Bastards! . . . . And the Welfare Plantation

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I. INTRODUCTION

The legitimacy status of children has been a deterrent for extramarital liaisons,[1] has guaranteed the social reputation of the father,[2] and has facilitated intergenerational transfers of wealth.[3] Historically, illegitimacy status has assisted in gender subordination and control over female sexuality and reproduction; it has made social class standing all but pre-determined at birth; it has contributed to the maintenance of racial stratification. Indeed, *illegitimate* is an appropriate description for the effects of this legally and socially imposed status upon children.

While there are a variety of ways in which scholars tackle the myriad legal and social issues that inhere from illegitimacy status,[4] scholars have recently focused on the effects of illegitimacy status on the children of LGBT couples, including a full symposium on the "new" illegitimacy in LGBT families.[5] From this perspective, one might characterize this Article

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1. Jenny Teichman, *Illegitimacy*, 8 J. MED. ETHICS 42, 43 (1982).

2. The regulation may guarantee reputation for the marital father but is far from a guarantee of biological paternity. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that a father asserting paternity rights under the marital presumption has a superior claim to the paternity claim of a non-marital, biological father).

3. *See, e.g.*, Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 86–87 (2003); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 357–60 (2011). *But see* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 284–85 (1999) (nothing that in both testate and intestate transfers of wealth, "[c]ourts construed enslavement as a defining, dispositive status that governed the assignment of rights, even after Emancipation. . . . Marriage and slavery were classified as mutually exclusive legal relationships, as 'fanciful conceit[s]' in the strongest articulation of the marriage-as-contract rule . . . . " (citation omitted)).

4. *See, e.g.*, Davis, *supra* note 3, at 79; Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195 (1998); Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495 (1992) [hereinafter Fellows, *Procreative Power*]; Maldonado, *supra* note 3, at 345. For an earlier examination, see HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 257–67 (1971).

5. *See* Symposium, *The New "Illegitimacy": Revisiting Why Parentage Should Not Depend*

as focused on the "old" illegitimacy, noting the origins of the modern form in the United States in American slavery.[6] Given the racial imbalance of children who are in foster care or who are seeking permanent adoption,[7] and the nature of the issues that confront these children, identification of illegitimacy's origins from this standpoint is instructive.

Part II of this Article discusses the relationship between the social devices used to maintain slavery and the laws determining illegitimacy status. Part III discusses illegitimacy's role in regulating sex and its race-specific counterpart of miscegenation. Part IV makes comparisons to legislation designed to punish unsanctioned relationships and delineate means for the care of illegitimate children, to modern-day welfare and its implications. Specifically, Part IV suggests particular moves in the evolution from legal slavery contributing to the modern form of welfare. Part V examines the role of marriage and of the marital presumption of paternity in creating illegitimacy status as well as reinforcement of stigma associated with Blackness. Part V goes on to discuss how the current welfare system imposes burdens on fathers, if so defined, while often creating barriers to strong relationships for those in poverty, especially men of color. Finally, Part VI of this Article suggests that any future reform efforts should be crafted with an awareness of racial history, both in avoiding additional burdens imposed on communities of color and those in poverty, as well as in finding realistic solutions to build strong community.

II. RACE AND "THE ODIUM OF ILLEGITIMACY"—A FINANCIAL PENALTY FOR BLACKNESS

Illegitimacy once was, and perhaps still is, a means of regulating race through anti-miscegenation law and sentiment. A case in the midst of Jim Crow segregation, *Wolfe v. Georgia Railway*,[8] demonstrates the variables

on Marriage, 20 AM. U. J. GENDER SOC. POL'Y & L. 1 (2012).

6. Illegitimacy was recognized under the common law, taken from English tradition. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *447 (1769). One significant tradition in this regard is Lord Mansfield's Rule. Lord Mansfield's Rule is an evidentiary one which provides that neither husband nor wife are entitled to give testimony on the question whether they had access to the other at the time of conception. *See* The King v. Luffe, (1807) 103 Eng. Rep. 316 (K.B.). Interestingly, William Murray, first Earl of Mansfield, helped dismantle slavery and also created the legal rule to protect the status of children born within a marriage, even if not biologically that of the husband. Lord Mansfield wrote the opinion in Somerset's Case, finding that slavery was unsustainable in England. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.).

7. CHILD WELFARE INFO. GATEWAY, FOSTER CARE STATISTICS 2011, at 9 (Jan. 2013), *available at* https://www.childwelfare.gov/pubs/factsheets/foster.pdf (stating that the number of Black children waiting in foster care is more than twice the representation of Blacks within the general population, having decreased from a high of 38% in 2001 to 27% in 2011).

8. Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899, 902 (Ga. Ct. App. 1907). In *Wolfe*, the appearance of balance in consequences is pure advocacy justifying the result; the effects were

comprising its origins:

> [A] pure black man cannot be mistaken for a white man, and the fact that intermarriage between the races has been continuously forbidden in this state, to charge a white man, even though of dark skin, with being a colored man, or a colored man, even though of fair skin, with being a white man, is to impute the *odium of illegitimacy*.[9]

For many years, anti-miscegenation legislation prevented interracial marriage, or relations of any kind.[10] A child of mixed race was, by definition, illegitimate. This included any children of a marriage annulled on grounds of miscegenation.[11] Further, since Blackness was understood and defined as any part Black,[12] virtually all individuals of even remote, but known,[13] Black heritage were deemed Black and, concomitantly, illegitimate. Yet, miscegenation was just one element in making Blackness synonymous with illegitimacy. No marriage by any slave was legally enforceable.[14] Even those "marriages" that slave owners encouraged to

predictable with the existing social, political and legal landscape. *See id.*

9. *Id.* (emphasis added).

10. *See generally* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2003).

11. *Id.* at 221–22.

12. *See, e.g.*, WALDO E. MARTIN, JR., THE MIND OF FREDERICK DOUGLASS 205–06 (1984); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (describing the "rules" for Blackness as based in descent and quantification of blood); Deborah W. Post, *Cultural Inversion and the One-Drop Rule: An Essay on Biology, Racial Classification, and the Rhetoric of Racial Transcendence*, 72 ALB. L. REV. 909, 923 (2009); Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592, 631 (2007). *See also* Plessy v. Ferguson, 163 U.S. 537, 541 (1896) ("[P]etitioner was seven eighths Caucasian and one eighth African blood . . . .").

13. *See, e.g.*, Mark Golub, Plessy *As "Passing": Judicial Responses to Ambiguously Raced Bodies in* Plessy v. Ferguson, 39 LAW & SOC'Y REV. 563 (2005); Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001) ("Passing is a deception that enables a person to adopt certain roles or identities from which he would be barred by prevailing social standards in the absence of his misleading conduct."); Christian B. Sundquist, *Signifying on Passing: (Post) Post-Racialism, (Post) Post-Modernism, and (Post) Post-Marxism*, 1 COLUM. J. RACE & L. 482 (2012).

14. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 7 (Transaction Publishers 2013) (1935) ("The proof of this lies clearly written in the slave codes. Slaves . . . . could not legally marry nor constitute families; they could not control their children. . . ."). Even marriage of a slave to a free person was permissible only by consent of the master.

> For example, in Virginia a marriage between a slave and a free Black was not legally recognized. If the mother was a slave, the child of the marriage became a slave. If the mother was free, the child was considered illegitimate and subject to being hired out by the overseer of the poor.

Id. Prohibitions on interracial marriages also limited the applicability of the presumption and the evidentiary rule. Yet, in a similarly perverse fashion of the modern day welfare system, a free Black

promote stability on the plantation were subject to breakup by sale.[15] "[I]n most states that permitted bondage[] marriage conferred no legally enforceable protections upon slaves. It did not keep a slave from being sold away from his or her spouse or separated from his or her children."[16] This legal and social reality produced leagues of Black children most, if not all, of whom were mixed[17] and all of whom were, by definition, illegitimate.

The status of illegitimates and the status of slaves were almost identical in sanctioned structural lineage. That is, the laws of slavery required that the status of the child followed that of the mother, not that of the father as for non-slaves.[18] Similarly, intestacy laws ensured that the status and rights of non-marital children arose only from the mother.[19] The category of illegitimacy, in addition to its independent concerns, perhaps also should be understood as a form of racial classification and a vestige of slavery.[20] However, there were two significant differences. First, slave children were not guaranteed the lineage of their mothers, as mother and child were both subject to sale:[21]

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father could not recover support from his son's owner, who was entitled to the child's labor and therefore required to support. Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 219 (1987). The father "had no just claim whatever on the administrator for taking care of his own child . . . ." Prince v. Cole, 28 Mo. 486, 487 (Mo. 1859).

15. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 82–85 (1988); HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750–1925, at 23 (1976); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1330–31 n.122 (1998) (reporting that in three southern states between 1864 and 1866 "slaveholders had terminated 32.4% of the 2,888 analyzed slave marriages" by the Freedmen's Bureau) (citing JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 175–77, 341, 361 tbl.17 (2d ed. 1979)).

16. KENNEDY, *supra* note 10, at 166 (citing THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 246 (1858)). *See also* Burnham, *supra* note 14, at 189 ("[T]he slave family could not be an organic unit of permanently linked, interdependent persons. In the eyes of the law, each slave stood as an individual unit of property, and never as a submerged partner in a marriage or family. The most universal life events—marriage, procreation, childrearing—were manipulated to meet the demands of the commercial enterprise. Although slaves did marry, procreate, and form families, in some cases even under the compulsion of the master, they did so without the sanction of southern law.").

17. KENNEDY, *supra* note 10, at 367–68.

18. *See* Burnham, *supra* note 14, at 215 ("In contradistinction to the common law, the slaveholding states all adopted the civil rule, *partus sequitur ventrem*—the issue and descendants of slaves follow the status of the mother.") (citing COBB, *supra* note 16, at 68; Wilbert E. Moore, *Slave Law and the Social Structure*, J. NEGRO HIST. 171, 185–87 (1941)).

19. *See* Trimble v. Gordon, 430 U.S. 762, 766 (1977) (rejecting the reasoning in Labine v. Vincent, 401 U.S. 532 (1971), that found illegitimate children were not "prevented . . . from sharing in the estates of their fathers").

20. *See* U.S. CONST. amend. XIII. *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (holding that the 13th Amendment authorized Congress to prohibit "the badges and incidents of slavery").

21. "As property, the slave could be seized at any moment and sold to pay off a living owner's

> [J]ust as the slave mother and father had no recognized legal relations with the child, the slave child could claim nothing from its parents. The lot of slave children was more damned and unfortunate than that of illegitimate children, although slave children were not strictly considered bastards. The slave child inherited its mother's status but was not assured of its parentage, whereas the bastard was its mother's child in every sense.[22]

Second, "where the slave owner's extra-marital sex might carry a social and financial penalty if the child he fathered were [W]hite, he stood to gain in every way from the sexual abuse of slave women."[23] The financial penalty even for a White child was not automatic because at common law, an unmarried biological father had no legal duty to support his child unless he openly acknowledged and legitimated the child or used adoption to do so.[24]

A. The Color of Welfare

The "odium of illegitimacy"[25] was developed over more than a century of laws regulating race and sexual engagement, which effectively created a race-based child welfare system:

> To remedy [the imposition upon masters for the maintenance of "illegitimate" children] laws were passed in 1715 and 1717 to *reduce to the status of a servant for seven years* any white man or white woman who cohabited with any Negro, free or slave. Their *children were made servants for thirty-one years*, a black thus concerned was *reduced to slavery for life* and the maintenance of the bastard children of women servants was made incumbent upon masters. If the father of an illegitimate child could be discovered, he would have to support his offspring. If not this duty fell upon the mother who had to discharge it by servitude or otherwise.[26]

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debts, or be transferred following the owner's death during the settlement of his estate." Burnham, *supra* note 14, at 202 (citation omitted).

22. *Id.* at 218 (citing Brewer v. Harris, 5 Gratt. 285, 303, 305 (Va. 1848)).

23. Burnham, *supra* note 14, at 216 n.120. "The slaveholder had two principal interests in promoting slave unions, both of which were tied to the plantation economy. First, he was in the business of producing crops and of reproducing capital in the form of slaves." *Id.* at 197.

24. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 215 (Jon Roland ed., Constitution Soc'y 1998) (1826), *available at http://www.constitution.org/jk/jk_000.htm*. *See also* State v. Tieman, 73 P. 375, 376 (Wash. 1903); Glidden v. Nelson, 15 Ill. App. 297, 300 (Ill. App. Ct. 1884).

25. Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899, 902 (Ga. Ct. App. 1907).

26. Carter G. Woodson, *The Beginnings of the Miscegenation of the Whites and Blacks*, 3 J. NEGRO HIST. 335, 341–42 (Oct. 1918) (emphasis added) (citations omitted); *see also* KENNEDY, *supra* note 10, at 59–60 (citing MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE

A direct connection between statutes of this type and the current child welfare system may be tenuous, but it is nonetheless fascinating to recognize the parallels in the pictures painted. There is a disproportional number of children of color in foster care or waiting for adoption placement;[27] poor single mothers bear the greatest responsibility[28] and now the government requires them to work lest they impose a financial burden for their children on the plantation master (read: taxpayers).[29] Single mothers are generally stigmatized, but most especially those producing "Black" children;[30] society stigmatizes and punishes men of color for creating children out of wed-lock or otherwise;[31] the long-term prospects for children in foster situations are inclusion in the low-wage work-force.[32] Though cynical, it is likely that the next step in the reformation of welfare is to require the apprenticeship of children receiving benefits.[33]

B. On "Account" of Marriage

The intermediate steps between time periods indicate intent. During Reconstruction when the Federal Government required the States to recognize the legal marriages of former slaves, States granted Blacks legal recognition of their unions. This was motivated not so much to acknowledge

NINETEENTH CENTURY SOUTH 29 (1997)); A. Leon Higginbotham, Jr. & Greer C. Cosworth, *"Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 54 (1991).

