-L6X7]). Powell wrote to Marshall the next day: "Although I voted tentatively to reverse on equal protection grounds, you have written the opinion so skillfully (and narrowly) on an 'as applied' basis that I am happy to join you." Letter from Justice Lewis F. Powell, Jr. to Justice Thurgood Marshall (Dec. 14, 1977) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 196, Case No. 76-6372, http://law2.wlu.edu/deptimages/powell%20archives/QuilloinWalcott.pdf [http://perma.cc/5P6G-L6X7]). Justice Blackmun wrote on Justice Marshall's second draft: "narrowly & carefully drawn opinion. Ok to join." *See* Justice Harry A. Blackmun, Handwritten Notes on Second Draft in Quilloin v. Walcott (Dec. 16, 1977) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 270, Case No. 76-6372).

238. *Quilloin*, 434 U.S. at 256 ("[W]e conclude that §§ 74-203 and 74-403(3), as applied in this case, did not deprive appellant of his asserted rights under the Due Process and Equal Protection Clauses.").

239. *Id.*

240. *Id.*

241. *Id.*

nullify his parental rights, now allowed the termination of Quilloin's: whether Darrell would ever again see the man he had known as his father for eleven years would be at the Walcotts' discretion. The *Quilloin* Court did not, however, pass judgment on the sex-based distinction embedded in Georgia's statute, which allowed unmarried mothers but not fathers to veto an adoption.[242] The sex discrimination question soon returned to the Court in the second stepfather adoption case, *Caban v. Mohammed.*

B. "Shared By Both Genders Alike": A Qualified Triumph for Sex Neutrality in Caban v. Mohammed *(1979)*

Abdiel Caban, unlike Leon Quilloin, had lived with his two children and their mother, Maria, for several years, and had since married another woman, Nina.[243] Even so, the New York Surrogate's Court interpreted state law to provide that Caban could prevent Maria's new husband, Kazim Mohammed, from adopting the children only if he could demonstrate that remaining with the Mohammeds was not in the children's best interests.[244] Caban challenged this application of the best-interests standard, arguing that it unconstitutionally elevated mothers' rights above those of equally caring nonmarital fathers and violated his due process rights.[245]

Caban had stronger facts than Quilloin, and his case attracted amicus support from the ACLU,[246] the Legal Aid Society,[247] and Community Action

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242. The question was not raised in Quilloin's Jurisdictional Statement. After reading Alt's bench memo, Powell noted his view that "it makes no sense to give either parent a veto over adoption. All that D/P requires is full opportunity to be heard. But there is [] E/P issue." Justice Lewis F. Powell, Jr., Handwritten Annotations on Memorandum from Jim Alt, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. (Nov. 10, 1977) (emphases omitted) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 196, Case No. 76-6372, http://law2.wlu.edu/deptimages/powell%20archives/QuilloinWalcott.pdf [http://perma.cc/5P6G-L6X7]). There was, as Blackmun clerk William Block wrote, "a square conflict [among courts] over whether the father of an illegitimate is entitled to the same parental rights as the mother of the illegitimate." Memorandum from William H. Block, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun 5 (Apr. 15, 1977) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 270, Case No. 76-6372).

243. Caban v. Mohammed, 441 U.S. 380, 382-83 (1979).

244. *Id.* at 387-88.

245. *Id.* at 385.

246. Brief for American Civil Liberties Union as Amicus Curiae Supporting Appellant, *Caban*, 441 U.S. 380 (No. 77-6431).

247. Brief for Legal Aid Society of New York City as Amicus Curiae Supporting Appellant, *Caban*, 441 U.S. 380 (No. 77-6431).

for Legal Services (CALS).[248] At the ACLU, Ennis noted that while the organization had "not been overly anxious to speak on this subject" in the past (clearly a reference to *Quilloin*), *Caban* "contains ideal facts," in that the "father has had a significant relationship with his children."[249] Whereas *Quilloin* posed a dilemma for feminists like Uviller, *Caban* provided an "excellent opportunity"[250] to combat the "alarming trend" toward removing children from their parents in the name of children's "best interests,"[251] in an amicus brief Uviller co-authored with parental rights advocate Martin Guggenheim.[252]

Profound changes in marriage patterns and gender roles undermined marital-status- and sex-based distinctions in the law of parenthood, the amici argued. Their briefs questioned the premise underlying New York's and many other states' statutory schemes: that adoption, when it entailed termination of a parent's rights, was presumptively in the best interests of illegitimate children. The "cruel and undeserved out of wedlock stigma" was largely "a thing of the past," as the CALS brief put it[253]: "Not only has cohabitation without marriage become more respectable, but the high divorce and remarriage rates mean that there are many children whose last name may be different from that of their remarried mother."[254] Further, the two-parent marital family so prized by advocates of stepfather adoption might be just as short-lived as the nonmarital relationship that produced the child. Conversely, as the ACLU noted, "unmarried fathers may also get married and thus be able

248. Brief for Community Action for Legal Services as Amicus Curiae Supporting Appellant, *Caban*, 441 U.S. 380 (No. 77-6431).

249. Memorandum from Bruce J. Ennis, ACLU Juvenile Rights Project, to General Counsel Mailing List 3 (June 5, 1978) (ACLU Records, *supra* note 225, at Box 2788, Folder (unnumbered), "Caban v. Mohammed (father's rights), 1978").

250. *Id.* The ACLU's "most important goal," Ennis wrote, was "preserving the integrity of the family." *Id.*

251. Memorandum from Albert G. Lauber, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun (Oct. 26, 1978) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 290, Case No. 77-6431).

252. To Uviller, the best-interests standard, of questionable value in the custody context, was often devastating when the possible termination of parental rights was at stake. *See* Uviller, *supra* note 188. Martin Guggenheim later authored an important critique of the implications of prioritizing children's "best interests" over the interests of their parents. *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2007).

253. Brief for Community Action for Legal Services as Amicus Curiae, *supra* note 252, at 32.

254. *Id.*

to supply a 'normal' home for the children."[255] Indeed, Caban had done just that.[256]

Amici elaborated on the anti-sex-stereotyping arguments made in *Stanley* and *Fiallo*, citing social science literature to support their contention that many unmarried fathers played active and crucial roles in their children's lives, while many divorced and separated fathers did not. After decisions such as *Weinberger v. Wiesenfeld*[257] had condemned sex stereotypes, it was no longer permissible to generalize about unmarried fathers' irresponsibility and dissolute character, amici contended. The briefs also emphasized that in other areas of family law, sex-based discrimination between fathers and mothers had receded.[258] In 1973, for instance, a New York Family Court judge jettisoned the tender years presumption favoring maternal custody for young children as unconstitutionally "based on outdated social stereotypes" and a "traditional and romantic view" of "mother love."[259]

Caban and his amici also made substantive due process arguments. The Legal Aid Society brief declared that

> [t]he gravity of the deprivation and emotional turmoil imposed upon Mr. Caban himself cannot be overestimated. Despite the fact that he has shouldered far greater responsibilities for the care and supervision of his children than have many married, separated or divorced fathers, his familial bonds were afforded only the most cursory recognition in the adoption proceedings.[260]

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255. Brief for the American Civil Liberties Union as Amicus Curiae, *supra* note 246, at 14.

256. Some scholars have suggested that outcomes in the unwed fathers cases can best be explained by an emphasis on the nonmarital father's relationship with the mother, and by a preference for fathers who have acted like husbands, rather than by the strength of the father-child relationship. *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 649-63 (1993); Murray, *supra* note 4, at 389-90. *But see* Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 448 (2007) ("The Court's emphasis on cohabitation between father and child seems driven more by its interest in daily caretaking than by loyalty to the nuclear family.").

257. 420 U.S. 636 (1975).

258. *See, e.g.*, Brief for the Legal Aid Society as Amicus Curiae, *supra* note 247, at 26 (describing the trend toward sex neutrality in child custody cases).

259. State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285, 288-89 (N.Y. Fam. Ct. 1973). *Compare id. with In re* Malpica-Orsini, 331 N.E.2d 486, 486 (N.Y. 1975) (allowing a stepfather adoption and terminating the parental rights of a nonmarital father who had lived with his daughter and her mother for the first nineteen months of her life).

260. Brief for the Legal Aid Society as Amicus Curiae, *supra* note 247, at 31-32.

At oral argument, Caban's attorney Robert Silk stopped short of contending that all natural fathers had a constitutional right to veto adoptions, but made clear that a father who had developed a significant relationship with his children (in supposed contrast to Quilloin) deserved protection from termination of his parental rights.[261] Nor would it be enough, Silk argued, to satisfy equal protection by denying both nonmarital parents the right to veto an adoption, because "state power does not exist to break into the private relationships of parents and their children when there has been no showing of unfitness."[262] In other words, equality between unmarried mothers and fathers was necessary but not sufficient: nonmarital parents of both sexes had fundamental rights that the Constitution should protect.

The Justices struggled over whether their ruling in *Caban* should be grounded in equal protection or substantive due process. Both options entailed complications. Substantive due process might allow a decision specific to the facts, but the facts of *Caban* were in "sharp dispute," as Powell clerk David Westin noted.[263] Powell hesitated to paint in the broad strokes of substantive due process analysis, with Westin worrying about the potential "constitutionalization of state adoption law" and the prospect that functional definitions of parenthood would require infinitely finer distinctions among deeply contested relationships.[264] White, meanwhile, insisted that his *Stanley* opinion was a *procedural* due process decision only—despite many wishful readings to the contrary.[265] Stevens initially expressed willingness to rule for Caban on substantive due process grounds. Blackmun, as the author of *Roe v. Wade*, may have seemed positively inclined toward substantive due process, and less toward equal protection, given his vote joining the Chief Justice's dissent in *Stanley*.[266]

A reversal on equal protection grounds also presented ideological and practical challenges. If the Court focused on the distinction between unmarried

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261. Oral Argument, Caban v. Mohammed, 441 U.S. 380 (1979) (No. 77-6431), http://www.oyez.org/cases/1978/77-6431 [http://perma.cc/ZGK5-JMLA].

262. *Id.* at 29:18.

263. Memorandum from David Westin, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. 8 (Nov. 6, 1978) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 205, Case No. 77-6431, http://law2.wlu.edu/deptimages/powell%20archives/CabanMohammed.pdf [http://perma.cc/BVN5-FQ2R]).

264. *Id.*

265. In cases decided since 1972, White had resisted substantive due process analysis. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 541 (1977) (White, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J. dissenting) (applying also to companion case Roe v. Wade, 410 U.S. 113 (1973)).

266. *See* discussion *supra* Section I.B.

fathers and divorced fathers, finding a fundamental interest to justify heightened scrutiny would, Powell feared, put them right back in substantive due process territory, worrying about the "'thicket' of 'strict scrutiny' and 'compelling state interest.'" Powell preferred instead to rely upon sex-based equal protection, which would allow state legislatures to decide whether to require the consent of both or neither of a child's natural parents.[267]

The first draft Powell circulated to colleagues endorsed a robust sex neutrality principle. Like White's early drafts in *Stanley*, it implied that virtually no distinctions between unwed mothers and fathers would pass constitutional muster. The impulse to veto a proposed adoption "is likely to be the result of a natural parental interest, shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children." New York law treated married mothers and fathers equally, so why should the same provisions not apply to unmarried parents?[268] Further, "[e]ven if perceived differences between maternal and paternal relations were the basis for the gender-based distinction . . . [the] classification is grounded on 'archaic and overbroad generalizations,' concerning the family."[269] Legislative classifications could not typecast women as exclusively occupied with home and children. "Nor may we accept uncritically the generalization . . . that mothers are closer to their children than are fathers."[270] Even "[d]uring infancy . . . one cannot invariably assume that the father's role in his child's life is less than that of the mother," Powell wrote.[271]

This was a bridge too far for Stewart, Stevens, and Blackmun, and Powell needed at least one of their votes to make a majority. Justice Stevens worried that if the consent of both "natural" parents were required, then delay and uncertainty could discourage prospective adoptive parents and impede

267. *See* Memorandum from Gary Sasso, Clerk, U.S. Supreme Court, to Justice Byron R. White 7-9 (Sept. 20, 1978) (on file with Byron R. White Papers, *supra* note 122, at Box 455, Folder 10). The sex-based equal protection approach also seemed consistent in methodology, if not in outcome, with the Court's approach in *Parham v. Hughes*, 441 U.S. 347 (1979), decided on the same day as *Caban*. *See* discussion *infra* Section II.C.

268. Justice Lewis F. Powell, Jr., First Draft Opinion in Caban v. Mohammed 9-10 (Dec. 28, 1978) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 205, Case No. 77-6431, http://law2.wlu.edu/deptimages/powell%20archives/CabanMohammed.pdf [http://perma.cc/BVN5-FQ2R]).

269. *Id.* at 12.

270. *Id.*

271. *Id.* at 13.

adoptions.[272] Even if mere notice to nonmarital fathers were required, Stevens thought that publicly identifying the mother "would offend her privacy interests in the most outrageous fashion."[273] Stevens wrote privately to Powell that he was "profoundly troubled" and asked him to consider revising his opinion to "minimize its impact on the adoption of infants."[274]

Powell quickly retreated. In response to Stevens's objections, which were shared by Stewart, Powell's second draft "altered [*Caban*'s] holding considerably" and "invalidate[d] the . . . statute much more narrowly," as Blackmun's clerk put it.[275] Powell eliminated nearly all of the broad language and added caveats suggesting that the adoption of newborns presented different problems than did the adoption of older children.[276] His second draft focused on case-specific facts, rather than generalizing about the constitutional infirmity of sex-based distinctions. Comfortable with Powell's revised opinion, Blackmun announced his intention to sign, giving Powell (and Caban) a 5-4 majority.[277]

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272. Letter from Justice John Paul Stevens to Justice Lewis F. Powell, Jr. (Dec. 29, 1978) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 205, Case No. 77-6431, http://law2.wlu.edu/deptimages/powell%20archives/CabanMohammed.pdf [http://perma.cc/BVN5-FQ2R]). Justice Stevens, an adoptive parent himself, consistently expressed such concerns in cases implicating adoption procedures. *See generally* BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE (2010).

273. Letter from Justice John Paul Stevens to Justice Lewis F. Powell, Jr. (Dec. 29, 1978) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 205, Case No. 77-6431, http://law2.wlu.edu/deptimages/powell%20archives/CabanMohammed.pdf [http://perma.cc/BVN5-FQ2R]).

274. *Id.*

275. Memorandum from Albert G. Lauber, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun 1 (Jan. 17, 1979) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 290, Case No. 77-6431); *see also id.* at 2 (explaining that "L[ewis]F[.]P[owell] undertook his revisions at the instance of P[otter]S[tewart] and J[ohn]P[aul]S[tevens], both of whom were concerned that the 1st draft would make adoptions difficult in the case of newborn children").

276. Justice Lewis F. Powell, Jr., Second Draft Opinion in Caban v. Mohammed 11-13 (Jan. 12, 1979) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 205, Case No. 77-6431, http://law2.wlu.edu/deptimages/powell%20archives/CabanMohammed.pdf [http://perma.cc/BVN5-FQ2R]).

277. Blackmun acknowledged that his views had evolved since he joined Burger's *Stanley* dissent six years earlier. *See* Letter from Justice Harry A. Blackmun to Chief Justice Warren E. Burger (Jan. 29, 1979) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 290, Case No. 77-6431) ("I have concluded that [Powell's second, narrower draft opinion in *Caban*] is not basically inconsistent with our dissenting posture in *Stanley v. Illinois* (although I am frank to say I am not sure how I would vote in that case were it being presented today).").