27. CHILD WELFARE INFO. GATEWAY, *supra* note 7.

28. DAPHNE LOFQUIST ET. AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 4–5 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf (showing that single female parent households out number single male parent households by three to one).

29. *Temporary Assistance for Needy Families (TANF) Overview*, U.S. DEPARTMENT HEALTH & HUM. SERVICES, http://www.hhs.gov/recovery/programs/tanf/tanf-overview.html (last visited Sept. 16, 2013) ("[R]ecipients must work as soon as they are job-ready or no later than two years after coming on assistance."); *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 210 (1997).

30. LOFQUIST ET AL., *supra* note 28, at 7.

31. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (making a powerful case that "Jim Crow" continues to systematically operate through the criminal justice system).

32. *See, e.g.*, Peter J. Pecora et al., *Educational and Employment Outcomes of Adults Formerly Placed in Foster Care: Results From the Northwest Foster Care Alumni Study*, 28 CHILD. & YOUTH SERV. REV. 1459, 1471–72 (2006) (evaluating "long-term effects of family foster care on adult functioning using a sample of 659 young adults from two public and one private child welfare agencies").

33. This suggestion is not so farfetched as it was openly discussed by former Speaker of the House, Newt Gingrich. *See* Trip Gabriel, *When Gingrich's Big Thoughts Backfire*, N.Y. TIMES (Dec. 5, 2011), http://www.nytimes.com/2011/12/06/us/politics/campaign-2012-when-gingrichs-big-thoughts-backfire.html?_r=0.

their freedom and full citizenship, but more so as a means of regulating behavior to avoid a drain of the states' economic resources.[34]

> The financial motives behind granting freed Blacks the right to marry were most apparent in the government's policies for newly freed men who were reunited with multiple spouses with multiple children. In these instances, government agents often selected one family for these men, basing their decisions on the number of dependents in each potential nuclear family unit. . . . The government's motive of minimizing states' responsibility for freed slaves was also reflected in decisions to allow newly freed black women with children fathered by their former slavemaster to name a black man as the father in charge of supporting their children.[35]

Through economic bonuses, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[36] provides incentives to states to implement measures to reduce illegitimacy, that is to say, reduce the number of non-marital children[37] with the assumption this reduction will also limit the number of children needing assistance.[38] Recent policy initiatives under the PROWRA include the Healthy Marriage Initiative,[39]

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34. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 302–03 (1999); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1657 (2005) (citing Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1569–70 (1996)).

35. Onwuachi-Willig, *supra* note 34, at 1660 (citing LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 233–34 (1979)); *See also* Maldonado, *supra* note 3, at 382. Differential laws and treatment have had an enduring effect on Black family life. *See, e.g.*, ANDREW BILLINGSLEA, BLACK FAMILIES IN WHITE AMERICA (1968); W.E.B. DUBOIS, THE NEGRO AMERICAN FAMILY (1970); E. FRANKLIN FRAZIER, THE NEGRO FAMILY IN THE UNITED STATES (1939); JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY, FROM SLAVERY TO THE PRESENT (1985); JOYCE LADNER, TOMORROW'S TOMORROW: THE BLACK WOMAN (1971); CAROL STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1975); CHARLES VERT WILLIE, THE FAMILY LIFE OF BLACK PEOPLE (1970).

36. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.); PRWORA created the Temporary Aid to Needy Families (TANF) to provide each state with a block grant. *Temporary Assistance to Needy Families*, U.S. DEPARTMENT HEALTH & HUM. SERVICES, http://www.hhs.gov/recovery/programs/tanf (last visited Sept. 16, 2013).

37. Prior policy initiatives have included sterilization efforts and incentives to reduce "illegitimacy." The state subsidizes childbirth and sterilization, but not medically safe abortions—it seems that there is a "tax" for choosing abortion. Susan Frelich Appleton, *Illegitimacy and Sex, Old And New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 379 (2012). Perhaps akin to this concept is the idea that child support is a "tax" on heterosexual intercourse. *See id*. at 365.

38. *See* 42 U.S.C. § 603(a)(2) (2006) (promoting responsible fatherhood and marriage to provide for families).

39. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (codified in scattered sections of 42 U.S.C.); *see also Healthy Marriage Initiative (HMI)*, U.S. DEPARTMENT HEALTH &

targeted especially at minority communities.[40]

C. Inheriting Stigma

Focusing primarily on its use as an impediment to inter-generational transfers of wealth, the Supreme Court in 1968 acknowledged that stigmatizing a child is an inappropriate means for deterring adult behavior.[41] It applied intermediate scrutiny to illegitimacy classifications, though leaving the door open for some continuing permissible distinctions,[42] including those based on the gender of the parent.[43] While gender distinctions note that mothers and fathers are not similarly situated in the birth of a non-marital child, it does not consider that illegitimacy is itself a distinction founded in gender roles and distinctions.

Comparatively, the use of illegitimacy as a form of racial discrimination has not been discussed by the courts,[44] not even in *Nguyen v. INS*, which involved the citizenship status of a foreign born, mixed-race, non-marital child.[45] In *Nguyen*, the non-marital, foreign-born child of a United States citizen father had to be legitimated before the age of eighteen in order to acquire United States citizenship.[46] In addition to implicating gender and

HUM. SERVICES, http://archive.acf.hhs.gov/healthymarriage/about/mission.html#footnote_1 (last visited Sept. 16, 2013).

40. *Hispanic-Targeted Healthy Marriage Programs*, U.S. DEPARTMENT HEALTH & HUM. SERVICES, http://archive.acf.hhs.gov/healthymarriage/pdf/June20_aa_hispanictargetedprograms.PDF (last visited, Sept. 16, 2013); *African American Targeted-Programs*, U.S. DEP'T OF HEALTH & HUM. SERVS., //archive.acf.hhs.gov/healthymarriage/pdf/June20_aa_targetedprograms.PDF (last visited Sept. 16, 2013).

41. Four years later, the Court further noted in *Weber v. Aetna*, that placing condemnation of the parents' "irresponsible liaisons . . . on the head of an infant is illogical and unjust." Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972). *See also* Levy v. Louisiana, 391 U.S. 68, 70 (1968) (applying Equal Protection to classifications based on legitimacy).

42. *See Weber*, 406 U.S. at 175. *But see* Lalli v. Lalli, 439 U.S. 259, 265 (1978) (holding classifications based on illegitimacy are invalid "if they are not substantially related to permissible state interests"); Trimble v. Gordon, 430 U.S. 762, 767 (1977) (requiring scrutiny less than "strict" for classifications based on illegitimacy); Mathews v. Lucas, 427 U.S. 495, 506 (1976) (requiring less than strict scrutiny for illegitimacy).

43. *See* Nguyen v. INS, 533 U.S. 53 (2001) (citizenship status automatic for U.S. citizen mother, but not father); Parham v. Hughes, 441 U.S. 347 (1979) (wrongful death suit allowed for mother, but not father).

44. Ironically, at least two of the early illegitimacy cases decided by the Supreme Court in the late 1960s and early 1970s analyzing Equal Protection involved African-American children, even if race was not explicitly identified in the opinions. *See* Labine v. Vincent, 401 U.S. 532, 549 (1971) (Brennan, J., dissenting) (the race of the plaintiff children is implied by reference); Levy v. Louisiana, 391 U.S. 68 (1968). *But cf.* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 257–67 (1971) (specifically identifying poverty and race related issues in illegitimacy).

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

46. *Id.* at 59; 8 U.S.C. § 1409 (2006).

illegitimacy status,[47] *Nguyen* implicates racial status and caste. In the previous history of citizenship cases, the court adjudicated whether the applicant was White in order to accord citizenship, [48] even denying citizenship to mixed-race children.[49] Ignoring these implications in citizenship cases or otherwise is tantamount to a continuation of antebellum law and society.[50]

III. WHITE MOTHERS OF BLACK CHILDREN

Since illegitimacy is dependent upon the marital status of the child's mother at the time of the child's birth, marriage served as a means for state enforced "birth control."[51] Thus, in addition to the maintenance of White supremacy and wealth maintenance,[52] illegitimacy served as a device for the maintenance of patriarchy, furthering the sexual control over women.[53] She need only be married, but not necessarily to the biological father. This is due to the anachronistic marital presumption of paternity laws that currently extends further by way of modern-day statutes assigning parentage to a

47. *See, e.g.*, Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in* Nguyen v. Ins, 20 LAW & INEQ. 275 (2002); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. Ins, 12 COLUM. J. GENDER & L. 222 (2003).

48. *See, e.g.*, United States v. Bhagat Singh Thind, 261 U.S. 204, 213–15 (1923) (holding that an East Indian was not considered White for purposes of immigration because White is to be interpreted in accordance with the understanding of the common person); Takao Ozawa v. United States, 260 U.S. 178, 198 (1922) (holding that Japanese are not White); *In re* Easurk Emsen Charr, 273 F. 207, 213–14 (W.D. Mo. 1921) (holding that Koreans are not White); *In re* Rallos, 241 F. 686, 686 (E.D.N.Y. 1917) (holding that Filipinos are not White); *In re* Buntaro Kumagai, 163 F. 922, 924 (W.D. Wash. 1908) (holding that Japanese are not White); *In re* Yamashita, 70 P. 482, 483 (Wash. 1902) (holding that Japanese are not White); *In re* Saito, 62 F. 126, 127–28 (C.C.D. Mass. 1894) (holding that Japanese are not White); *In re* Kanaka Nian, 21 Pac. 993, 993–94 (Utah 1889) (finding that Native Hawaiians are not White); *In re* Ah Yup, 1 F. Cas. 223, 225 (C.C.D. Cal. 1878) (holding that Chinese are not White).

49. *See, e.g.*, *In re* Cruz, 23 F. Supp. 774, 775 (E.D.N.Y. 1938) (denying a mixed Native and African American petitioner naturalization).

50. *See supra* text accompanying notes 10–17.

51. Teichman, *supra* note 1, at 42 ("It would not be altogether paradoxical to say that the fundamental form of birth control is marriage and marriage law, since it is marriage which determines who shall reproduce the species and when.").

52. Inheritance is primarily based on recognized forms of legal paternity, which includes succession to children born of a marriage (marital presumption); public acknowledgement of paternity in writing; waiver by contract, typically of the husband; legal adoption; in an invitro-fertilization procedure; or through legal paternity proceedings prior to the death of the testate. Davis, *supra* note 3, at 86–87. *See* Maldonado, *supra* note 3, at 357–60 (demonstrating that inheritance continues to be based substantially in the marital status of the parents).

53. *See generally* Appleton, *supra* note 37; Fellows, *Procreative Power*, *supra* note 4.

consenting married father in the case of artificial donor insemination.[54]

A. Momma's Baby

Early on, aside from resorting to the marital presumption,[55] paternity was determined by voluntary public acknowledgment by a non-marital father.[56] Prior to reliable blood test or DNA evidence, occasionally physical comparison between putative father and child along with circumstantial evidence of untimely consummation were sufficient to disprove paternity.[57] This evidence was used not only to prove adultery but also, in some instances, as strong proof of miscegenation.[58] Professor Mary Louise Fellows reminds us that:

> If a child who had African-American features was born to a woman who was believed to be of the white race and whose husband was also believed to be of the white race, the nineteenth-century courts refused to apply the marital presumption. The courts held that that the presumption could be rebutted by 'evidence which clearly and conclusively shows that the procreation by the husband was impossible; and that, . . . according to the course of nature, the husband could not be the father of the child . . . .'[59]

Rather than imagine that a White man could have Black heritage,[60] the

54. *See* UNIF. PARENTAGE ACT § 703 (amended 2002), 9B U.L.A. 356 (2001 & Supp 2004).

55. *See infra* text accompanying notes 82–90.

56. *See* Maldonado, *supra* note 3, at 357.

57. *See* Watkins v. Carlton, 37 Va. 560, 564 (Va. 1840) (citation omitted) ("Proof of impotency of the husband, or of nonaccess to the wife, were sufficient to bastardize the issue, because such facts shewed the natural impossibility that the husband should be the father; and any other matter which proved the same impossibility, was equally sufficient to bastardize the issue.").

58. In *Watkins*, the court stated that if "cases of the husband being beyond sea, imprisoned, impotent, and the like, are but instances of the application of the rule. Even nonaccess, if proved, though the parties are in the same kingdom, will suffice. How, then, if the impossibility rests upon the laws of nature itself? Shall it be less regarded? Shall the *white* child of a *white* couple be bastardized, upon questionable proof that the husband was rendered impotent by disease; and shall we legitimate a *negro* because he was born in wedlock?" *Id.* at 575. *See also* Fellows, *Procreative Power*, *supra* note 4, at 502 ("Thus, judicial error was tolerated when it meant that a white child, unrelated by blood, would be made a white man's legal heir. An African-American child becoming a white man's legal heir, however, was unacceptable. Faced with this situation, the [*Watkins*] court essentially suspended application of the presumption."); *see also infra* notes 67–70 and accompanying text.

59. *See* Fellows, *Procreative Power*, *supra* note 4, at 500 n.18 (citing Bullock v. Knox, 11 So. 339, 340 (Ala. 1891)). *See also supra* note 57 (discussing non-proof of paternity).

60. *See* sources cited *supra* note 13 (discussing "passing," where White-appearing African-Americans "pass" as White for its social privilege and indicating that, because of the prevalence of "passing," someone may believe his heritage to be "pure" Caucasian even if it is not so).

"blame" was placed on the wife and mother for her presumed infidelity.[61] Thus, the marital presumption of paternity was an effective means of gender subordination as well as a means of ensuring White supremacy.