Stevens and Stewart dissented in *Caban*, emphasizing their desire to protect illegitimate children's welfare by facilitating newborn adoptions. Stevens articulated the view of "natural differences" between mothers and fathers that would animate his—and ultimately a majority of the Court's—treatment of nonmarital fathers' equal protection claims for the remainder of his tenure. Unlike many if not most nonmarital fathers, a mother was identifiable, present at her child's birth, and would have "virtually inevitable" responsibility for decisions made about an infant.[278] As such, mothers and fathers of children "born out of wedlock" simply were not similarly situated, so that granting mothers and not fathers the right to consent to an adoption posed no constitutional problem. More than the majority opinion, Stevens's dissent in *Caban* presaged the Court's subsequent posture toward nonmarital fathers' claims.

C. *"Not Similarly Situated": Rejecting Sex Equality in* Parham v. Hughes *(1979)*

Caban marked the zenith of nonmarital fathers' constitutional rights in the Supreme Court. Another 5-4 decision issued on the same day underscored the divisions among the Justices about the meaning of sex equality for nonmarital parents. When an automobile accident killed six-year-old Lemuel Parham and his mother, Cassandra Moreen, the boy's father sued for his son's wrongful death. Curtis Parham did not live with Lemuel and his mother, but averred that he had supported Lemuel financially, visited him daily, and taken care of him on many weekends. Parham had signed his son's birth certificate but had not completed legitimation paperwork.[279]

Parham v. Hughes presented a question virtually identical to the one decided a decade earlier in *Glona v. American Guarantee & Liability Insurance Co*: could a state bar a parent from recovering for the wrongful death of an illegitimate child? The difference between *Glona* and *Parham* proved determinative, however: Minnie Brade Glona, who lost her son Tommy to a

278. Caban v. Mohammed, 441 U.S. 380, 405-06 (Stevens, J., dissenting). His dissent also expressed the hope that the *Caban* ruling would affect only the relatively few situations in which an unmarried father had developed a relationship with his children that was truly comparable to the mother-child bond. *Id.* at 415-17.

279. Parham v. Hughes, 441 U.S. 347, 349-50 (1979). For Powell, the fact that Georgia allowed nonmarital fathers to "legitimate" their children unilaterally distinguished the case from *Trimble v. Gordon*, where Illinois law did not provide for legitimation except where the parents married. The Georgia law was, therefore, more like the New York law requiring illegitimate children to produce a court order of filiation, which the Court had upheld in *Lalli v. Lalli*. *Id.* at 359-61 (Powell, J., concurring).

negligent driver, was a mother, and her claim succeeded before the Warren Court in 1968.[280] In *Parham*, Stewart wrote for a plurality that the Georgia law allowing mothers but not fathers to bring a wrongful death action for an illegitimate child did not offend the constitutional principle of sex equality. "The fact is," Stewart wrote, "that mothers and fathers of illegitimate children are not similarly situated."[281] In Georgia, only fathers could, "by voluntary unilateral action," legitimate a child, and, unlike a mother's, a father's identity might be unknown.[282] Excluding fathers of illegitimate children from wrongful death recovery "does not discriminate against fathers as a class but instead distinguishes between fathers who have legitimated their children and those who have not."[283]

A majority of the *Parham* Court did see the Georgia law as distinguishing on the basis of sex, and therefore applied heightened scrutiny, but only four Justices voted for invalidation. Powell, author of *Caban*, concurred, finding the statute substantially related to the important governmental objective of "avoiding difficult problems in proving paternity after the death of an illegitimate child."[284] Four dissenters, including Blackmun, saw the law as unconstitutional sex discrimination.[285] Although *Parham* did not involve the parental rights of unmarried fathers, it suggested that plaintiffs in future cases might find it difficult to frame legal distinctions between nonmarital fathers and mothers as impermissibly discriminatory.

Moreover, *Parham*, like *Fiallo*, rejected fathers' sex discrimination claims precisely when fathers' and mothers' interests in sex neutrality most converged. In these cases, granting superior rights to mothers reinforced the assumption that paternal involvement in the lives of nonmarital children was worth less than maternal bonds, no matter how well the father had nurtured and loved his child. Depriving fathers and their nonmarital children of reciprocal citizenship rights and denying nonmarital fathers the right to sue for the wrongful death of their children offered no benefit to mothers; indeed, these decisions perpetuated mothers' burden for the primary care of nonmarital children by devaluing fathers' contributions.

To be fair, the Justices did not yet have before them a full-throated feminist argument for recognizing nonmarital fathers' rights in contexts where men's and women's interests converged. In the 1970s, feminist disagreement over the

280. Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

281. *Parham*, 441 U.S. at 355.

282. *Id.*

283. *Id.* at 356.

284. *Id.* at 359-60 (Powell, J., concurring in the judgment).

285. *Id.* at 361-62 (White, J., dissenting). For more on *Parham*, see Mayeri, *supra* note 21.

relationship between sex equality and nonmarital parenthood played out mostly behind the scenes, in internal debates within the ACLU rather than in dueling briefs in the Supreme Court. The ACLU's legal director rejected Ginsburg's proposal to file an amicus brief in *Fiallo*, and the petitioners' brief relegated to a footnote the feminist argument that women are harmed by the sex-stereotyping of nonmarital fathers. The fathers who defied such stereotypes, whom the Court presumed were a small minority, suffered the primary harm of the sex discrimination left intact by the unwed fathers cases. In *Caban*, the only successful case of the three, amicus briefs focused on harm to fathers and to children, reflecting their authors' primary concern with unjust terminations of parental rights generally. In *Parham*, the plaintiff had no amicus support.

The juxtaposition of *Fiallo*, *Caban*, and *Parham* highlights how, paradoxically, nonmarital fathers' sex discrimination arguments fared better when fathers faced off against mothers than when mothers, too, stood to gain from a sex-neutral rule. And the paradoxes did not end there. In the 1970s, feminist disputes over nonmarital fathers' rights never made their way into amicus briefs or otherwise influenced the Justices' deliberations in cases before the Court. Nevertheless, the Court decided *Fiallo*, *Caban*, and *Parham* on sex-based equal protection grounds. In the 1980s, by contrast, feminist arguments played a key role in two of the nonmarital fathers cases that came before the Court, but the Justices dodged them and instead decided two other cases primarily on due process grounds. Although the Court for the first time heard full-throated feminist arguments for and against nonmarital fathers' parental rights, the Justices sidestepped questions of sex equality altogether and reaffirmed the state's prerogative to privilege marital families at nonmarital fathers' expense.

IV. AVOIDING EQUALITY: FEMINISM AND FATHERHOOD IN THE SUPREME COURT, 1980-89

Feminist legal advocacy in the 1970s and 1980s often suffered from inauspicious timing. Feminists reasoned from race on the eve of civil rights retrenchment, turning what seemed like fruitful analogies in the Warren Court era into political and legal constraints before the Burger Court.[286] They sought more expansive affirmative action and disparate impact doctrines at a time when courts were cutting back these remedies in the context of race.[287] They

286. *See generally* MAYERI, *supra* note 11 (describing the historical trajectory of feminists' use of analogies between race and sex inequality).

287. *See generally id.* chs. 3-6.

presented compelling arguments that illegitimacy penalties subordinated women after the Court articulated the primary harm of illegitimacy-based classifications as their detrimental impact on "hapless" and innocent children.[288]

Feminist advocacy in the unwed fathers' cases suffered from a similar temporal disconnect: by the time the feminist dilemma was squarely before the Justices, with clearly articulated positions on both sides of the question, the Court had both drawn its battle lines on other terms and moved further to the right. Both of these developments likely made the Justices less receptive to framing the unwed fathers' cases in terms of substantive sex equality than they might have been. Section IV.A. explains why the feminist dilemma came to the fore in the 1980s, briefly outlining the legal and political factors that heightened feminist disagreement over sex equality in nonmarital parenthood. Sections IV.B. and IV.C. juxtapose the two unwed fathers cases decided by the Court during this period with two other cases the Court dodged, revealing both the contours of the feminist dilemma and the consequences of its submergence in equality jurisprudence.

A. Parenthood After the Sex Equality Revolution

Developments in the late 1970s and early 1980s intensified debate among feminists over the rights of nonmarital fathers. The divorced-fathers' rights movement enjoyed relatively rapid success in winning legislative and judicial decisions approving joint custody. Sociologists exposed the economic devastation of divorce for women and children. Litigation defeats, the failure to achieve ratification of the ERA, and the ascendancy of conservatism in national politics prompted feminists to examine the shortcomings of 1970s feminist legal advocacy and to assess the future of sex equality.

The late 1970s and early 1980s witnessed profound changes in child custody law.[289] The maternal preference continued to erode and joint custody gained ground in many states, thanks to an uneasy coalition between feminists and divorced-fathers' rights activists, as Deborah Dinner has recounted.[290] For feminists, joint custody held the promise of relieving divorced mothers of sole responsibility for childcare, undermining stereotypes about motherhood as women's primary destiny, and, ideally, creating incentives for fathers to spend more time caring for children during marriage.[291] For fathers' rights activists,

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288. *See* Mayeri, *supra* note 21.

289. *See* Dinner, *supra* note 17, at 121-22.

290. *See id.* at 122-23.

291. *Id.* at 126.

joint custody was an essential element of the new "divorce bargain," in which fathers received custody rights in exchange for fulfilling child support obligations. As Dinner describes, fathers' rights activists and feminists not only favored joint custody for different reasons, they often diverged in their policy prescriptions.[292] In debates over joint custody in California, a bellwether state for family law innovations, fathers' rights activists fought for a categorical presumption of joint custody, while feminists who favored the presumption did so only when both parents wished to share custody. Without this caveat, feminists feared, joint custody presumptions would devalue women's disproportionate responsibility for caregiving during marriage and reduce their bargaining power at divorce, harming women and children.[293]

At the same time, feminists who had long worried about the economic impact of no-fault divorce and marital breakdown on women saw their worst fears confirmed. The "feminization of poverty" became a shorthand to describe the rise of female-headed households born of rising rates of divorce and nonmarital childbirth. Sociologist Lenore Weitzman spotlighted a chasm between the economic fortunes of divorced men and women.[294] While the magnitude of post-divorce inequality remained in dispute, its existence did not, and some feminists identified formal sex neutrality as the culprit. Reforms that treated divorcing husbands and wives as if they were interchangeable spouses in a presumptively egalitarian partnership could not produce substantive equality of results, wrote feminist legal scholar Martha Fineman in 1983.[295] Fineman argued that women's socioeconomic disadvantage meant that, "at least for the foreseeable future, genuine reform can only be achieved through a rational, but potentially unequal, division of economic assets between husbands and wives at divorce."[296] Treating men and women as equals under the law exacerbated women's inferior status so long as women shouldered the

292. *Id.* at 129-35.

293. *Id.*

294. For early publications of Weitzman's research on the economic consequences of divorce, see, for example, Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards*, 28 UCLA L. REV. 1181 (1981). Weitzman's 1985 book drew national attention to the phenomenon. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985). The disparity Weitzman initially reported proved to be overstated, but the adverse impact of divorce on women and children was undeniable.

295. Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 791.

296. *Id.* at 792.

lion's share of domestic and caregiving responsibilities and faced widespread discrimination in the labor market.

Critical feminists also turned their gaze to child custody, arguing that the rise of ostensibly gender-neutral rules devalued mothers' caregiving labor and held fathers to a "different, much less demanding standard."[297] Some feminists sought to balance the benefits of legal sex neutrality with a revaluation of women's care work. Nancy Polikoff, writing in 1982, defended a "primary caretaker" presumption for child custody decision making, arguing that this "sex-neutral standard" would protect mothers and children in the vast majority of cases where women served as primary caretakers. It would also allow fathers to benefit from the presumption if they provided "primary nurturance and care during the ongoing marriage."[298]

Many feminists reevaluated their legal priorities in the early 1980s. The ERA's defeat and the Reagan Administration's threatened cutbacks in civil rights and social spending surfaced disagreements regarding the past and future of feminist legal advocacy. Fear of undermining the ERA's ratification chances had constrained some advocates in their legal arguments and others in their willingness to dissent publicly from expedient political positions. At the same time, a new generation of feminists enjoyed greater access to the legal academy, publishing scholarship critical of judicial decisions that limited sex equality, and sometimes of the feminist legal strategies that helped produce them. Rather than inspiring caution or quiescence, the ERA's defeat and the conservative ascendancy liberated feminists to own publicly more expansive definitions of sex equality.[299] These setbacks also emboldened feminists to air their disagreements about substance and strategy.

The feminist disagreement that had simmered beneath the surface in the early nonmarital fathers cases burst into the open in the 1980s before a Supreme Court that included Sandra Day O'Connor, the first female Justice. Between 1982 and 1988, two cases reached the Court that explicitly presented what one advocate termed the "feminist dilemma": how to balance the desire to overcome women's default responsibility for nonmarital children with concerns that the realities of gender inequality rendered legal sex neutrality antithetical to women's autonomy and to substantive sex equality. In

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297. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 119. For an excellent summary of these critiques, see Dinner, *supra* note 17, at 142-44.

298. Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237 (1982).

299. *See, e.g.*, Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1224-25 (2009) (describing feminists' reassessment of their constitutional agenda in the wake of the ERA's defeat).

Kirkpatrick v. Christian Homes of Abilene and *McNamara v. San Diego Department of Social Services*, feminists on both sides of the debate made their case to the Justices. But the Court sidestepped the sex equality question—and the cases themselves—entirely, and framed the two unmarried fathers' cases it did decide, *Lehr v. Robertson* and *Michael H. v. Gerald D.*, as due process disputes in which husbands prevailed over fathers. The winner in all of these cases, it would seem, was marital supremacy.

1. *"The Feminist Dilemma": Unwed Mothers Against Sex Neutrality in* Kirkpatrick v. Christian Homes of Abilene

Kirkpatrick was the first case to present the Court with a feminist argument against sex neutrality in nonmarital parental rights. In a small Nebraska town, Donald Kirkpatrick and Laura S. began an intimate relationship when he was 22 and she was 14.[300] At 15, Laura became pregnant, and decided, in consultation with her parents, to place the child for adoption.[301] An adoptee herself, Laura "had great concern for the stigma attached to a child born out of wedlock in a small town."[302] She did what many white girls had done for generations: entered a home for unwed mothers (in Texas), and remained there until she gave birth.[303]

When Laura informed him of the pregnancy, Kirkpatrick proposed marriage, but Laura declined.[304] In Texas, biological fathers were entitled to receive notice of adoption proceedings, but could not veto an adoption and take custody of an unlegitimated child unless a court agreed that legitimation was in the child's best interests.[305] The trial court denied Kirkpatrick's legitimation petition and placed the infant in foster care pending appeal.[306] The state appellate court affirmed. "We are not nearly so far down the road to unrestrained egalitarianism as to hold that the Constitution guarantees an

300. Appendix at 117a-19a, Kirkpatrick v. Christian Homes of Abilene, Inc., 460 U.S. 1074 (1983) (No. 82-647) [hereinafter *Kirkpatrick* Appendix]; Brief for Petitioner at 6-7, *Kirkpatrick*, 460 U.S. 1074 (No. 82-647) (on file with ACLU Records, *supra* note 225, Box 2804, Folder 2 (untitled)).

301. *Kirkpatrick* Appendix, *supra* note 300, at 118a-19a, 128a-29a.

302. Nancy S. Erickson, *The Feminist Dilemma over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority*, 2 L. & INEQ. 447, 452 (1984).