White wives and children were once understood to be the property of the husband and putative father;[62] coverture, an anachronistic marital form, supported this notion. Under coverture, the husband took responsibility for his wife's debts, making any child of hers a debt for which the husband was responsible.[63] This is somehow an additional justification for the marital presumption of paternity.[64] Though adultery was generally not condoned, legal rules made it difficult to prove.[65] However, it was considered especially egregious for a White woman to commit adultery with a Negro.[66] Interracial adultery rendered White women "'infamous and bankrupt in reputation, and unworthy of associating with the decent and respectable of

61. *See infra* note 68.

62. *See* Burnham, *supra* note 14, at 215–16. The treatment of women under rape law (or lack thereof) was an indication of their status as property. *See, e.g.*, JOSHUA D. ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861, at 133–63 (2003); Burnham, *supra* note 14, at 199 (discussing racist and misogynistic justifications for rape); Cheryl Harris, *Finding Soujourner's Truth: Race Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 332 (1996) (noting if slave marriages were recognized it would give Black men property rights to their wives and children); KENNEDY, *supra* note 10 at 162–82; Jennifer B. Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117–23 (1983). Marital coverture continues in subtle forms like anti-nepotism rules, women's status after dissolution of marriage, and husband's surname. Davis, *supra* note 3, at 79.

63. *See* Dianne Avery & Alfred S. Konefsky, *The Daughters of Job: Property Rights and Women's Lives in Mid-Nineteenth-Century Massachusetts*, 10 LAW & HIST. REV. 323, 336–37 (1992). One of the burdens of marriage undertaken by men that was frequently mentioned was that upon marriage he became responsible for paying all of his wife's debts. *Id.* The responsibility of a wife's debt was a burden that made up for the benefit that a husband gained by having access to her wealth. *Id.* The debt burden, however, apparently was illusory. *Id.* Historical evidence suggests that women avoided debt and usually did not marry holding any debt. *Id.* at 343. *See also* SUSAN LEBSOCK, THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784–1860, at 126–27 (1984).

64. *See* Avery & Konefsky, *supra* note 63, at 336.

65. Generally speaking, unless a third person were present or otherwise witnessed the act and could provide testimony to that effect, proof for adultery could only be circumstantial, requiring evidence of opportunity and inclination. *See* William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN'S L. REV. 435, 446–47 (1997). As courts were once inclined to find in favor of a continuing marriage, this proof had to be quite strong for the ground to be effective. *See id.*; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 142–45 (2005).

66. ROTHMAN, *supra* note 62, at 455; PETER BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH 48–64 (1995); *see generally* Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115, 122–42 (1984); A. Leon Higginbotham, Jr., & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1998–2000 (1989).

the community . . . .'"[67] A White woman who gave birth to a Black child showed clear evidence of the offense.[68] Indeed, being the *mother of a Black child* was enough to indicate poor moral character.[69] Thus, indicating that the strongest litmus for illegitimacy was Blackness.[70] This is still the case, in that "a single white woman giving birth to a bi-racial child may . . . [encounter] some social stigma . . . . [T]he stigma of out-of-wedlock birth and the financial difficulties many single mothers face may combine with these other factors to persuade some [W]hite birth mothers to surrender their bi-racial children for adoption."[71] Notwithstanding its impetus, this choice is perhaps better than infanticide or abortion, recourse once common for White mothers of Black children.[72]

67. Joshua D. Rothman, *"To Be Freed from Thate Curs and Let at Liberty": Interracial Adultery and Divorce in Antebellum Virginia*, 106 THE VA. MAG. HIST. & BIOGRAPHY 443, 443 (1998) (quoting Petition of Thomas Culpepper, No. 10943, Legislative Petitions, Records of the General Assembly, Record Group 78, Archives Division, Library of Virginia, Richmond (Norfolk County, Va. Dec. 9, 1835)). *See also* Higginbotham & Kopytoff, supra note 66, at 1998–2000 (exploring *Watkins v. Carlton*, 37 Va. 560 (Va. 1840), and genealogical possibilities).

68. The assumption does not account for the possibility of Negro heritage in the background of either or *both* parties to the marriage. *See* ROTHMAN, *supra* note 62, at 455–57, 459.

69. ROTHMAN, *supra* note 62, at 452 (citing Petition of Thomas Cain, No. 13097, Archives Division, Library of Virginia, Richmond (Frederick County, Va. Jan. 9, 1841)).

70. ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 3–9, 41, 70, 79–81 (2009) (arguing that race became a proxy for immorality). *See also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 8 (1998) ("[I]t is believed that Black mothers transfer a deviant lifestyle to their children that dooms each succeeding generation to a life of poverty, delinquency, and despair. A persistent objective of American social policy has been to monitor and restrain this corrupting tendency of Black motherhood.").

71. Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 137–38 (1998) (suggesting that this dynamic enables the transfer of children from the least advantaged women to the most advantaged, doing nothing to change the conditions that make child care impossible for some women). *See also* Appleton, *supra* note 37, at 352 (citing ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* (2006); ELAINE TYLER MAY, BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS 127–49 (1995)). *See also* Teichman, *supra* note 1, at 43 ("Marriage law controls birth for the purpose of organizing human society into families, kin-groups, lineages and nations . . . . Since these matters are of very profound importance it is not hard to understand why traditionally a child born outside the rules carried a heavy stigma or was even, in some places, actually put to death.").

72. *See* KENNEDY, *supra* note 10, at 367 (citing HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF (Jean Fagan Yellin ed., 1987) (1861)). Technically, the child of a White mother is at least bi-racial, but it is still part of our common history and social categories to identify the child as Black. *See supra* notes 12 and 13.

B. A "Different" Single Mom

The modern world has seen the advent of a new group attempting to counteract the stereotypes of immorality, poverty and race that pervade single-motherhood status: Single Mothers by Choice.[73] The last two decades have seen the percentages of out-of-wedlock births "[a]mong white women and women who attended college, more than double[] during the 1980s; for women with professional or managerial jobs, it nearly tripled."[74] As the group attempts to counter stereotypes, members acknowledge "that by bearing children out of wedlock, or even adopting on their own, they would "inherit the stigma of their poorer younger sisters,"[75] not to mention browner.[76] This is not to say that Black and Brown women, professional and otherwise, do not choose to become single mothers, just that this association is part of the stigma.

IV. AN OFFSPRING OF THE MARITAL PRESUMPTION OF PATERNITY: ILLEGITIMACY

Illegitimacy is the offspring of the marital presumption. That is, they are related and generally work together to accomplish the same social purposes. Similar to illegitimacy, the origins of the martial presumption served not only to predetermine intergenerational transfers of wealth,[77] and ensure sexual control over women, but also to continue racial purity through the mythology of White supremacy.[78] Fellows demonstrates that the social imperatives have not changed as "the marital presumption, the evidentiary rule, and the UPA (Uniform Parentage Act) all transfer procreative power to white men while simultaneously minimizing and denying the procreative power of African-American women and, in different ways, of [W]hite women."[79]

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73. Single Mothers by Choice is a national organization that provides support and information to single women considering single motherhood who have already chosen to become single mothers. The majority of its members are professional women in their thirties and forties. *See About*, SINGLE MOTHERS BY CHOICE, http:// www.singlemothersbychoice.org/about (last visited Sept. 16, 2013). *See also* Jane D. Bock, *Doing the Right Thing?: Single Mothers by Choice and the Struggle for Legitimacy*, 14 GENDER & SOC'Y 62, 63 (2000).

74. Bock, *supra* note 73, at 63. *See generally* Valerie S. Mannis, *Single Mothers by Choice*, 48 FAM. REL. 121 (1999) (noting that women sometimes choose to parent alone).

75. Bock, *supra* note 73, at 63.

76. *See supra* note 28.

77. *See* Teichman, *supra* note 1.

78. *See supra* note 3. Science has long since refuted a biological basis for the social construction of race. *See, e.g.*, STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981).

79. Fellows, *Procreative Power*, *supra* note 4, at 496.

A. Legitimately White–Gender Determines Race

The marital presumption concludes that the husband of a married woman is also the father of any child to whom she gives birth. Its origins likely date back to Lord Mansfield,[80] if not before, and continues in some form in every state.[81] With a similar result, children adopted by a married couple are then deemed legitimate and may avoid the stigma of the circumstances of their birth,[82] assuming the adoptee appears to be of the same race.[83] For multi-race families, it is not unusual for non-family members to believe a bi-racial or Black child has been adopted, even if this is not true.[84] Indeed, it is likely that the practice of secrecy in adoption records stemmed from, at least partially, an attempt to avoid speculation about the racial background of an adopted child and to ensure the reputation of the adopting family.[85] However, Black children born outside marriage are

80. *See supra* note 6 (discussing Lord Mansfield's rule, and evidentiary rule supporting the marital presumption of paternity).

81. *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 228, 233–34 (2006) [hereinafter Appleton, *Presuming Women*]. *See generally* Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467 (2012) (discussing presumption).

82. White unmarried mothers could use maternity homes and adoption agencies that were unavailable to African Americans. *See* Burnham, *supra* note 14, at 207–08 (citing WALKER, *supra* note 70, at 79–81).

83. One of the purposes of adoption agencies was to hide or deny the fact of adoption. Barbara Melosh, *Adoption Stories: Autobiographical Narrative and the Politics of* Identity, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 218, 219 (E. Wayne Carp ed., 2002) ("Concern for matching–placing children with adoptive parents who were similar in appearance, temperament, and intelligence–also attests to the interest in effacing the difference of adoption, of making the adoptive family indistinguishable from the biological family."); Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150 (1999). Thus, the doctrine of matching was created. *Id.* Hair color, eye color and even class were considered in matching parents to child. "The idea was that parents and child could establish a better relationship if differences were minimized." Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, 1 RES. L. & SOC. 267, 280 (1978). The extension of matching policy into ethnicity and race was expectable. Race was the criterion most strictly followed. *See* JOYCE A. LADNER, MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES 58 (1977); Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 178 (1983). This is not unlike modern in-vitro fertilization possibilities where matching of physical characteristics, most especially, are adhered by social convention. *See, e.g.*, Susannah Baruch, *Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease*, 8 HOUS. J. HEALTH L. & POL'Y 245 (2008); Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 966 (2007).

84. *See generally supra* notes 10–14 and accompanying text.

85. For example, in *Jones v. Gill*, 66 P.2d 1033, 1033 (Kan. 1937), the spreading of rumors that an adopted child was a "half-breed" born to a White father and Negro mother was found to have caused "humiliation, injury, and damage" and to be slanderous. One has to wonder if the social taboos against miscegenation are not the underlying reasons for the history of secrecy in adoption

usually raised by their mother or by other family members, and are counted as part of the illegitimacy rates for this segment of the population.[86]

The presumption of legitimacy that inheres from the marriage of a child's parents, allows these children to automatically receive benefits, not readily available to non-martial children, including rights of inheritance, wrongful death damages for the death of the father, child support, United States citizenship,[87] and many other government benefits.[88] In addition, efforts to protect adopted children from the stigma of illegitimacy by sealing their birth records, continues the general stigma associated with birth status, both for these children and for those never adopted or "legitimized."[89] Since it is more likely that children of divorce will receive child support than children of never-married parents, it is correspondingly less likely that African-American and Latino children, as well as foreign-born children of United States soldiers,[90] who are often mixed race and denied citizenship through their fathers,[91] will not receive support.

proceedings. Support for this proposition is sparse, but nonetheless warrants examination. In the least, the historical use of adoption and welfare for the benefit of Black children and families is not parallel to that of White families. *See* Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 42–44, 53–54 (1993). *See also* Burnham, *supra* note 14, at 207–08.

86. *See* Burnham, *supra* note 14, at 207–08 (citing WALKER, *supra* note 70, at 78); *See also* RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* (1992) (discussing racial differences in the treatment of "out-of wedlock" pregnancy).

87. *See, e.g.*, Miller v. Albright, 523 U.S. 420 (1998) (upholding the validity of laws governing United States citizenship for children born out of wedlock and outside the United States to a citizen parent); Nguyen v. INS, 533 U.S. 53 (2001) (determining that, in the same law addressed in *Miller*, more restrictive requirements for children born to a citizen father are acceptable). *But see* Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222, 255 (2003) (arguing that Nguyen should have argued that the immigration law impermissibly discriminated on the basis of birth status); Nikki Ahrenholz, Comment, Miller v. Albright: *Continuing to Discriminate on the Basis of Gender and Illegitimacy*, 76 DENV. U. L. REV. 281, 281 (1998) (arguing that the Court in *Nguyen* ignored the discriminatory effect on foreign-born, non-marital children).

88. Maldonado, *supra* note 3, at 364. *See also* Harry D. Krause, *Bringing the Bastard into the Great Society–A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 829–30 (1966) (noting that legal distinctions deny illegitimate children "those private resources that ought to be available to give [them] an even start in life").

89. *See* sources cited *supra* note 24.

90. Maldonado, *supra* note 3, at 366.

91. The non-marital, foreign-born child of a United States citizen father must be legitimated before the age of eighteen in order to acquire United States citizenship. 8 U.S.C. §1409(a)(2–4) (2006). Aside from implicating gender, see *supra* note 36, the history of citizenship cases requiring the applicant be adjudged White, even to the preclusion of mixed-race children, denial of citizenship status of the mixed race, foreign born children of United States soldiers and other male United States citizens also implicates racial status and caste. *See, e.g.*, *In re* Cruz, 23 F. Supp. 774, 775 (E.D.N.Y. 1938).

B. Proving Grounds

The advent of accurate blood tests for paternity[92] and the later use of DNA tests[93] shifted the focus of paternity to the child rather than on the status and reputation of the father. This advancement greatly reduced the stigma experienced by non-marital children. Unfortunately, these tools have also served to impose impossible financial burdens and stigma on poor fathers who are disproportionately men of color.[94] The pressure on unmarried mothers to identify fathers is one means of stigmatizing these fathers. Furthermore, many of the means employed for child support enforcement presents barriers to the formation of strong child-father bonds, and consequently, for community stability.