303. *See* KUNZEL, *supra* note 34, at 65-90 (describing the movement of unmarried mothers to maternity homes); SOLINGER, *supra* note 34, at 1-3 (describing the divergent paths of white and black unmarried mothers in the 1950s).

304. *See Kirkpatrick* Appendix, *supra* note 300, at 157a.

305. Brief for Petitioner, *supra* note 300, at 4-5 (quoting TEX. FAM. CODE § 13.21).

306. *See In re* Baby Girl S., 628 S.W.2d 261 (Tex. App. 1982).

unwed father parental rights in violation of the best interests of the child," the Texas Supreme Court had proclaimed in 1976.[307] Four years later, over the dissent of three Justices, the same court explained:

> While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility . . . . To classify him as a parent simply because he is a biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother.[308]

As for the wide gulf between the rights of married and unmarried fathers, there was "a rational basis for the State to distinguish" between "a sperm donor, a rapist, a 'hit and run' lover, an adulterer and the like" and "the father who has accepted the legal and moral commitment to the family."[309]

Supporters said Kirkpatrick was a responsible, upstanding young man devoted to his daughter and eager to marry her mother; detractors claimed he was an irreligious statutory rapist with inconstant paternal instincts who planned to turn the child over to the care of his female relatives.[310] Both characterizations enjoyed some support in the record. Laura testified that Kirkpatrick was a "wonderful man," but that at 15, she was not ready to marry and start a family, and she wanted her daughter raised by "two Christian parents."[311]

After "an apparently bitter internal dispute,"[312] the national ACLU agreed to represent Kirkpatrick before the U.S. Supreme Court.[313] The ACLU argued that substantive due process and equal protection required that unmarried fathers be permitted to legitimate their children over the mother's objection, veto an adoption, and obtain custody unless they were proven unfit. The Court

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307. *In re* K, 535 S.W.2d 168, 171 (Tex. 1976).

308. *In re* T.E.T., 603 S.W.2d 793, 797 (Tex. 1980).

309. *Id.* Three Texas justices disagreed with the majority's assessment, believing it to be inconsistent with federal and state constitutional sex equality provisions. *Id.* at 798-800 (Steakley, J., dissenting); *see also In re* K, 535 S.W.2d at 175 (Pope, J., dissenting). The U.S. Supreme Court denied certiorari over the dissents of Justices Brennan, White, and Marshall. Order Denying Certiorari, Oldag v. Catholic Charities of the Diocese of Galveston-Hous., 450 U.S. 1025 (1981).

310. *See Kirkpatrick* Appendix, *supra* note 300, at 191a.

311. *Id.* at 151a, 191a.

312. Erickson, *supra* note 302, at 454.

313. The Children's Rights Project's primary interest in the case was in challenging the use of the best-interests standard in termination of parental rights proceedings. *See* IRA GLASSER & MARGARET LOWRY, ACLU, THE CHILDREN'S RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION 15 (1983).

should, the ACLU argued, declare the best-interests standard unconstitutionally vague, at least with respect to terminations of parental rights.[314] And the Texas statute was "freighted with the 'baggage of sexual stereotypes' so often condemned by this Court."[315] The injury to "caring fathers" was "patent."[316] "Less obvious but equally invidious" was "the harm done to women," who were "inevitably locked into the childcare role, unable to share childrearing responsibilities equally with men."[317]

Before *Kirkpatrick*, the interests of unmarried mothers had been in the background, as in the ACLU's decision not to intervene in *Quilloin*, but never at the forefront. *Kirkpatrick* was different. Feminist attorney Nancy Erickson authored an amicus brief on behalf of "unwed mothers" who opposed unmarried fathers' asserted right to veto an adoption and obtain custody for themselves.[318] She quoted unmarried mothers who said they would not have pursued adoption if it meant that the father might gain custody. Instead, these mothers might have felt pressured to have an abortion or to raise an unwanted child, Erickson asserted, violating their right to privacy and decisional autonomy and flouting the child's best interests. Mothers should also have the right to give up their children for adoption anonymously, Erickson argued, and men should not be allowed to use their sexual partners as involuntary surrogate mothers.[319]

Erickson denied that the Texas statutory scheme reflected "an impermissible gender bias"[320] or promoted "sexual stereotypes that portray men as incapable of good parenting."[321] Kirkpatrick himself seemed to assume that various female relatives—his mother, sister, or grandmother—would care for the baby if he were to obtain parental rights and custody.[322] Most recently,

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314. Petition for Writ of Certiorari at 22-27, Kirkpatrick v. Christian Homes of Abilene, Inc., 460 U.S. 1074 (1983) (No. 82-647) (on file with ACLU Records, *supra* note 225, Box 2804, Folder 5 (untitled)).

315. *Id.* at 31 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979)).

316. *Id.* at 31.

317. *Id.* at 31-32; Brief for Petitioner, *supra* note 300, at 70; *see also id.* at 70-71 ("Great harm, both psychological and social, is done to women and men who do not fit the stereotyped mold. Women are unfairly condemned by society when they lose or relinquish custody of their children, and men disparaged when they assume primary caretaking roles." (citing, inter alia, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975))).

318. Brief of Nancy S. Erickson, et al. as Amici Curiae on Behalf of Unwed Mothers, *Kirkpatrick*, 460 U.S. 1074 (No. 82-647).

319. *See* Erickson, *supra* note 302, at 465.

320. *Id.* at 470.

321. *Id.*

322. *Id.*

Kirkpatrick had married a "full-time homemaker" who allegedly was eager to raise the child, leading Erickson to observe that awarding custody to a man who did not intend to assume a caregiving role hardly served feminist objectives.[323] Feminists like Erickson embraced the goal of greater paternal involvement in the care of children, but they worried about the effects of formal equality on unequal social circumstances. "Our desires, as feminists, to see men assume the parental duties that in the past they have abandoned to women should not prevent us from recognizing that a legal rule granting an unwed father exactly the same rights as an unwed mother could lead to extreme oppression of women," Erickson wrote.[324]

Blackmun clerk Cory Streisinger thought that Kirkpatrick had "a serious claim of gender-based discrimination," and advised Blackmun to support granting certiorari.[325] At first only White and Blackmun voted to grant, but White's draft dissent apparently persuaded Burger and Brennan to change their votes.[326] White expressed qualms about the Texas statutory scheme on both due process and equal protection grounds.[327] He reminded his colleagues that earlier Court decisions had strongly implied that a state could not, constitutionally, "terminate a natural parent's rights without a showing of parental unfitness."[328] Significantly, White also believed that Kirkpatrick had a

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323. *Id.* at 471. "Yet another woman appears to take over the childcare responsibilities!" Erickson exclaimed. *Id.*

324. *Id.* at 455.

325. *See* Memorandum from Cory Streisinger, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun 7 (Dec. 3, 1982) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 386, Case No. 82-647). Streisinger noted that the sex discrimination issue was not so clearly presented in *Lehr v. Robertson*, which was simultaneously before the Court.

326. *Compare* Certiorari Vote Count (Jan. 7, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 250, Case No. 82-647, http://law2.wlu.edu/deptimages/powell%20archives/82-647_Kirkpatrick_ChristianHomeofAbilene.pdf [http://perma.cc/QDL4-5ZNU]) (recording votes to grant certiorari from Justices White and Blackmun), *with* Certiorari Vote Count (Jan. 14, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 250, Case No. 82-647, http://law2.wlu.edu/deptimages/powell%20archives/82-647_Kirkpatrick_ChristianHomeofAbilene.pdf [http://perma.cc/QDL4-5ZNU]) (recording votes to grant certiorari from Chief Justice Burger and Justices Brennan, White, and Blackmun).

327. Justice Byron R. White, Draft Dissent from Denial of Certiorari in Kirkpatrick v. Christian Homes of Abilene at 2 (Jan. 11, 1983) (No. 82-647) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 250, Case No., http://law2.wlu.edu/deptimages/powell%20archives/82-647_Kirkpatrick_ChristianHomeofAbilene.pdf [http://perma.cc/QDL4-5ZNU]).

328. *Id.* Justices Blackmun, Burger, and Brennan were prepared to join White's dissent from the denial of certiorari. *See* Letter from Justice Harry A. Blackmun to Justice Byron R. White (Jan. 12, 1983) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 386, Case No. 82-647); Letter from Justice William J. Brennan, Jr. to Justice Byron R. White (Jan. 12,

"weighty equal protection claim" that "the challenged laws are based simply on the sexual stereotype that women can be more trusted with children than men."[329] Kirkpatrick's "argument is not without force," White wrote.[330] "At the least, there is sufficient doubt to merit this Court's attention."[331] All in all, he concluded, "The importance of these issues to many unwed fathers and their children can hardly be overstated."[332]

Despite the evident interest of at least four of its members who voted to grant certiorari, the Court sidestepped the thorny issues presented in *Kirkpatrick* by remanding on a state law question.[333] *Kirkpatrick* provided an unprecedented—and ultimately missed—opportunity for the Court to grapple with explicitly feminist arguments for and against nonmarital fathers' parental rights.[334] In a second case, *McNamara v. San Diego Department of Social Services*,[335] the ACLU seized the chance to elaborate on the feminist argument for sex neutrality.

2. *The ACLU Fights for Sex Neutrality in* McNamara v. San Diego Department of Social Services

Edward McNamara, a thirty-four-year-old carpenter, part-time salesman, and divorced father of two, had a brief sexual relationship with a nineteen-

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1983) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 386, Case No. 82-647); Letter from Chief Justice Warren E. Burger to Justice Byron R. White (Jan. 12, 1983) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 386, Case No. 82-647). Powell wrote on White's draft dissent: "Still inclined to deny—but BRW makes a good argument." Handwritten Notes by Justice Lewis F. Powell, Jr., on White, Draft Dissent from Denial of Certiorari in Kirkpatrick v. Christian Homes of Abilene, *supra* note 327, at 1.

329. Justice Byron R. White, Draft Dissent from Denial of Certiorari in Kirkpatrick v. Christian Homes of Abilene, *supra* note 327, at 3.

330. *Id.*

331. *Id.*

332. *Id.*

333. Kirkpatrick v. Christian Homes of Abilene, 460 U.S. 1074, 1074-75 (1983). Justice Blackmun initially was very concerned that *Kirkpatrick* be expedited in order to avoid further uncertainty over the now two-year-old little girl's parentage. Then the Texas Attorney General suggested that Texas law could be interpreted to grant Kirkpatrick another means of establishing paternity. *See* Memorandum from Justice Harry A. Blackmun to the Conference (Apr. 4, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 250, Case No. 82-647, http://law2.wlu.edu/deptimages/powell%20archives/82-647_Kirkpatrick_ChristianHomeofAbilene.pdf [http://perma.cc/QDL4-5ZNU]). On remand, however, the Texas court upheld its earlier ruling against Kirkpatrick. *See In re* Baby Girl S., 658 S.W.2d 794, 796 (Tex. Ct. App. 1983).

334. Lehr v. Robertson, 463 U.S. 248 (1983).

335. 488 U.S. 152 (1988).

year-old woman in the fall of 1980.[336] The two lost touch, and McNamara did not know he had fathered a baby girl until, over dinner two weeks after her birth in the summer of 1981, her mother asked him to relinquish his parental rights.[337] McNamara initially requested that the baby be placed with a childless couple from his church who sometimes looked after his sons, but the mother preferred adoption by a family who knew neither biological parent.[338] After spending half an hour holding his weeks-old daughter, McNamara later recalled, he requested custody. "I decided I wanted her, and could raise her . . . . And I informed the county that I wanted her, and I was not going to agree to the relinquishment."[339]

But it was too late. The Department of Social Welfare placed Katie with a foster family over McNamara's objections,[340] and a protracted legal battle followed. When Katie was just five months old, a California trial court ruled against McNamara, declaring that it was in Katie's best interests to remain with Pamela and Robert Moses, the foster parents who sought to adopt her.[341] In 1984, the California Supreme Court reversed and remanded, holding that custody should not be awarded to a nonparent unless parental custody would be detrimental to the child.[342] But when the case went back to the trial court, Katie was three and a half years old and had lived with the Moses family almost since birth. The judge found that a change of custody under these circumstances would be detrimental, terminated McNamara's parental rights, and granted the adoption petition.[343] McNamara appealed again, to no avail.[344]

When the U.S. Supreme Court agreed to hear McNamara's appeal, he was still seeking custody of Katie, who was seven years old and had seen McNamara only once or twice, as an infant. The prospect of removing Katie from the only home she had ever known made *McNamara*, as Isabelle Katz Pinzler of the ACLU Women's Rights Project put it, "the perfect example of

336. Cynthia Gorney, *The Disputed Kinship of Katie Moses*, WASH. POST (Nov. 28, 1988), http://www.washingtonpost.com/archive/lifestyle/1988/11/28/the-disputed-kinship-of-katie-moses/55af462a-b507-42b0-adae-6c8b64437d20 [http://perma.cc/6EBD-VM3L].

337. *Id.*

338. *Id.*

339. *Id.* (alteration in original).

340. *In re* Baby Girl M., 688 P.2d 918, 920 (Cal. 1984).

341. *Id.*

342. *Id.* at 925.

343. *In re* Baby Girl M., 236 Cal. Rptr. 660, 661 (Ct. App. 1987).

344. *Id.* at 666. By the time the California intermediate appellate court decided McNamara's case, Katie was five years old. *Id.* at 661.

'hard cases make bad law.'"[345] An early draft of the ACLU's amicus brief opened with a plea for the Court to dismiss the case for want of a substantial federal question and strategically avoided the equal protection issue.[346]

A few weeks later, Pinzler and her colleagues learned, to their relief, that McNamara was no longer seeking custody of Katie but merely visitation rights. This decision transformed the ACLU's brief into a full-throated argument for sex neutrality. Unlike Caban and Lehr, McNamara did "not seek to limit the rights of Katie's natural mother."[347] Instead, McNamara challenged "the right of the State to sever his parent-child relationship on grounds which patently discriminate on the basis of sex."[348] Unmarried mothers' parental rights could not "be severed absent their consent or a showing of unfitness or abandonment," whereas an unmarried father who had no opportunity to develop a relationship with his child could have his rights terminated under a much less stringent "best interests" or "detriment" standard.[349] This, the ACLU argued, was sex discrimination pure and simple.

The ACLU's *McNamara* brief articulated the strongest version yet of the feminist argument for sex neutrality in parental rights. The only "respect in which the interests of mothers and fathers are profoundly and inherently different," the brief declared, concerned a woman's "fundamental right . . . to terminate a pregnancy."[350] After a child is born, "no reason exists, outside of social custom and stereotyped notions of the proper roles for women and men, to support a gender based distinction in parental rights and obligations."[351]

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345. Memorandum from Isabelle [Katz Pinzler], Dir., ACLU Women's Rights Project, to Steve[n R. Shapiro], Assoc. Legal Dir., ACLU 1 (May 13, 1988) (on file with ACLU Records, *supra* note 225, Box 3527, Folder B2100, "McNamara v. San Diego Correspondence"). She continued: "In saving this child undeniable trauma we run the risk of making very bad law which may result in greater trauma for more families." *Id.*

346. Memorandum from Steve[n R. Shapiro], Assoc. Legal Dir., ACLU, to Ira [Glasser], Exec. Dir., ACLU, et al. 2 (May 12, 1988) (on file with ACLU Records, *supra* note 225, Box 3527, Folder B2100, "McNamara v. San Diego Correspondence").

347. Motion for Leave to File Brief Amicus Curiae & Brief Amicus Curiae of the ACLU & the ACLU of San Diego & Imperial Counties in Support of Appellant at 12, McNamara v. Cty. of San Diego Dep't of Soc. Servs., 488 U.S. 152 (1988) (No. 87-5840) (on file with ACLU Records, *supra* note 225, Box 3527, Folder (unnumbered), "McNamara v. San Diego ACLU Amicus Brief") [hereinafter Brief for ACLU as Amicus Curiae].

348. *Id.*

349. *Id.* at 13-14. "[W]hatever standard California uses in terminating the parental rights of an unwed parent, it must be the same for both parents. The standard applied to mothers is plain: desertion, relinquishment, or, in certain cases, failure to pay for care, support, and education. Fathers are entitled to be judged by the same rule." *Id.* at 17-18 (citation omitted).

350. *Id.* at 22-23.

351. *Id.* at 23-24.

Echoing Ginsburg's arguments of the preceding decade,[352] the brief contended that women, men, and children all suffered harm when the State presumed "that either gender has a monopoly on nurturance, love, concern, or the willingness to support and care for children."[353] Channeling Sylvia Law's position in a classic 1984 article, the ACLU called gender-differentiated parental rights a self-fulfilling prophecy. Law had written: "Although sex-based classifications are unjust in relation to individuals . . . who do not fit the stereotypes . . . the primary constitutional infirmity in such classifications is not that they are inaccurate, but rather that they are self-fulfilling."[354] The ACLU brief noted: "An official presumption that unwed fathers are uninterested . . . can surely help to create or perpetuate such a result."[355] Now that nonmarital fathers could be compelled to support their biological children financially, to deprive them of rights risked "contribut[ing] to the anger and resentment of some fathers" and causing them, "however unjustifiably," to shirk both childcare and financial responsibilities.[356]

The ACLU's brief in *McNamara* went further than any previous submission to the Court in arguing that women's welfare ultimately was best served by recognizing greater rights for nonmarital fathers. More common was the view expressed by Norah Whiting in a letter to the *Washington Post*: "It is a hard fact to face," she wrote, "but if we mothers honestly want (as we say we do) a society filled with men who are committed, involved fathers, we cannot also demand that men who are fathers simply disappear quietly whenever their presence proves inconvenient for us."[357] Others disagreed. Of the California Supreme Court decision requiring that custody be given to a willing father unless "detrimental" to the child, adoption lawyer David Keene Leavitt declared, "The mother can abort it; she can kill the fetus. But if she wants to bear it to term, she needs the permission of the fellow who got her pregnant

352. *See, e.g.*, Brief for Appellee at 10-13, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (No. 73-1892), 1974 WL 186057 (arguing that to deny the "mother's insurance benefit" to fathers shortchanged mothers, fathers, and children).

353. Brief for ACLU as Amicus Curiae, *supra* note 347, at 24.

354. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 995 (1984).

355. Brief for ACLU as Amicus Curiae, *supra* note 347, at 24.

356. *Id.* In closing, the ACLU warned that if the Court ruled "that unwed fathers do not share equal rights as well as equal responsibilities for their children," it would "send precisely the wrong message to these fathers and may further trap the mothers of these children and the children themselves in the cycles of poverty and dependence in which they all too often find themselves." *Id.* at 25.

357. Norah Whiting, Letter to the Editor, *Equal Rights in the Nursery*, WASH. POST, Dec. 5, 1988, at A22.

before she can put it up for adoption. It's a nightmare for women."[358] Syndicated columnist Ellen Goodman took a more balanced approach, arguing that an unwed father's rights "should be calibrated in terms of his commitment. There's a vast difference between the father who has lived with his children, and the one who has deserted them."[359] But in *McNamara*, "neither the mother nor the California law ever gave Ed McNamara the chance to act like a father."[360]

Once again, the Court declined to pass judgment on the relationship between sex equality and parental rights. O'Connor clerk Sharon Beckman judged the equal protection issue "insubstantial," and maintained that, in any event, it was neither raised nor decided below.[361] Blackmun clerk Kevin Kearney agreed that the equal protection issue was not "properly presented" and that "on the merits the claim is not strong, as there are reasons for the state to treat the mothers of newborns differently [from] fathers."[362] He wrote to the Justice: "My strongest impression is that this case should not be here, and that its ultimate resolution, unless it is dismissed, will be messy."[363] At oral argument, "several justices challenged McNamara's lawyer to point to a place in the court record where the issue of 'equal protection' was raised. 'When you find it, say "Bingo!"' snapped Justice Antonin Scalia."[364] Justice O'Connor also reportedly voiced skepticism about "why someone who engages 'in a so-called one-night stand' would have a constitutional right to control the fate of the

358. Dan Morain, *"Casual" Fathers Win More Control in Adoption Cases*, L.A. TIMES, Oct. 23, 1984, at B18. Leavitt had long been a proponent of unwed mothers' right to place their babies for adoption. *See* Lilliston, *supra* note 198, at E4 ("A man can have seven minutes of pleasure with a girl and then come back later and ruin her life and that of the child. . . . If there is no affection and cooperation between the two, someone has got to have the rights and it has got to be her." (quoting Leavitt)).

359. Ellen Goodman, *Exploring the Rights of Unwed Fathers*, WASH. POST, Nov. 20, 1978, at A19.

360. Ellen Goodman, *If a Father Has a Duty, Can He Be Denied Rights?*, CHI. TRIB., Dec. 4, 1988, at E4.

361. Memorandum from Sharon Beckman, Clerk, U.S. Supreme Court, to the Conference 12 (Jan. 5, 1988) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 529, Case No. 87-5840).

362. Memorandum from Kevin Kearney, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun ii (Nov. 14, 1988) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 529, Case No. 87-5840). At the same time, the clerk was "not comfortable with a due process standard which would recognize a mother's fundamental interest and ignore a father's. . . . Where the mother has kept the father in the dark, there is nothing he can do during the pregnancy to show his commitment." *Id.* at 25-26.

363. *Id.*

364. David G. Savage, *High Court Dismisses Case of Unwed La Habra Father*, L.A. TIMES, Dec. 7, 1988, at OC1.

child who accidentally results from the affair."[365] In an anticlimactic conclusion to a seven-year court battle, a majority of the Court voted to dismiss *McNamara* for want of a properly presented federal question.[366]

B. Unwed Fathers vs. Husbands in the Supreme Court, Redux

The direct involvement of feminists in *Kirkpatrick* and *McNamara* framed these cases as centrally concerned with questions of sex equality in nonmarital parenthood, but the Court decided neither on the merits. The two unwed fathers' cases that the Court did decide in the 1980s, *Lehr v. Robertson*[367] and *Michael H. v. Gerald D.*,[368] included sex-based equal protection claims as well, but like the 1970s cases did not bear overt hallmarks of feminist intervention, and rendered mothers largely invisible. *Lehr* and especially *Michael H.* resoundingly rejected marital status equality for fathers and submerged almost entirely the sex equality questions simultaneously and starkly presented to the Court in *Kirkpatrick* and *McNamara*.

1. "A Bias in Favor of the Formal Family": Lehr v. Robertson *(1983)*

Jonathan Lehr and Lorraine Martz met after Lorraine's father was killed in Vietnam and Jonathan's mother, Helen, took the troubled teenage girl, estranged from her mother and stepfather, under her wing.[369] Jonathan and Lorraine became intimately involved and lived together sporadically along with Lorraine's daughter from a previous relationship, Renee.[370] Their daughter Jessica was born in 1976, and the couple was at one point engaged.[371] Lehr visited Lorraine and Jessica in the hospital after the birth but did not accede to Lorraine's request that they marry.[372]

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365. David G. Savage, *Justices Cool to Unwed Father's Appeal for Child*, L.A. TIMES, Nov. 29, 1988, at E19.

366. *See* McNamara v. Cty. of San Diego Dep't of Soc. Servs., 488 U.S. 152, 152 (1988) (per curiam); Justice Harry A. Blackmun, Conference Notes in McNamara v. Cty. of San Diego Dep't of Soc. Servs. (Nov. 30, 1988) (on file with Harry A. Blackmun Papers, *supra* note 76, at Box 529, Case No. 87-5840).

367. 463 U.S. 248 (1983).

368. 491 U.S. 110 (1989).

369. *See* Joint Appendix at 87-88, Lehr v. Robertson, 463 U.S. 248 (1983) (No. 81-1756) 1982 U.S. S. Ct. Briefs LEXIS 216.

370. *See id.* at 89.

371. *Id.* at 39.

372. *Id.* at 39, 109.

What happened next was the subject of vigorous dispute. Lehr maintained that he did everything in his power to ascertain Lorraine's whereabouts when she moved with her children to another part of New York State and then married Richard Robertson.[373] Lorraine insisted that Lehr showed no interest in Jessica until Richard commenced adoption proceedings, though Lehr visited with Renee on several occasions after Jessica's birth.[374] In any event, Lehr filed a petition to establish paternity in late January 1979.[375] However, filing a paternity suit was not one of the seven circumstances that entitled a putative father to notice and a hearing in adoption proceedings under New York's post-*Stanley* statutory scheme. Though all parties – including the judge – were aware of Lehr's paternity suit, the court approved Richard's adoption of Jessica, effectively foreclosing Lehr's parental rights.[376]

The judge's apparent eagerness to finalize the adoption despite knowing that Lehr had petitioned for paternity disturbed several of the Justices.[377] But after passing on the first round of voting at conference, both Burger and Brennan voted to affirm the New York Court of Appeals decision upholding the adoption.[378] Burger assigned the majority opinion to Stevens, a dissenter in *Caban*. Stevens's first draft was, according to Justice Powell, "a mish-mash of an opinion. Can't believe JPS wrote it."[379] As law clerk Rives Kistler wrote to Powell, the first part of Stevens's opinion "refocus[ed] the constitutional inquiry," characterizing precedents such as *Stanley*, *Quilloin*, *Caban*, and the illegitimacy cases in ways that "give only grudging approval to the Court's

373. *Id.* at 19.

374. *Id.* at 88-90. It seems from the record that Lehr had developed a bond with Renee, Lorraine's other daughter, but the absence of a biological tie apparently precluded him from asserting any visitation rights with respect to Renee. *See id.* at 56-57, 92.

375. *See id.* at 2.

376. Lehr v. Robertson, 463 U.S. 248, 253 (1983).

377. *See, e.g.*, Lewis F. Powell, Jr., Handwritten Annotations to Memorandum from D. Rives Kistler, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. 1 (Dec. 6, 1982) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]) ("I could reverse if we address merits of N.Y. law as applied in this case, where identity + interest of putative father were known. N.Y. law is valid facially.").

378. Powell's conference notes indicate that both Burger and Brennan voted to affirm on the second round of voting, but were "not at rest." Justice Lewis F. Powell, Jr., Conference Notes in Lehr v. Robertson at 1 (Dec. 10, 1982) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]).

379. Powell wrote: "I'll await other writing. J[ohn]P[aul]S[tevens]'s op. appears unsatisfactory." Justice Lewis F. Powell, Jr., Handwritten Annotations to Memorandum from D. Rives Kistler, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr., *supra* note 377, at 1.

cases that recognize constitutional protection for non-traditional family relationships."[380] Stevens explicitly endorsed "formal family" and recognized family relationships as superior, citing and quoting at length a recent article by Bruce Hafen, a prominent conservative law professor and Mormon leader.[381]

As Hafen interpreted recent jurisprudence, the Court had not effected a revolutionary change in the laws of reproduction and the family in the 1970s.[382] Despite easing some of the legal burdens imposed on nonmarital children and their parents, legalizing contraception and abortion, and removing many overtly sex-based classifications from the law, the Justices—even at their most liberal and expansive—had never dethroned the marital family or formal family relationships.[383] Despite much wishful and creative thinking by liberal constitutional lawyers and scholars (and a few lower court judges), "marriage and kinship are still the touchstones of constitutional adjudication in family-related cases," Hafen concluded.[384] "The Court has limited some traditional policies, but has done so only in an effort to remedy exceptional inequities."[385] And critically, "[e]ven the exceptional cases have been treated in such a way that constitutional protection has not been extended to relationships between unmarried adults."[386]

Stevens's majority opinion in *Lehr* seemed to ratify Hafen's account, even after Stevens removed the long quotations from Hafen's article. Stevens wrote to Brennan:

> I know the [Hafen] article as a whole exhibits a bias in favor of the formal family, but I do not believe that bias is any stronger than the stance the Court has taken in several opinions. I really think all of us

380. *Id.* at 2.

381. Justice John Paul Stevens, First Draft Opinion in Lehr v. Robertson 8 n.12 (May 10, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]).

382. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 465 (1983).

383. *Id.* at 544 (describing the "historical position of preference this society has so long assigned to the institution of marriage").

384. *Id.* at 471.

385. *Id.*

386. *Id.* Hafen's assessment was shared by a number of scholars with diverse political views. *See, e.g.*, Thomas C. Grey, *Eros, Civilization and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 90.

> would agree with each of the statements that Hafen makes in what I have quoted.[387]

Stevens added, "I would rather have your vote than Mr. Hafen's quotation but wonder how strongly you feel about it."[388] Brennan eventually withdrew his objection to the longer Hafen quotation, but Stevens left it out after Powell registered his discomfort as well.[389] Still, the final opinion privileged the "formal family" and "recognized family unit."[390]

Removing the extended homage to Hafen was not the only revision Stevens made to assuage his colleagues' concerns. Justice O'Connor expressed qualms about the treatment of the sex-based equal protection issue. Stevens had written in an early draft:

> Before birth, the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. And from the moment the child is born, the mother always has a relationship of legal responsibility toward the child. Because the natural father of an illegitimate child can often be legally and practically anonymous if he chooses, responsibility does not devolve upon him in the same automatic fashion.[391]

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387. Letter from Justice John Paul Stevens to Justice William J. Brennan, Jr. 2 (June 3, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]).

388. *Id.*

389. *See* Letter from Justice William J. Brennan, Jr. to Justice John Paul Stevens 1 (June 6, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]); Letter from Justice William J. Brennan, Jr. to Justice John Paul Stevens 1 (June 3, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]); Letter from Justice Lewis F. Powell, Jr. to Justice John Paul Stevens (June 6, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]); Letter from Justice John Paul Stevens to Justice William J. Brennan, Jr., *supra* note 387, at 1-2.

390. Lehr v. Robertson, 463 U.S. 248, 257 (1983).

391. Justice John Paul Stevens, First Draft Opinion in Lehr v. Robertson, *supra* note 381, at 19 (citation omitted). The discussion in Stevens's *Lehr* draft is remarkably similar to his published opinion in *Miller v. Albright* fifteen years later. *See* Miller v. Albright, 523 U.S. 420, 436 (1998) ("The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the

O'Connor found this discussion "disturbing."[392] She "agree[d] that, as a practical matter, it is *easier* for the natural father of an illegitimate child to evade legal responsibility because of his anonymity."[393] She continued:

> I recognize that the clause 'responsibility does not devolve upon him in the same automatic fashion' is probably intended to be descriptive only. Nevertheless, the language contains connotations of approval of a scheme that imposes less legal responsibility on the natural father, and I would prefer to avoid any implication of that kind.[394]

O'Connor thought "this generic discussion of the difference between natural mothers and natural fathers [was] not necessary" to dispense with Lehr's equal protection challenge.[395] Instead, she urged Stevens to rely on *Quilloin* and on Lehr's lack of a "substantial relationship" with his daughter.[396] Stevens revised the draft accordingly.[397] O'Connor's intervention appears to have been the first time a Justice expressed concern about the detrimental effect on women of basing superior parental rights on the assumption of weightier maternal responsibilities.