To avoid distinctions between marital and non-marital children, some scholars have argued for the elimination of the marital presumption by requiring all children to have paternity testing.[95] Where the intention may be to reduce and eventually eliminate the continued stigma and consequences for children born out of wedlock, the presumption was never consistently used for the benefit of Black children, born to either White families or Black families,[96] and may actually increase the consequences borne by some children. First, required testing may bring a surprise to an otherwise stable marriage and prompt conflict, the consequences of which may be felt by the child. This may include the breakup of that marriage with blame potentially placed on the child,[97] non-support by an otherwise willing parent, and

92. In the 1940s, courts accepted the evidentiary value of blood group testing. *See* E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 1,19–24 (1992).

93. *See id.* at 29 ("When combined with other genetic marking tests, such as standard blood grouping tests and HLA tests, the Probability of Paternity can be raised to a Paternity Index of over a hundred million to one, or above 99.999999 percent."). Because restriction fragment length polymorphism (RFLP) requires a large blood sample and a lengthy time for testing, polymerase chain reaction (PCR) DNA testing has become the standard process for DNA paternity tests. *See id.* at 36. PCR often results in exclusion rates higher than 99.99% with a small sample and in a quick timeframe. *See id.* at 37–38, 47.

94. *See supra* text accompanying notes 55–72.

95. *See* Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 265–70 (2006); June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1066–70 (2003) (advocating for paternity testing for all children); Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 926, 929 (2006). *But see* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 558–59 (2000).

96. *See* Fellows, *Procreative Power*, *supra* note 4, at 498–509.

97. Paternity testing may potentially serve as a trigger for marital violence and child abuse. *See* Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged*, 27 JUDGES J. 9, 11 (1988) ("[H]e often

exclusion from inheritance rights.[98] Second, required testing creates a DNA database, which would be accessible by the state for other purposes.[99] For a population already disproportionally affected by foster care and by the prison industrial complex,[100] this is not a welcome suggestion.

V. ". . . THE FATHER OF A SLAVE IS UNKNOWN TO OUR LAW"[101]

The most obvious connection between race and illegitimacy is the understanding that slaves were not recognized as fathers under the law. This was, and still is, the baseline for understanding the social stigma associated with race,[102] and the presumed condition accorded it as well as the class-based reality of inherited wealth once generally denied to even the acknowledged Black children of White fathers.

A. Rearing Good Slaves

"[T]he nature of the parenting relationship wholly depended upon the grace of another, in whose hands the child's future actually lay."[103] Indeed, in the eyes of the law, rearing good slaves was more important than good

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threatens to take the children away if she tries to leave . . . . His threats to kill her or her family if she leaves him are very real."); *see also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining The Issue of Separation*, 90 MICH. L. REV. 1 (1991). It is not uncommon for abusers to do things to harm children, even their own, as a means of continuing control over their wives or girlfriends.

> Because the underlying cause for violence is emotional insecurity, low self-esteem, and a history of abusive behavior from childhood, the batterer will turn the aggression on the children when the victim is removed from the batterer's control. The batterer may use the children to communicate threats to the victim, physically or emotionally abuse the children, or even resort to kidnapping the children.

Michael J. Voris, *Civil Orders of Protection: Do They Protect Children, the Tag-along Victims of Domestic Violence?*, 17 OHIO N.U. L. REV. 599, 606 (1991). *See also* SARAH M. BUEL, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: RECOMMENDATIONS TO IMPROVE INTERVENTIONS (2001); Shannan Catalano, *Intimate Partner Violence in the United States*, BUREAU JUST. STAT. 17, http://www.bjs.gov/content/pub/pdf/ipvus.pdf (last updated Dec. 19, 2007).

98. *See* UNIF. PARENTAGE ACT § 601 cmt. (amended 2002), 9B U.L.A. 338 (2001 & Supp 2004).

99. Given the recent Supreme Court decision *Maryland v. King*, 133 S. Ct. 1958 (2013), determining that DNA evidence was a legitimate part of police booking procedures not unlike fingerprinting and photographing and reasonable under the Fourth Amendment, the possibility of evidence collected for civil purposes in a criminal context is no longer remote.

100. *See generally supra* note 31.

101. Burnham, *supra* note 14, at 203 (citing Frazier v. Spear, 5 Ky. (2 Bibb) 385, 386 (Ky. 1811)).

102. *See supra* text accompanying notes 8–33.

103. Burnham, *supra* note 14, at 205.

childrearing.[104] "Although the system discouraged parents from forming strong bonds, the slave mother was nevertheless constantly accused of neglecting her children, and the father of brutality."[105] Even understanding that the law cannot prevent parent-child bonds and relationships, it nonetheless creates the conditions under which they exist. For most of the history of welfare, policy was designed to penalize marriage of welfare recipients[106] and to treat minority recipients of transfer payments differentially.[107] However, the most consistent welfare policy objective, throughout, is "making fathers pay."[108]

Blackness carries with it the presumption of illegitimacy. This means, in effect, that Black men are not perceived as fathers. "For decades, government officials have focused on paternal absence in African-American families, treating '[f]atherlessness . . . as a distinctly Black problem,' and blaming absent fathers for many of the social ills plaguing African-American communities—poverty, teen pregnancy, high delinquency and incarceration rates, poor academic performance, and idleness."[109]

In spite of the impediments imposed by a history of slavery and those

104. *Id.* at 204.

105. *Id.*

106. *See, e.g.*, Joel F. Handler, *Women, Families, Work, And Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375 (1996); David L. Chambers, *Fathers, The Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575 (1995); Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WIS. L. REV. 235 (1994).

107. Jefferson v. Hackney, 406 U.S. 535, 548 (1972) (upholding state programs where "a larger percentage of Negroes and Mexican-Americans in AFDC than in the other programs, and that the AFDC is funded at 75% whereas the other programs are funded at 95% and 100% of recognized need"); *see also* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 234 (1995); Fellows, *Procreative Power*, *supra* note 4, at 496.

108. *See, e.g.*, Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 994 (2006) [hereinafter Maldonado, *Deadbroke*] ("Why are policymakers unaware of the higher rate of paternal involvement amongst low-income, nonresident African-American fathers? Because, when measuring responsible fatherhood, only formal child support payments count."); Singer, *supra* note 95, at 250 ("[E]nforcement of child support obligations is one of the few antipoverty strategies on which conservatives and liberals generally agree.").