In the end, none of the Justices disputed the majority's ruling that unmarried mothers and fathers could be treated differently in adoption proceedings so long as the father had not formed a significant relationship with his biological child and the mother had.[398] The majority and dissenters White,

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unmarried father may often be undisclosed and unrecorded . . . ."). For a trenchant critique of the opinions in *Miller*, see Collins, *supra* note 5.

392. Letter from Justice Sandra Day O'Connor to Justice John Paul Stevens 2 (May 23, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]).

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*; *see also* Letter from Justice John Paul Stevens to Justice Sandra Day O'Connor 1 (May 23, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]) (proposing revision).

397. *See* Justice John Paul Stevens, Second Draft Opinion in Lehr v. Robertson 19 (May 25, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]).

398. *See* Lehr v. Robertson, 463 U.S. 248, 267 (1983). Powell agreed that Lehr's equal protection claim was "meritless," though he was skeptical that Stevens's lengthy substantive due process discussion in Part I of his opinion was necessary. *See* Justice Lewis F. Powell, Jr., Handwritten Annotations to Memorandum from D. Rives Kistler, Clerk, U.S. Supreme

Marshall, and Blackmun disagreed over a different question: whether, given Lehr's efforts to form such a relationship—including the filing of a paternity petition—the strict application of the statute's requirements violated due process.

Lehr somewhat cryptically confirmed that marital status was a legitimate basis for sex-differentiated treatment of parental rights and responsibilities. The briefing in *Lehr* addressed the sex-based equal protection question, with Lehr and his supporters arguing that to give notice and a hearing to all unwed mothers but only a select category of unwed fathers violated the principles articulated in *Stanley*, *Caban*, and the Court's constitutional sex equality jurisprudence.[399] Opponents argued that cases such as *Parham* had established the constitutionality of distinguishing between unmarried mothers, whose identity could easily be established at birth, and unmarried fathers, whose parentage often was shrouded in ambiguity.[400] Justice O'Connor's intervention saved the *Lehr* opinion from incorporating what she viewed as damaging assumptions about mothers' inevitable responsibility for nonmarital children, but White's dissent avoided the sex-based equal protection question altogether.[401] In denying even the most basic procedural rights to Lehr, the Court appeared to retreat from its earlier precedents.[402] And Reagan's next appointments to the Court would not bode well for nonmarital fathers' rights.

Court, to Justice Lewis F. Powell, Jr. 1 (June 4, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]); Letter from Justice Lewis F. Powell, Jr. to Justice John Paul Stevens (May 17, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]).

Brennan did not wish to pass judgment on the issues of consent to newborn adoption presented by cases such as *Kirkpatrick*. *See* Letter from Justice William J. Brennan, Jr. to Justice John Paul Stevens (June 6, 1983), *supra* note 389; Letter from Justice William J. Brennan, Jr. to Justice John Paul Stevens 2 (June 1, 1983) (on file with Lewis F. Powell, Jr. Papers, *supra* note 161, at Box 243, Case No. 81-1756, http://law2.wlu.edu/deptimages/powell%20archives/LehrRobertson.pdf [http://perma.cc/G6AK-ZYDX]). On *Kirkpatrick*, see *infra* Section IV.A.1.

399. *See* Brief for Appellant at 1-2, Lehr v. Robertson, 463 U.S. 248 (1983) (No. 81-1756).

400. *See* Brief of National Committee for Adoption as Amicus Curiae Supporting Neither Party at 14-15, Lehr v. Robertson, 463 U.S. 248 (1983) (No. 81-1756).

401. White's dissent did not pass judgment on "whether [the statute] violates the Equal Protection Clause by discriminating between categories of unwed fathers or by discriminating on the basis of gender." *Lehr*, 463 U.S. at 276 (White, J., dissenting).

402. Neither *Quilloin* nor *Caban* raised the question whether a putative father was entitled to a hearing—both cases involved what one commentator called "the more extensive, substantive right of an unwed father to veto an adoption approved by the natural mother." Jennifer J. Raab, Lehr v. Robertson: *Unwed Fathers and Adoption—How Much Process Is Due?*, 7 HARV. WOMEN'S L.J. 265, 272 (1984). For a contemporaneous account of the state of the law in this

2. *Affirming Marital Supremacy, Avoiding Equality:* Michael H. v. Gerald D. *(1989)*

By the time the Supreme Court heard *McNamara* and *Michael H.* at the end of the 1980s, William Rehnquist, its most conservative member, had become Chief Justice, replacing Warren Burger. Conservative D.C. Circuit Judge Antonin Scalia had taken Rehnquist's seat as an Associate Justice. And, after a bruising and ultimately unsuccessful battle over the confirmation of conservative scholar and former Solicitor General Robert Bork, Ninth Circuit Judge Anthony Kennedy had replaced Lewis Powell, a swing voter in earlier nonmarital father cases. These appointments solidified the rightward shift that commenced with Nixon's appointments of Burger, Powell, and Rehnquist in the late 1960s and early 1970s.

Having dodged *McNamara*, the Court decided *Michael H. v. Gerald D.*,[403] another contest between husbands and fathers decided on due process grounds. Even more than *Lehr*, *Michael H.* buried questions of equality and almost entirely ignored the interests of women and mothers. The mother in *Michael H.*, Carole D., had given birth to a daughter, Victoria, in May 1981.[404] A fashion model married to an oil executive, Carole was involved in an extramarital relationship with Michael H. in Los Angeles, while her husband, Gerald D., lived primarily in New York and traveled abroad on business.[405] Victoria always remained with Carole, but they moved frequently between households as a series of separations and reconciliations with Michael, Gerald, and a third man followed.[406]

Though the parties disputed nearly everything else, Michael's paternity was not in question: blood tests had established the biological link with more than ninety-eight percent certainty.[407] Soon thereafter, Michael filed an action to establish legal paternity.[408] For two periods of several months—once when Victoria was an infant, and again when she was two years old—Carole,

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area, see Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313 (1984).

403. 491 U.S. 110 (1989).

404. *Id.* at 113.

405. *Id.*

406. *Id.* at 114.

407. *Id.* By the late 1980s, the accuracy of blood tests to determine paternity had increased dramatically. For a contemporaneous assessment, see D.H. Kaye, *The Probability of an Ultimate Issue: The Strange Case of Paternity Testing*, 75 IOWA L. REV. 75 (1989).

408. *Michael H.*, 491 U.S. at 114.

Michael, and Victoria lived as a family in California.[409] Carole left Michael for good in 1984, and soon thereafter, Carole and Gerald reconciled again.[410] By this time, Gerald, Carole, and Victoria were living together in New York.[411] An attorney and guardian ad litem representing Victoria's interests sought visitation rights for Michael.[412]

The psychologist who evaluated the parties in order to recommend a visitation arrangement produced a largely unflattering report, depicting Carole as "child-like," with a "limited capacity to be intimate or self-sacrificing to the degree which normally characterizes relationships between parents and children . . . ."[413] For his part, Michael allegedly "exhibit[ed] virtually all of the characteristics associated with parents who engage in incestuous-type relationships," though the psychologist found no evidence of inappropriate sexual contact.[414] Only Gerald, Carole's husband, seemed promising parental material,[415] but the psychologist believed he was the least committed to Victoria's long-term care.[416] Ultimately, the psychologist recommended that Michael be afforded limited visitation, the best of what he evidently regarded as an unfortunate set of options.[417]

Whatever their individual strengths and shortcomings, Victoria had formed attachments to all three adults. Michael apparently had grasped the opportunity to establish a relationship with Victoria, which, under *Lehr*, presumably meant that he had a liberty interest earning him the right to notice and a hearing before his parental rights were terminated. But *Michael H.* differed from the earlier cases in one crucial respect: when Victoria was born, Carole was legally married, to Gerald. California's century-old marital presumption, recently amended, provided only very limited circumstances under which a mother's husband would not automatically be declared the sole legal father of any child born during the marriage.[418] Accordingly, the California trial court granted summary judgment to Gerald, declaring him

409. *Id.* at 114-15.

410. *Id.*

411. *Id.* at 115.

412. Specifically, Michael H. sought visitation *pendente lite*. *See* Michael H. v. Gerald D., 236 Cal. Rep. 810, 813 (Ct. App. 1987), *aff'd*, 491 U.S. 110 (1989).

413. *Id.*

414. *Id.*

415. *Id.*

416. Joint Appendix at 52, Michael H. v. Gerald D., 491 U.S. 110 (1989) (No. 87-746) 1988 U.S. S.Ct. Briefs LEXIS 1138 [hereinafter *Michael H.* Appendix].

417. Michael H., 491 U.S. at 115.

418. *Michael H.* Appendix, supra note 416, at 30.

Victoria's legal father and terminating Michael's parental rights.[419] In 1987, an appellate court affirmed, and the California Supreme Court denied review.[420]

By the time the case reached the U.S. Supreme Court, *Michael H.* was framed as a contest between Gerald and Michael for legal recognition as Victoria's father.[421] Procedural and substantive due process claims loomed large, consuming the lion's share of the briefs and commentary on the case. As in earlier unwed father cases, though, it was also possible to view the challenged statute as discriminating based on sex. Michael argued that California's statutory scheme "constitutes gender-based discrimination":

> Under its terms, the right of a biological mother to remain a parent is *never* open to question without access to a full panoply of due process protections. On the other hand, a biological father is deprived of parental rights without any determination of his fitness and precluded from *ever* asserting his parental rights notwithstanding his established relationship with the child.[422]

Gerald contended that Michael was "simply wrong. . . . [T]he mother's right to dispute the presumption is coextensive with the putative father's."[423] Even assuming a gender-based distinction, Gerald argued that the statute bore "a substantial relationship to the state's interest of assuring parentage for the child and protecting the family into which the child is born."[424] An amicus brief filed by the ACLU sidestepped the equal protection question, and instead pressed the argument that to sever the bond between Michael and Victoria violated Michael's fundamental right to maintain an established parent-child relationship.[425]

In the end, the Court addressed only Michael's due process claim, dealing him a resounding defeat. The plurality opinion, authored by Justice Scalia, exuded barely veiled disdain for Michael's claim and for the complicated family

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419. *See* Michael H. v. Gerald D., 236 Cal. Rptr. at 820 (Ct. App. 1987), *aff'd*, 491 U.S. 110.

420. *Id.* at 821.

421. *See, e.g.*, *2 Fathers Claim Right to Daughter*, CHI. TRIB., Oct. 13, 1988, at 32 (discussing *Michael H.*).

422. Brief for Appellant Michael H. at 29, *Michael H.*, 491 U.S. 110 (No. 87-746).

423. Motion to Dismiss or Affirm for Appellee at 7-8, *Michael H.*, 491 U.S. 110 (No. 87-746).

424. Brief for Appellee at 31, *Michael H.*, 491 U.S. 110 (No. 87-746).

425. *See* Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of American Civil Liberties Union Foundation and ACLU Foundation of Southern California in Support of Appellants, *Michael H.*, 491 U.S. 110 (No. 87-746); Brief of the National Council on Children's Rights Supporting Appellants, *Michael H.*, 491 U.S. 110 (No. 87-746).

situation that produced it.[426] Scalia scoffed at the notion that a biological father could invoke constitutional protection for his relationship to a child conceived in an "adulterous" affair when his parenthood would intrude upon the harmony of an intact marital family.[427] In his concurrence, Stevens agreed with the dissenters that Michael's biological and relational connection to Victoria earned him the right to notice and a hearing, but concluded that Michael had such an opportunity.[428] The dissenters expressed dismay at what they perceived as a stunning retreat from the principles that animated *Stanley*, *Caban*, and even *Lehr*, where the Court had emphasized that a biological tie plus an established relationship sufficed to create a protected liberty interest.[429] The only mention of Michael's equal protection claim came in the plurality's brief note that "it was neither raised nor passed upon below."[430] *Michael H.* seemed, therefore, to stand primarily for the Court's endorsement of marital supremacy, and for a cramped conception of due process rights more generally.

Capping almost two decades of debate over their proper scope and constitutional pedigree, *Michael H.* stands as the Supreme Court's final word on the parental rights of nonmarital fathers. A question originally framed as discrimination based on sex and marital status had become a battle over the process due to nonmarital fathers threatened with termination of their parental rights. From the beginning, some of the Justices had considered an equality framing: early drafts of the majority opinions in *Stanley* and *Caban* endorsed a robust rule of formal sex neutrality in nonmarital parental rights and rejected unflattering generalizations about unmarried fathers as dissolute, irresponsible, and uncaring. But this unqualified version of nonmarital sex neutrality never garnered enough support to prevail. Nor were the Justices—even those most sympathetic to nonmarital families' plight, even in the heyday of nonmarital fathers' rights—ever prepared to embrace full equality for marital and nonmarital fathers. In short, though nonmarital fathers achieved some due process protections, they never won a constitutional guarantee of equal treatment based on sex and marital status. And the Court never directly engaged with the fundamental question that divided feminists: when does legal sex neutrality serve substantive sex equality? However one believes those questions should be answered, the consequences of avoiding them have implications beyond the unwed fathers parental rights cases.

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426. *Michael H.*, 491 U.S. 110.

427. *Id.* at 113.

428. *Id.* at 132-33 (Stevens, J., concurring).

429. *Id.* at 142-43 (Brennan, J., dissenting).

430. *Id.* at 116-17 (plurality opinion).

V. DIVERGENCES: NONMARITAL PARENTHOOD IN THE AGE OF EQUALITY

When Peter Stanley brought the first unwed father case to the Supreme Court in 1971, he posed novel questions of sex and marital status discrimination to a nation engulfed in cultural and constitutional change. Though nonmarital fathers won unprecedented due process rights in the decades that followed, they remained in many ways in a class by themselves. Unlike many other groups that claimed constitutional rights in the Supreme Court, unwed fathers did not have the support of established organizations or mobilized social movements who represented their particular interests. Instead, various groups and interests fought for their own causes on the battleground of nonmarital fatherhood. Social movements left their mark on the constitutional treatment of nonmarital fathers, but not in the usual way.

This Part examines the causes and consequences of nonmarital fathers' failed pursuit of constitutional parity with mothers and marital fathers. Section V.A considers nonmarital fathers' unsuccessful quest to be treated as "de facto divorced fathers" and suggests reasons for this failure. Section V.B examines the divergence between Justices' and feminists' concerns in the debate over unwed fathers' rights. This divergence had significant ramifications for constitutional equality law, and for the relationship between sex equality and marital supremacy, as Section V.C. explains.

A. Nonmarital Fathers vs. Divorced Fathers

Between the 1960s, when nonmarital fathers began to attract the attention of legal and social work professionals, and the 1980s, when the Supreme Court last considered nonmarital fathers' parental rights, sex neutrality became the rule in the law of divorce. This transformation began in the early 1970s, as feminists and divorced fathers' rights activists—for somewhat different reasons—began to advocate for the abandonment of maternal custody preferences, and continued through the 1970s and 1980s as joint custody and paternal involvement gained ground. Divorced fathers won greater access to their children, in part through arguments for equal treatment and against mothers' inherently superior parenting ability. Nonmarital childbearing became more common and less stigmatized. As a result, singling out nonmarital fathers for inferior parental rights seemed increasingly anomalous.

Even before the sex equality revolution, nonmarital fathers could cite the 1965 case *Armstrong v. Manzo*,[431] where the Court had recognized a divorced

431. 380 U.S. 545 (1965).

father's procedural right to notice and a hearing in an adoption proceeding. In *Stanley*, the Center on Social Welfare Policy and Law's amicus brief noted that *Manzo* was "almost directly on point."[432] In *Quilloin*, Justice Marshall framed the equal protection question as whether "the state was required to treat [Quilloin] the same as a divorced father."[433] Quilloin's attorney called his client a "de facto divorced father. . . . He has done everything as far as a nurturing instinct is concerned that a normal divorced father would."[434] But Quilloin could not overcome the trial court's apparent finding that he had neither legitimated his son nor provided consistent financial support. Marshall's opinion for the unanimous Court affirmed the validity of distinctions between divorced and never-married fathers, at least in cases where the father had "never shouldered any significant responsibility" for the child.[435]

Advocates for nonmarital fathers continued to press the divorced father analogy in *Caban*, *Lehr*, and *Michael H.* In *Caban*, for instance, the Legal Aid Society's amicus brief highlighted

> the juxtaposition of Mr. Caban's plight with the status of a divorced father who has had no contact whatsoever with his children. Regardless of the duration of the marriage, the amount of support provided, or indeed, whether the divorced father had even been made aware of the birth of the child, the child of such a father could not be adopted [without the father's consent under New York law].[436]

In *Michael H.*, the parallel between nonmarital and divorced fathers seemed especially strong: like many divorced fathers, Michael had maintained a relationship with his daughter through court-ordered visitation during the

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432. Brief for Center on Social Welfare Policy and Law as Amicus Curiae at 5, Stanley v. Illinois, 405 U.S. 645 (1972) (No. 70-5014).

433. Opinion Announcement at 1:40, Quilloin v. Walcott, 434 U.S. 246 (1978) (No. 76-6372), http://www.oyez.org/cases/1977/76-6372 [http://perma.cc/3PDX-KV5Q].

434. Oral Argument at 9:46, *Quilloin*, 434 U.S. 246 (No. 76-6372), http://www.oyez.org/cases/1977/76-6372 [http://perma.cc/3PDX-KV5Q].

435. *Quilloin*, 434 U.S. at 256. "[E]ven a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage," Marshall wrote. *Id.*

436. Brief for Legal Aid Society as Amicus Curiae Supporting Appellant at 54, Caban v. Mohammed, 441 U.S. 380 (1978) (No. 77-6431); *see also* Brief for Community Action for Legal Services as Amicus Curiae at 44-46, *Caban*, 441 U.S. 380 (No. 77-6431) (making similar arguments). Community Action for Legal Services elaborated this comparison in *Lehr*, repeatedly invoking *Armstrong v. Manzo*. *See* Brief for Community Action for Legal Services, Inc. et al. as Amici Curiae at 50, Lehr v. Robertson, 463 U.S. 248 (1983) (No. 81-1756) (citing *Armstrong v. Manzo*, 380 U.S. 545).

times when he was estranged from her mother.[437] As Michael Hirschensohn (the plaintiff in *Michael H.*) told the *Los Angeles Times* in 1987, "I lived with the woman I loved, we split up and I think I'm entitled to see my daughter. I'm not asking to be treated other than [as] a divorced father."[438]

Nonmarital fathers' efforts to highlight their similarities to divorced fathers belied crucial differences, however. One key distinction was unmarried fathers' relative lack of organization. Like feminists, divorced fathers had mobilized as a movement by the 1970s, though they did so primarily at the state and local rather than national level.[439] Fathers' rights activists had developed and published critiques of the divorce system since the 1960s, and successfully lobbied state legislatures in the following decades.[440] In contrast, there is little evidence that unmarried fathers mobilized before the 1980s, though it is possible that they took earlier action under the radar at the state and local level. By the early 1980s, some fathers' rights organizations supported unmarried fathers' efforts to gain custody of their children, and journalists began to write about the rights of "single dads" as a group, glossing over distinctions based on marital status.[441] Some unmarried fathers started their own organizations later in the decade: Hirschensohn founded Equality Nationwide for Unwed Fathers (ENUF) and claimed some credit for changing California law to eliminate the conclusive marital presumption that deprived him of parental rights.[442]

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437. The ACLU's *Michael H.* brief acknowledged that the "state may indeed have a legitimate interest in protecting families that conform to the traditional nuclear model," but argued that interest "would not bar a biological father from visiting a child after divorce has dissolved a marital unit." Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of American Civil Liberties Union Foundation and ACLU Foundation of Southern California in Support of Appellants, *supra* note 425, at 28.

438. Roxane Arnold, *Fatherhood: Law Facing a Challenge*, L.A. TIMES, Mar. 5, 1987, at B1 (quoting Michael Hirschensohn).

439. Other stakeholders in the nonmarital fathers cases, such as adoption advocates and social workers, had long enjoyed the benefits of professionalization and organization.

440. *See* Dinner, *supra* note 17, at 5-6.

441. *See, e.g.*, Marci DeWolf, *United By Divorce: Single Fathers Flex Legal Muscles*, CHI. TRIB., Mar. 1, 1981, at J1 (describing the efforts of the Northern Virginia Chapter of Fathers United for Equal Rights); James T. Yenckel, *Men Organizing in the Battle for "Equal Rights,"* L.A. TIMES, June 18, 1981, at I14 (describing a Houston conference uniting various fathers' and men's rights organizations).

442. Susan Karlin, *The Family Way*, L.A. TIMES MAG., June 21, 1992, at 6. It is not clear how large or active these organizations were. Hirschensohn told a reporter in 1992 that ENUF had "several hundred members." *Id.* ENUF was affiliated with larger fathers' rights organizations that focused on divorced fathers, the National Council for Children's Rights in Washington, D.C., and the Joint Custody Association of California. *See* Charles-Edward Anderson, *Unwed Dads' Setback*, 75 A.B.A. J., Dec. 1989, at 24. Hirschensohn later attracted the support of the Palo Alto group Fathers' Rights and Equality Exchange (F.R.E.E.). *See*

However, nonmarital fathers' organizations did not participate in federal constitutional litigation; the Supreme Court heard their claims through the filter of civil libertarian and legal services groups with their own agendas and priorities.

Nonmarital fathers also framed their arguments somewhat differently from divorced fathers. In the 1980s, Dinner has shown, the divorced fathers' rights movement began to justify claims for paternal or joint custody as rights owed to fathers in exchange for their obligation to pay child support.[443] Perhaps not surprisingly, nonmarital fathers and their allies were slower to invoke fathers' child support obligations as the legal or moral basis for parental rights.[444] Many unmarried fathers, including Stanley, were in no position to support their children. Three of the four plaintiffs in the 1980s nonmarital fathers cases had not had an opportunity to establish parental rights or a relationship with their children, and so had no support obligation to fulfill. Moreover, the organizations that filed amicus briefs on nonmarital fathers' behalf represented indigent and low-income individuals and families in danger of having their parental rights terminated because of "neglect," which many civil libertarians and anti-poverty lawyers saw as little more than a code word for poverty. And judges and commentators frequently drew the connection between support and rights to the detriment of nonmarital fathers: in *Quilloin*, for instance, the Court made much of the plaintiff's alleged failure to provide consistent financial support for his son. It was not until *McNamara* that the ACLU highlighted nonmarital fathers' support obligations as a rationale for affording them reciprocal parental rights. By then, Congress and state governments had enacted increasingly aggressive child support enforcement measures that fell most heavily on poor and low-income, often unmarried, fathers.[445]

Press Release, Fathers' Rights & Equality Exchange, F.R.E.E. Announces Support of Hirschensohn Case (Oct. 24, 1994) (on file with author). The *Los Angeles Times* reported in 1989 that John Ryan had founded an organization called the National Organization for Birth Fathers and Adoption Reform, which claimed 125 members. Paul Dean, *Two Men and a Baby: Birth Fathers, Adoption's Once-Silent Partners, Seek Role in Their Children's Lives*, L.A. TIMES, Oct. 29, 1989, http://articles.latimes.com/1989-10-29/news/vw-527_1_birth-father [http://perma.cc/SKK3-5LNV].

443. Dinner, *supra* note 17, at 87.

444. Unmarried fathers did sometimes make this argument in individual custody cases, of course, just as individual fathers emphasized their own contributions to children's financial support in parental rights and adoption cases. In other words, it is not that support obligations did not figure into nonmarital fathers' arguments, but rather that support obligations did not play a prominent role in their justifications for retaining parental rights themselves.

445. *See* Dinner, *supra* note 17, at 112-13.

Finally, and significantly, nonmarital fathers began their quest for rights burdened by deep-seated cultural images, inflected by race and class, branding them as derelicts and deadbeats.[446] Divorced fathers were not immune from the deadbeat depiction, especially as child support enforcement became a national political imperative. Nevertheless, spokesmen for the divorced fathers' rights movement tended to embody, and represent, a predominantly white and increasingly middle-class constituency. By the 1980s, divorced fathers claimed rights based upon their ability to fulfill child support obligations, in sometimes explicit contrast to nonmarital fathers, whose delinquency forced unwed mothers onto the welfare rolls.[447] Unmarried fathers presented a direct threat to privatized dependency at a time when politicians traded on racialized tropes such as the "welfare queen."[448] The very term "unwed fathers" conjured for many a racialized image of the "undeserving poor," presumptively unworthy of rights.[449] The racial politics of nonmarital parenthood were overt in the 1960s and early 1970s: then, African-American mothers and children predominated as plaintiffs in the "illegitimacy" cases, and advocates exposed the racial motivation and impact of morals regulations and welfare restrictions in an effort to undermine their constitutionality.[450] Though many plaintiffs in the unwed fathers cases were men of color, advocates did not bring race discrimination claims on their behalf. Still, race functioned as a powerful subtext in the unwed fathers cases and helped to shape divergent perceptions of divorced and nonmarital fathers.

From the beginning, nonmarital fathers and their supporters protested marital status discrimination in parenthood. Nonmarital fathers pointed to the legal status of divorced fathers as an appropriate baseline against which to measure their own parental rights. That baseline moved significantly during the 1970s and 1980s, as divorced fathers won joint custody statutes in many states, and formal sex neutrality with respect to financial allocations at divorce. Nonmarital fathers also won important new rights during this period, to be sure: if a biological father successfully seized the opportunity to develop a relationship with his child and faced no competing claims to fatherhood, he might seek constitutional protection of his parental status. Still, increasingly rigorous and marriage-neutral child support enforcement mechanisms did not

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446. *See* Roberts, *supra* note 16.

447. *See* Dinner, *supra* note 17, at 128, 136-37.

448. MARISA CHAPPELL, THE WAR ON WELFARE: FAMILY, POVERTY, AND POLITICS IN MODERN AMERICA 199-241 (2010); Lefkovitz, *supra* note 13, 595-98.

449. *See* Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. POVERTY L. & POL'Y 127, 130 (2011); Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897, 898-99, 901-04 (2013).

450. *See* Mayeri, *supra* note 21.

translate into fully equal parental rights for nonmarital fathers. For them, the "divorce bargain" remained out of reach.[451]

B. Justices vs. Feminists

Throughout the unwed fathers litigation, both Justices and feminists grappled with the meaning of sex neutrality, and the significance of marital status, for nonmarital parental rights. Despite some overlaps and intersections, however, feminists and the Justices debated the unwed fathers cases on fundamentally different terms.[452] Feminists struggled over the implications of nonmarital fathers' claims for women's rights, substantive sex equality, and the desired transformation of gender roles. Those with civil libertarian sympathies also worried about unwarranted state intrusion into the lives of poor families. For members of the Court, by contrast, the unwed fathers cases were battles between husbands and biological fathers over the rights of men, the integrity of the adoption process, and the superiority of the marital family. The Court's discussions bore the ideological imprint of the divorced fathers' rights and traditional family values movements more than of feminism.

For the Justices who were open to seeing nonmarital fathers' claims as a question of equal rights, sex and marital status discrimination arguments had purchase primarily because the challenged laws deprived *fathers* of rights, unjustly relegating them to second-class status regardless of their individual circumstances or dedication to their children. There is little evidence that these Justices regarded paternal involvement as part of a larger feminist agenda of upending traditional gender roles and challenging *mothers'* primary responsibility for childrearing. In other words, whereas Justices who were sympathetic to equality arguments were primarily concerned with whether fathers, as a group or individually, were deserving of rights, feminists who favored equal treatment for fathers did so largely because they hoped mothers, and women generally, would benefit from disrupting gendered assumptions about parenting.

For feminists' civil libertarian allies, this commitment to sex equality for mothers intersected with a growing concern about state authorities

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451. *See* Dinner, *supra* note 17, at 140 (arguing that tying custody rights to financial support "undermined poor men's capacity to experience fatherhood as a relationship defined by caregiving rather than breadwinning"); *id.* at 147 (describing how the divorce bargain "helped to legitimize cutbacks in welfare supports for mothers and children" by "affirm[ing] child support, rather than public assistance, as the normative source of provisioning for children outside of intact marriages").

452. For a perspective that emphasizes the convergence between the Court's decisions and feminist principles, see Hendricks, *supra* note 256, at 443-53.

extinguishing poor parents' rights in the name of children's welfare. Terminating the parental rights of nonmarital fathers based on nothing more than a best-interests-of-the-child determination had troubling implications for mothers and fathers alike. Indeed, terminations based on "neglect" arguably had the greatest impact on mothers, who were more likely to have assumed primary responsibility for children's care and therefore had the most to lose from state intervention.[453]

Similarly, the Justices and feminists who were skeptical of nonmarital fathers' rights claims diverged in their reasoning and in their underlying motivations. For several members of the Court, the specter hanging over the nonmarital fathers cases was that of adoptions thwarted by the need to identify, locate, and notify biological fathers whose consent had previously been immaterial. For these Justices, the state's interest in finding stable marital homes for illegitimate children outweighed the interests of nonmarital fathers, at least those who had not developed relationships with or legitimated their children. The desire for a smooth path to adoption at a time when the supply of adoptable infants had plummeted converged with a persistent belief in the superiority of marital families to motivate these Justices' resistance to nonmarital fathers' claims. In contrast, feminists who were skeptical of formal sex equality in parental rights were concerned primarily about women's autonomy to make meaningful choices about their own and their children's futures without interference from the state or from nonmarital fathers.[454]

Justices and feminists also disagreed among themselves and with each other about what role, if any, marital status should play in determining parental rights. For some feminists on either side of the fathers' rights question, marital status was largely beside the point. Unlike fathers' rights skeptics on the Court, most feminists did not assume the superiority of marital

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453. Justice O'Connor, the only Justice to express concern about assuming mothers' primary responsibility for nonmarital children, did not align with feminists' civil libertarian allies on questions of parental rights. O'Connor joined the majority in *Lehr* and *Michael H.*; moreover, she—and Chief Justice Burger and Justice White—joined the dissent in *Santosky v. Kramer*, which struck down a New York parental rights termination scheme on constitutional grounds, see 455 U.S. 745 (1982) (Rehnquist, J., dissenting).

454. The Justices who resisted formal sex neutrality were not wholly unconcerned with mothers' autonomy, to be sure. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 408 (1979) (Stevens, J., dissenting) (reasoning that to require the consent of both parents to an adoption "would remove the mother's freedom of choice in her own and the child's behalf without also relieving her of the unshakable responsibility for the care of the child"). Nevertheless, the skeptical Justices most consistently expressed concern about facilitating adoptions, especially of newborns. And whereas feminists and their civil libertarian allies wished for a robust consent requirement for all birth parents, the Justices were more likely to believe that states should be permitted to withhold veto power from both birth parents.

families. Nor were feminists particularly invested in the efficiency of adoption procedures except to the extent that they vindicated a mother's truly voluntary decision to surrender her child. And many feminists who were skeptical of formal sex neutrality for nonmarital parents had similar qualms about the equal treatment of men and women at divorce.

Marital status mattered to many participants in the debate over parental rights, but in different ways and for different reasons. For the Court, formal marriage signaled a man's commitment to accept the full responsibilities of fatherhood; in exchange, he received the full complement of parental prerogatives. Nonmarriage raised a presumption, rebuttable only in certain circumstances, that a father lacked such commitment. For many of the feminists who were skeptical of nonmarital fathers' claim to equal treatment, marital primacy was a means to an end rather than an end in itself. In other words, if sex neutrality was now required for marital parents who divorced, then marital status-based distinctions at least helped to preserve nonmarital mothers' autonomy against further incursions. For others, marriage was morally significant, but not for what it said about a man's commitment to fatherhood; rather, marriage signaled a woman's consent to her partner's (now presumptively equal) parental rights. The Court and some feminists agreed that nonmarital fathers should be held to a higher standard than mothers or marital fathers. But the Justices and feminist skeptics reached this conclusion through very different conceptions of the relationship between sex equality and marital supremacy.

In other areas of constitutional sex equality law, social movements—often in dialogue with countermovements—shaped each other's positions and together influenced outcomes in the Supreme Court. As Reva Siegel has shown, conflict over the ERA tempered the arguments of its friends and foes and contributed to a "de facto ERA"—an equal protection jurisprudence that reflected mutually imposed limitations on the scope of sex equality.[455] Hints of this dynamic appear in the unwed fathers cases, such as when feminists worried that siding with Quilloin might send the wrong signal about the meaning of the ERA for mothers' autonomy and parental prerogatives.[456] By and large, though, the nonmarital fathers' cases reflect a profound disconnect between feminist arguments and the terms of federal constitutional jurisprudence. In part, this was a matter of timing: it was not until the 1980s that the "feminist" dilemma made its way into Supreme Court briefs. By then, path dependency and an increasingly conservative political climate may have foreclosed significant feminist influence in either direction. Two other

455. *See* Siegel, *supra* note 151, at 1332-39.

456. *See supra* notes 222-230 and accompanying text.

movements, divorced fathers' rights and traditionalist conservatism, instead left their ideological fingerprints on the nonmarital fathers cases.

To the extent that the Court embraced nonmarital fathers' rights, it was largely on terms that resonated with the divorced fathers' rights movement. As scholars have shown, divorced fathers' rights activists often co-opted the principle of formal sex neutrality to advance paternal prerogatives at women's expense.[457] Whereas feminists hoped that legal sex neutrality would advance substantive sex equality by unsettling traditional gender roles, fathers' rights advocates sought to maintain gender hierarchies within marriage.[458] Fathers' rights leaders eventually sought a "divorce bargain" that exchanged custody rights for the fulfillment of child support obligations.[459] The Court's emphasis on the provision of consistent financial support as a prerequisite for nonmarital fathers' right to consent to adoption reflects a similar calculus, in which a father proved his mettle by assuming the traditional male breadwinner role. Moreover, the Justices who embraced nonmarital fathers' claims, like divorced fathers' rights activists, never did so on the ground that *women* would benefit from shared responsibility for parenting or from the disruption of gender role stereotypes.

Insofar as the Justices resisted nonmarital fathers' claims, they often did so in ways that reflected traditionalist views about gender roles and marriage. The dissenting opinions in *Stanley* and *Caban* and the majorities in *Fiallo* and *Parham* embraced a deeply gendered conception of parenthood. On this view, mothers, irrespective of marital status, inevitably formed strong bonds with their offspring, whereas fathers needed marriage to anchor them to children. Motherhood as women's highest calling is, of course, a mainstay of the traditionalist vision of family.[460] And *Parham* has long been featured on Eagle Forum's "Top Ten Cases that Prove the Equal Rights Amendment (ERA) Would Have Been a Disaster," joined more recently by *Miller v. Albright*, which upheld citizenship laws that placed greater burdens on nonmarital fathers and their children than on other parent-child pairs.[461]

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457. *See* JOCELYN ELISE CROWLEY, DEFIANT DADS: FATHERS' RIGHTS ACTIVISTS IN AMERICA 263-64, 266, 269 (2008); Dinner, *supra* note 17, at 110 (describing how fathers' rights activists "harnessed the ideals of formal equality and liberalized gender roles to better men's bargaining position at divorce").

458. Dinner, *supra* note 17, at 139.

459. *Id.* at 87.

460. *See, e.g.*, PHYLLIS SCHLAFLY, THE POWER OF THE POSITIVE WOMAN 45-52 (1977).

461. *Top Ten Cases That Prove the Equal Rights Amendment (ERA) Would Have Been a Disaster*, EAGLE F. (2002), http://www.eagleforum.org/era/2002/top-ten.shtml [http://perma.cc/2TT8-C3BH] (listing as number ten *Miller v. Albright* and as number nine *Parham v. Hughes*, "which upheld the state's ability to disfavor procreation outside of marriage by

The Justices' attitudes toward nonmarital families varied significantly, to be sure. When it came to fatherhood, those attitudes did not neatly align with other ideological preferences. White, who took conservative positions on abortion rights, homosexuality, and constitutional standards for parental rights terminations,[462] was fathers' most ardent champion. Douglas, a liberal icon, initially scorned Peter Stanley's claim. Marshall sympathized with nonmarital families in *Stanley* but stopped short of full equality for divorced and nonmarital fathers in *Quilloin*. Brennan took fathers' side in most cases, but joined the *Lehr* majority. And Stevens, considered one of the more liberal Justices on many issues, was among the most hostile to nonmarital fathers' rights.[463]

Still, many of the Justices shared a commitment to marital supremacy. In the stepfather adoption cases, the Court assumed the inherent superiority of a two-parent marital family unit almost regardless of biological or social ties. In the newborn adoption cases, parental rights advocates defending the integrity of poor families battled adoption proponents who worried that consent requirements would interfere with smooth transfers of parental rights. On balance, many of the Justices, across the ideological spectrum, believed nonmarital children were best raised by married parents and spared the "stigma of illegitimacy." In the early 1980s, Justice Stevens could credibly tell his colleagues in the *Lehr* majority that they all shared Hafen's "bias in favor of the formal family."[464] By the end of the decade, the majority embraced the legal primacy of marriage, upholding the termination of Hirschensohn's parental rights notwithstanding his established relationship with the biological daughter who called him "daddy."

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denying certain rights to the father of an illegitimate child . . . . [The] ERA would have precluded this [case]").

462. *See* Bowers v. Hardwick, 478 U.S. 186, 187 (1986) (White, J., authoring majority opinion upholding Texas anti-sodomy law); Santosky v. Kramer, 455 U.S. 745, 770 (1982) (White, J., joining dissenting opinion in a case holding New York's parental rights termination statute unconstitutional); Roe v. Wade, 410 U.S. 179, 221 (1973) (White, J., dissenting from a decision upholding abortion rights).

463. Notably, all of the Justices agreed that states could not place stringent statutes of limitation on unmarried mothers' paternity claims. *See* Clark v. Jeter, 486 U.S. 456, 463 (1988) (holding a six-year statute of limitations on paternity suits to be an unconstitutional denial of equal protection to illegitimate children); Pickett v. Brown, 462 U.S. 1, 18 (1983) (same result for a two-year statute of limitations); Mills v. Habluetzel, 456 U.S. 91, 101 (1982) (same result for a one-year statute of limitations).

464. *See supra* notes 381-382 and accompanying text.

C. *After the Constitutional Equality Revolution*

In the years after *Michael H.*, feminist ambivalence and disagreement about unwed fathers' rights persisted. Some, in the tradition of Ginsburg and Law, continued to worry that maintaining traditional maternal preferences perpetuated gender stereotypes and patterns of inequality.[465] Others, such as Mary Becker,[466] Karen Czapanskiy,[467] and Martha Fineman,[468] rejected formal sex neutrality for unmarried parents and for family law more generally, as perpetuating rather than ameliorating substantive inequality. Mary Lyndon Shanley,[469] Katharine Bartlett,[470] and others sought middle ground through more functional or less exclusive conceptions of parenthood. Indeed, as legal and cultural definitions of family became less formal, and as open adoption, third-party visitation, and blended families grew increasingly common, the imperative to choose between fathers became less evident. Focusing on function rather than on marriage, biology, or gender, and thinking beyond the two-parent dyad advanced sex neutrality and shared parenting by emphasizing the importance of care and nurture for all parents regardless of sex. These interventions held the promise of circumventing the feminist dilemma without relinquishing shared feminist goals.

At century's end, the states diverged, sometimes dramatically, in their approach to the constitutional rights of nonmarital fathers. Courts in Texas and California, for instance, took a more expansive view of nonmarital fathers' rights than they had in earlier cases such as *Kirkpatrick* and *McNamara*. In 1987, the Texas Supreme Court interpreted the state Equal Rights Amendment to invalidate the statute challenged in *Kirkpatrick*, which required nonmarital fathers, but not mothers, to satisfy a best-interests test in order to legitimate a

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465. Ruth Bader Ginsburg & Barbara Flagg, *Some Reflection on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 15-16.

466. *See* Mary E. Becker, *The Rights of Unwed Mothers: Feminist Approaches: The* Social Service Review *Lecture*, 63 SOC. SERV. REV. 496, 503 (1989).

467. *See* Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1417-41 (1991).

468. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES (1995).

469. *See* Shanley, *supra* note 5, at 63-65.

470. *See* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882-83 (1984) [hereinafter Bartlett, *Rethinking Parenthood*].

child.[471] In *In re Raquel Marie X.*, the New York Court of Appeals held unconstitutional a statute that required nonmarital fathers seeking to block the adoption of an infant under six months old to have lived with the child's biological mother for a certain period of time.[472] The California Supreme Court, in the 1992 case *In re Kelsey S.*, held unconstitutional a state statutory scheme because it enabled a biological mother unilaterally to prevent a biological father from establishing the presumed father status necessary to veto an adoption.[473] Many states, however, maintained legal barriers that limited nonmarital fathers' ability to withhold consent for the adoption of their infants, and otherwise restricted the circumstances in which biological fathers could assert parental rights.[474] High-profile cases in which courts returned children to their biological parents after many years living with adoptive parents spurred state legislative efforts to curtail birth parents' rights and stabilize adoptions.[475] By the turn of the century, states' laws regarding parentage and consent to adoption were a complex patchwork of statutes and case law that reflected widely varying interpretations of federal and state constitutional law.[476]

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471. *In re* Unnamed Baby McLean, 725 S.W.2d 696, 698 (Tex. 1987); 1 JOAN HEIFETZ HOLLINGER, ADOPTION LAW AND PRACTICE § 2.04[2] (2015). In 1994, the Texas Supreme Court rejected the analysis of *Michael H.* to hold that the conclusive marital presumption violated the Due Course of Law guarantee of the Texas Constitution. *In re* J.W.T., 872 S.W.2d 189, 198 (Tex. 1994). For more on states' treatment of the marital presumption post-*Michael H.*, see June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219 (2011). On the trend in uniform laws toward "an emphasis on quick and easy adoption of desirable newborns," see Berger, *supra* note 5, at 347.

472. *In re* Raquel Marie X., 559 N.E.2d 418, 427 (N.Y. 1990).

473. 823 P.2d 1216, 1238 (Cal. 1992).

474. *See, e.g.*, *In re* Baby Boy D., 742 P.2d 1059 (Okla. 1985) (upholding a statute granting a nonmarital mother the unilateral right to consent to her child's adoption unless the father had legitimated the child). For a discussion of states that took a similarly restrictive approach, see 1 HOLLINGER, *supra* note 471, §§ 2.04[2], 2.54-55 (discussing the laws of Oregon, Utah, Nebraska, Kansas, and South Dakota). *See also* Berger, *supra* note 5, at 347 (noting that "[o]nly a minority of states have statutes that permit unmarried fathers to assert rights if they can show they were thwarted in their desire to parent or support a child").

475. On the trend in uniform laws toward "an emphasis on quick and easy adoption of desirable newborns," see Berger, *supra* note 5, at 347. On the heart-wrenching cases that gave political impetus to this trend, see David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 753-56 (1999); *see also id.* at 770 (describing legislative responses).

476. On the cases the Court avoided in the 1990s, see Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 102-106 (2004). *See also id.* at 102, 106-07 (describing provisions of the Uniform Adoption Act promulgated after two wrenching,

In recent years, a new generation of progressive and feminist scholars has called for legal, institutional, and cultural reforms to bolster the role of nonmarital fathers in the lives of their children.[477] Citing the benefits to children of fathers' involvement and the importance of encouraging co-parenting after the dissolution of nonmarital relationships, these commentators regret the law's complicity in maternal gatekeeping that allows mothers to exclude willing biological fathers from their children's lives. Others remain skeptical, inclined to protect mothers' autonomy and wary of fathers' rights claims that appear insensitive to women's subordination within and outside the family.[478] Once on the cutting edge of constitutional sex equality law, debates over nonmarital parents' *parental* rights now occur largely outside its ambit.[479]

1. *Collateral Consequences: The Derivative Citizenship Cases*

Whether one sees the Court's withdrawal from this constitutional controversy as a salutary opportunity for federalist experimentation or a regrettable instance of judicial abdication, the Court's avoidance of equality questions in the unwed fathers' parental rights cases has had significant collateral consequences for constitutional sex equality law.[480] Although the Court ignored feminist arguments in the "unwed fathers" cases of the 1970s and 1980s, at the turn of the twenty-first century equal protection challenges to sex-discriminatory citizenship transmission requirements forced a reckoning.

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high-profile "failed adoption" cases). Oren notes that the general trend in state courts is toward enforcement of a "biology plus" standard, even in newborn adoption cases. *See id.* at 109.

477. *See* Huntington, *supra* note 4; Maillard, *supra* note 4; Maldonado, *supra* note 6, at 336-350.

478. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) (arguing that public policy should support caregiver/dependent dyads rather than assuming the privatization of women's and children's dependency within the nuclear family); Carbone & Cahn, *supra* note 3, at 1229 (describing "a new system of family law" which "accords unmarried women greater power in the family by looking the other way").

479. The recent case *Adoptive Couple v. Baby Girl* involved a nonmarital father who would have had only a limited right to object to his child's adoption under the law of South Carolina and many other states. 133 S. Ct. 2552 (2013). His claim to parental rights rested upon the Indian Child Welfare Act (ICWA). Several briefs in *Adoptive Couple* addressed the fundamental right of unmarried mothers to place their children for adoption, but these discussions generally avoided the language of sex equality or equal protection for mothers and fathers. Professor Bethany Berger has offered a compelling analysis of the race, gender, and class implications of *Adoptive Couple*. *See* Berger, *supra* note 5.

480. In other words, one could remain agnostic, as I do here, about the proper resolution of the feminist dilemma and still lament the Court's failure to engage the questions it presents.

Miller v. Albright[481] and *Nguyen v. INS*.[482] at last impelled the Court to grapple with the feminist case for—though not against—sex neutrality for nonmarital parents. Lorelyn Penero Miller and Tuan Anh Nguyen challenged provisions of the Immigration and Nationality Act (INA) that operated to prevent their fathers from passing on U.S. citizenship, under circumstances in which a citizen mother, marital or not, would automatically have been able to do so.

Unlike the parental rights cases, these citizenship cases posed no "feminist dilemma."[483] As in *Stanley*, *Wiesenfeld*, and *Fiallo*, the fathers' opponent was the state, and a victory for sex neutrality would not come at mothers' expense. Indeed, feminists made powerful arguments in law review articles and amicus briefs that limiting fathers' ability to transmit citizenship to illegitimate offspring hurt women at least as much as men by perpetuating mothers' primary responsibility for the care and support of nonmarital children.[484] As director of the ACLU Women's Rights Project more than two decades earlier, Ginsburg had badly wanted to present such arguments as amicus in *Fiallo*.[485] Now a Supreme Court Justice, she made them in dissent.[486] In *Miller*, Justice Stevens's plurality opinion elaborated the views first articulated in his *Caban* dissent almost two decades earlier, deeming sex-differentiated laws to be justified by "the undisputed assumption that fathers are less likely than mothers to have the *opportunity* to develop relationships" with nonmarital children.[487] Stevens, joined by Chief Justice Rehnquist, declared "singularly unpersuasive" the contention that erecting higher barriers to citizenship transmission for nonmarital fathers promoted gender-based stereotypes about paternal disengagement.[488]

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481. 523 U.S. 420 (1998).

482. 533 U.S. 53 (2001).

483. The unwed fathers' parental rights and derivative citizenship cases are analyzed together relatively rarely. For exceptions, see, for example, Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405 (2013); and Katharine Silbaugh, Miller v. Albright: *Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139 (1999).

484. *See* Brief of the National Women's Law Center, et al. in Support of Petitioners, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1702034; Davis, *supra* note 56; Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v Albright, 1998 SUP. CT. REV. 1; Collins, *supra* note 5.

485. *See supra* note 172and accompanying text.

486. Ginsburg's dissent in *Miller* was not as strong on this point as perhaps it might have been, due to an incomplete history of citizenship transmission laws and their implementation, later excavated by Kristin Collins. *See* Collins, *supra* note 5.

487. *Miller*, 523 U.S. at 444.

488. *Id.* at 434. Stevens relied on his own majority opinion in *Lehr* for support. *See id.* at 441.

A torrent of criticism greeted Justice Stevens's position. Even scholars sympathetic to the feminist arguments against sex neutrality in the parental rights and adoption contexts condemned the challenged INA provisions, noting that the concerns Stevens raised in *Caban* and *Lehr* simply did not apply.[489]

Because only four Justices reached the merits of the equal protection question in *Miller*, the same provisions came before the Court again in *Nguyen* three years later.[490] This time, a 5-4 majority upheld the disparate requirements for nonmarital fathers, over Justice O'Connor's vehement dissent. Eighteen years earlier, O'Connor had persuaded Stevens to omit his language about mothers' inevitable responsibility for nonmarital children in *Lehr*. Now, armed with quotations from 1930s National Woman's Party leaders supplied by scholars and amici,[491] and with three decades of constitutional sex equality precedents,[492] she wrote that the challenged law was "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children."[493] Most recently, in *Flores-Villar v. United States*, scholars and advocates submitted briefs articulating the feminist case for sex neutrality.[494] Though Justice Elena Kagan's recusal left the Court equally

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489. *See* Silbaugh, *supra* note 483; *see also* Pillard & Aleinikoff, *supra* note 484, at 30 (noting that "[a] sex-neutral INA would not have the same zero-sum effects as between fathers' and mothers' choices" as it might in cases like *Lehr*).

490. Nguyen v. INS, 533 U.S. 53, 56 (2001).

491. *Id.* at 92 (O'Connor, J., dissenting) (quoting Burnita Shelton Matthews's 1932 protestation that "when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background"). An amicus brief from the National Women's Law Center and other feminist organizations, and the 2000 *Yale Law Journal* Note by Kristin Collins on which the brief heavily relied, had also quoted from Matthews's testimony. *See* Brief of the National Women's Law Center, et al. as Amici Curiae in Support of Petitioners, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1702034; Collins, *supra* note 5, at 1695.

492. *See, e.g.*, *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting) ("The majority, however, rather than confronting the stereotypical notion that mothers must care for [nonmarital] children and fathers may ignore them, quietly condones 'the very stereotype the law condemns.'") (quoting J.E.B. v. Alabama, 511 U.S. 127, 138 (1994)). For another trenchant critique of *Nguyen*, see Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J.L. & GENDER 222 (2003). *See also* Nina Pillard, Comment: *Plenary Power Underground in* Nguyen v. INS: *A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835 (2002) (suggesting that the plenary power doctrine, though not directly applicable, operated to dilute the sex discrimination analysis in *Nguyen*).

493. *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting).

494. *See, e.g.*, Brief of the National Women's Law Center et al. as Amici Curiae Supporting Petitioner, Flores-Villar v. United States, 564 U.S. 210 (2011) (No. 09-5801), 2010 WL 2602010; Brief for Professors of History, Political Science, and Law as Amici Curiae Supporting Petitioner, *Flores-Villar*, 564 U.S. 210 (No. 09-5801).

divided, resulting in affirmance of the lower court decision upholding the challenged provisions,[495] these laws are likely to come before the Court again.[496]

The limitations of the Court's reasoning in *Miller* and *Nguyen* suggests that the Justices' failure to engage with feminist arguments for and against sex neutrality in the adoption cases had consequences beyond the parental rights context. The Court failed to acknowledge, much less answer, the fundamental question posed by the unwed fathers cases: what would true sex neutrality look like in the context of nonmarital parenthood, and when does sex neutrality serve women's autonomy and equality interests? In other words, when is formal equality an effective tool to combat substantive inequality, and when does it fall short? If the Court had seen the central question posed by nonmarital fathers' rights as one of the relationship between formal sex neutrality and substantive sex equality, then the answer in the citizenship transmission cases should have been clear. Sex neutrality in derivative citizenship served the interests of both men and women and posed no feminist dilemma.[497]

2. *Beyond Marital Supremacy: Unintended Consequences?*

Today, the constitutional law of the family stands at a crossroads. As the advent of marriage equality coincides with an unprecedented socioeconomic and racial marriage gap, the future of marital supremacy is among the most pressing outstanding constitutional questions. In the years since the Court

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495. *Flores-Villar*, 564 U.S. 210, *aff'g* 536 F.3d 990 (9th Cir. 2008).

496. *See* Morales-Santana v. Lynch, 804 F.3d 520 (2d Cir. 2015) (finding gender-based discrimination in the physical presence requirement for derivative citizenship unconstitutional under the Equal Protection Clause). As Kristin Collins's incisive historical work has demonstrated, these requirements are constitutionally vulnerable on grounds beyond their gender asymmetry, namely their nativist, racially exclusionary origins. *See* Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014); Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in* Flores-Villar v. United States, 91 B.U. L. REV. 1485 (2011); *see also* Villegas-Sarabia v. Johnson, No. 5:15-CV-122, 2015 WL 4887462 (W.D. Tex. Aug. 17, 2015) (citing Collins's work to support holding the differential physical presence requirement unconstitutional).

497. It is possible that the interests of non-U.S. citizen mothers might be adverse to those of U.S. citizen fathers in a small number of instances in which the transmission of American citizenship to a child would preclude that child from being recognized as a citizen of her mother's nation. Most countries today, however, allow for dual citizenship. It is also possible that a U.S. citizen father might, for example, gain the upper hand in a custody dispute with a noncitizen mother if he alone is able to transmit U.S. citizenship to his child. I am grateful to Kristin Collins for alerting me to this point.

decided the unwed fathers cases, lesbian and gay individuals and families have fought state-level battles for legal recognition of parental rights irrespective of marital status or biology. Many have worried that marriage equality—especially given the majority's glorification of marriage in *Obergefell v. Hodges*—bodes ill for the constitutional status of nonmarital families.[498] Recent work by Douglas NeJaime suggests, to the contrary, that marriage equality may support, rather than impede, the recognition of intentional and functional parenthood, with salutary implications for nonmarital as well as marital families.[499] In the absence of marriage rights, some states have granted parental status to unmarried women and men based on intent and function, rather than gender and biology; contemplated the possibility of recognizing more than two legal parents; and reconsidered the historic link between marital status and parental rights.[500]

Notably, advocates for LGBT parents made creative use of the unwed fathers cases as they sought to detach parentage from biology, gender, and marriage. The Court's emphasis in *Lehr* on whether or not a nonmarital father had "grasp[ed]" the "opportunity" to parent offered by his biological tie suggested that, in the absence of marriage, parental status depended on conduct rather than on a mere genetic link. In a trio of landmark California Supreme Court cases decided in 2005, LGBT rights advocates used the unwed fathers cases to support their argument that parentage should depend on whether a biological parent's partner intended to, and did, function as a parent, rather than on formal marital status or on biology.[501] Remarkably, these advocates even harnessed *Michael H.*'s protection of the "unitary family" to suggest that a same-sex couple's marriage-like relationship should support a finding of parental rights for a nonmarital partner.[502]

The unmarried fathers cases, with their emphasis on parental conduct rather than mere biology, unexpectedly aided non-biological LGBT parents who lacked access to marriage but who clearly had demonstrated their

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498. *See, e.g.*, Melissa Murray, *The New Marriage Inequality*, 104 CALIF. L. REV. (forthcoming 2016) (arguing that *Obergefell*'s reasoning marginalizes nonmarital families and undermines their constitutional rights). I take up this question in greater depth in Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126 (2015).

499. *See* NeJaime, *supra* note 23.

500. *Id.*

501. *Id.* at 1228 n.263.

502. *Id.* at 1223 n.231. Basing parental rights on partners' marriage-like relationships, of course, arguably reinforces marital supremacy in a functional, rather than formalistic, guise. For more on how functional definitions of family can reinforce traditional family law values such as the privatization of dependency and the primacy of marriage, see Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985 (2015).

commitment to parenthood. Conversely, conferring parental status based upon functional and intent-based criteria rather than formal categories such as marital status and biology could redound to the benefit of many committed nonmarital fathers. Even more promising is the prospect of legal recognition for more than two parents.[503] If courts had not felt compelled to choose one father to the exclusion of the other, after all, Quilloin, Lehr, and Hirschensohn might have maintained relationships with their children without precluding the establishment of legal relationships with new stepfathers.[504] Open adoptions, in which birth parents maintain ties with their children,[505] could have allowed Laura S. and the mother of Ed McNamara's biological daughter to effectuate their preference for adoption by legal strangers without terminating Kirkpatrick's and McNamara's (or their own) parental rights altogether.[506] Whether the sequel to marriage equality is a challenge to marital supremacy or its retrenchment, a departure from legal formalism or its reinstantiation, only time will tell.[507]

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503. Louisiana is a rare state to officially recognize the possibility of "dual fatherhood." *See, e.g.*, Smith v. Cole, 553 So. 2d 847, 854 (La. 1989) (holding that the existence of a nonbiological legal father with a support obligation did not extinguish the support obligation of a biological father). California recently passed a law permitting the legal recognition of more than two parents under certain circumstances. *See* S. Bill 274, ch. 564, § 1, *Legislative Counsel's Digest*, Oct. 4, 2013, (abrogating *In re* M.C., 123 Cal. Rptr. 3d 856 (Ct. App. 2011)). For discussions of the potential impact of non-exclusive parenthood on nonmarital fathers, see, for example, Bartlett, *Rethinking Parenthood*, *supra* note 470; Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007). *See also* Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715 (2015) (arguing for the benefits of multiple parenthood for children in foster care); Meyer, *supra* note 475, at 813-45 (proposing an alternative model of adoption in which the parental rights of birth parents need not be terminated).

504. The guardian ad litem representing Victoria's interests in *Michael H.* recommended that both Gerald and Michael be afforded some parental rights. *See* Brief for Appellant Victoria D., Michael H. v. Gerald D., 491 U.S. 110 (1989) (No. 87-746), 1987 WL 880074.

505. On the rise of post-adoption visitation arrangements, see Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309 (2012).

506. There are, of course, costs as well as benefits to recognizing multiple legal parents, but a deep consideration of the topic is beyond the scope of this article.

507. *See* Serena Mayeri, *The Functions of Family Law*, 163 U. PA. L. REV. ONLINE 331 (2015) (responding to Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985 (2015)). Though it is too soon to identify a long-term trend, the early years of marriage equality suggest that racial disparities in marriage among same-sex couples may be significantly smaller than among heterosexual couples. *See* Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. 1, 5 (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf [http://perma.cc/C4LU-YTY4].

CONCLUSION

The unwed fathers cases receive little attention from constitutional scholars, and they are often relegated to a footnote in the history of sex equality law despite a significant (albeit small) body of feminist scholarship that critically engages them. In part, this neglect reflects how the Court framed these cases as questions of due process, rather than equal protection, and as contests between nonmarital fathers and prospective stepfathers, rather than as questions of sex and marital status equality vis-à-vis mothers and divorced fathers.

Integrating the unwed fathers cases into the larger history of equality jurisprudence helps to illuminate the nature of the law's limitations. Since the 1970s, scholars have observed that the Justices have misconstrued sex differences as "natural" or "biological" rather than socially constructed and essentially malleable. As a result, the Court has often been unwilling to see men and women as "similarly situated" for the purposes of equal protection analysis.

The unwed fathers cases invite us to consider how the rhetoric of sex differences intersects with and sometimes obscures another primary axis of differentiation in constitutional equality law: marital status. In cases involving marital households, formal sex neutrality largely prevailed in the Supreme Court; no longer could the government distinguish between husbands and wives, widows, and widowers in the provision of public benefits such as Social Security. States could neither limit alimony to wives, nor, increasingly, overtly discriminate between marital mothers and fathers as presumptively preferable custodial parents. Stereotypes about women as naturally superior nurturers and caregivers and men as primary breadwinners became illegitimate bases for differentiating between spouses—and to a large degree, between marital parents.

Ironically, then, while the law of marriage had long been a bastion of gender differentiation, in the 1970s and 1980s, marriage effectively became a prerequisite for formal legal equality in parental rights. A sex-neutral approach to parenting within marriage seemed clearly to advance feminist aspirations for an egalitarian division of labor at home, a prerequisite for freedom and equal opportunity in the public sphere. Divorce tested the utility of sex neutrality in parenting, but the feminist dilemma proved particularly acute in the context of nonmarital parental rights. Absent the definitive moment of maternal consent to paternal involvement in a child's life implicit in marriage, feminist skeptics required more than a biological tie and good intentions to overcome maternal prerogatives.

Like the feminist campaign against illegitimacy penalties, the feminist debate over nonmarital fathers' parental rights never infiltrated the Justices'

deliberations, much less Court opinions. Unlike the feminist campaign against illegitimacy penalties, debates over parental rights reflected real differences among feminists over the utility of sex neutrality as a principle of legal reform. For some, parental sex equality seemed like a luxury only the privileged could afford. Others believed the time had come to negotiate a new nonmarital bargain.

The story of nonmarital fathers' quest for equality complicates our understanding of the historical relationship between feminism and marital supremacy. Where mothers' and fathers' interests coincided, feminists could wholeheartedly attack the legal privileging of marriage. When fathers' rights threatened mothers' freedom, marital primacy shielded unmarried women from the downside of sex neutrality. But that protection came at a price: the Court's failure to grapple with the demands of substantive sex equality or to question the superiority of marital families.

The revolution in constitutional sex equality law laid important groundwork for the success of the marriage equality movement. By making marriage formally gender-neutral, feminists unseated the most powerful traditional argument for limiting marriage to the union of a man and a woman. Marriage equality for same-sex couples is now the law of the land,[508] but the marriage gap shows no sign of closing. Nonmarital parenthood increasingly is the rule rather than the exception, especially among lower-income Americans, and in communities of color. How, if at all, the Constitution will speak to burgeoning inequalities between marital and nonmarital families in this new age of marriage equality remains to be seen.

508. Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) ("[S]ame-sex couples may exercise the right to marry. . . . [T]he reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