109. Maldonado, *Deadbroke*, *supra* note 108, at 993–94 (citation omitted). Eighteen percent of U.S. women obtaining abortions are teenagers. Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSP. ON SEXUAL & REPROD. HEALTH 1, 41–50 (2011); *see also Facts on Induced Abortion in the United States*, GUTTMACHER INST. (Oct. 2013), http://www.guttmacher.org/pubs/fb_induced_abortion.html. "Forty-two percent of women obtaining abortions have incomes below 100% of the federal poverty level ($10,830 for a single woman with no children)." *Id.* Since 1990, at least, Blacks have consistently accounted for 30% of all abortions. *Id.* In 2011, Blacks made up approximately 12.3% of the United States population. *Census Data: Demographic Statistics*, INFO PLEASE, http://www.infoplease.com/us/census/data/demographic.html (last visited Nov. 3, 2013). Blacks still make up for thirty percent of all abortions today. *See Facts on Induced Abortion in the United States, supra*.

imposed by modern society, resulting in the discriminatory policies of a modern welfare system, Professor Solangel Maldonado points to recent studies finding "that low-income, never married African-American nonresident fathers are *more* involved with their children than are nonresident fathers of other races."[110] This is fortunate because without fathers' involvement, children are more likely to do poorly academically, socially, and emotionally than children in two-parent homes.[111] However, "[c]hildren with involved nonresident fathers perform better academically and have higher self-esteem and fewer social and behavioral problems than children who have little contact with their fathers."[112]

There is little question about the overall benefits of involvement of fathers in the development and socialization of their children or of the overall detriments without. It is also the case that courts do not award visitation dependent upon child support payment. It is nonetheless the case that current child support enforcement efforts and mechanisms discourage or even make impossible meaningful visitation and relationship development with nonresident, poor fathers.[113] The make-them-pay focus is both unrealistic and dramatically misses an opportunity to encourage the relationships that prove beneficial for child development and ultimately for society in general.

Even understanding that the law cannot prevent parent-child bonds and relationships, it nonetheless creates the conditions under which they exist. "[T]he nature of the parenting relationship wholly depended upon the grace of another, in whose hands the child's future actually lay."[114] Indeed, in the eyes of the law, rearing good slaves was more important than good

110. Maldonado, *Deadbroke*, *supra* note 108, at 994 (citations omitted); *see also* Vivian L. Godsden et al., *Situated Identities of Young, African American Fathers in Low-Income Urban Settings: Perspectives on Home, Street, and the System,* 41 FAM. CT. REV. 381, 387, 395 (2003).

111. Maldonado, *Deadbroke*, *supra* note 108, at 997–98 (citations omitted) ("Studies have found that children who have infrequent contact with their fathers are more likely to experience academic, social, and emotional problems than children who grow up with two parents. For example, they are more likely to engage in early sexual activity, abuse drugs, and engage in delinquent behavior. They also tend to have lower levels of cognitive development and lower self-esteem than children who share close relationships with their nonresident fathers.").

112. *Id.* at 998 (citations omitted).

113. *See* Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 650 (2012) ("Automatic withholding of child support payments from employer payroll accounts for two-thirds of all child support collections. Child support is also secured from able nonpayers through a range of alternative mechanisms, such as intercepting federal and state income tax refunds, seizing bank account balances, restricting or revoking drivers', occupational, and professional licenses, and placing liens on properties."). Indeed, if *Lehr v. Robertson*, 463 U.S. 248 (1983), determined that fatherhood is dependent upon biology and an established relationship, any sanctions impeding the fulfillment and continuation of that relationship makes this proposition a mockery.

114. Burnham, *supra* note 14, at 205.

childrearing.[115] "Although the system discouraged parents from forming strong bonds, the slave mother was nevertheless constantly accused of neglecting her children, and the father of brutality."[116] Similarly, for most of the history of welfare, Congress designed policy to penalize marriage of welfare recipients[117] and to treat minority recipients of transfer payments differentially.[118] However, the most consistent welfare policy objective, throughout, is making fathers pay.[119]

B. Can't Buy a Good Father

While there may be a strong correlation with visitation and child support payments, making poor fathers pay when their own financial stability is in question only serves to frustrate and alter any delicate balance allowing that father to visit his child and contribute in any meaningful fashion. Maldonado advocates for recognition of "in-kind" payments in lieu of hard cash.[120] In-kind is symbolic, visible and durable[121] and places the focus more squarely on the relationship between father and child.[122] Given the correlation between involvement by fathers in the lives of their children and successful outcomes,[123] it makes more sense for the state to invest in promoting these associations over either enforcement of what are essentially small amounts or dealing with the consequences of poor social outcomes for a greater number of children.

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115. *Id.* at 204 (citations omitted).

116. *Id.*

117. *Cf.* Chambers, *supra* note 106.

118. *See supra* note 108 and accompanying text; *see also* DAVIS, *supra* note 3, at 234; Fellows, *Procreative Power*, *supra* note 4, at 496.

119. *See, e.g.*, Maldonado, *Deadbroke*, *supra* note 107, at 994 ("Why are policymakers unaware of the higher rate of paternal involvement amongst low-income, nonresident African-American fathers? Because, when measuring responsible fatherhood, only formal child support payments count."); Singer, *supra* note 95, at 249–50.

120. Maldonado, *Deadbroke*, *supra* note 108, at 995–96 ("Although the majority of poor, nonresident African-American fathers do not pay child support, many make in-kind and nonfinancial contributions to their children. Child support enforcement officials have not recognized these contributions, crediting only formal child support payments. As a result, poor, African-American fathers are perceived as greater deadbeats and as less involved in their children's upbringing than other fathers. This failure to recognize informal contributions may drive poor fathers away and make it more difficult for them to maintain relationships with their children.").

121. *Id.* at 1005.

122. *Id.* at 1019 ("[C]ustodial mothers and children might benefit if the law credited fathers' in-kind contributions because deadbroke fathers would have an incentive to make in-kind contributions and spend more time with their children.").

123. *See supra* notes 111–112 and accompanying text.

Unemployment rates for African-American males are still the highest of any category.[124] Placing some of that grant money into target programs for job creation or for corresponding job training would benefit children with nonresident fathers more than child support "persecutions." High rates of incarceration of men of color[125] make finding employment that much more difficult and, during incarceration, removes those fathers from the community and very often from contact with their child. To complete the trifecta, not only are nonmarital children less likely to receive support for college,[126]— perhaps obvious for children of impoverished parents— this dynamic also contributes to low levels of college educated African-Americans.[127]

VI. MARRIAGE AND OTHER REGULATED CONTRACTS

Current statistics indicate that marriage rates for African-Americans are low,[128] but were not always at such levels. In fact, family ties remained strong throughout slavery, despite legal barriers to stability. Legal impediments included old conceptualizations of marriage as a contract; since slaves could not contract, they could not marry.[129] Correspondingly, the incidents of marriage were unenforceable, including the financial responsibility of fathers to support their children: [130]

> many whites, believed that slavery had destroyed the sense of family obligation, was astonished by the eagerness with which former slaves in contraband camps legalized their marriage bonds. The same pattern was repeated when the Freedman's Bureau and state governments made it possible to register and solemnize slave

124. *See Table A-2 Employment Status of the Civilian Population by Race, Sex, and Age*, BUREAU LAB. STAT., http://www.bls.gov/news.release/empsit.t02.htm (last updated Oct. 22, 2013).

125. *See U.S. Incarceration Rates by Race and Sex*, NAT'L JUST. INST., http://www.nij.gov/journals/270/criminal-records-figure2.htm (last updated June 4, 2012).

126. *See* Maldonado, *supra* note 3, at 363; Maldonado, *Deadbroke*, *supra* note 108, at 993 (stating that men who were never married to their children's mothers are even less likely to be involved in their children's upbringing or to share a close relationship with them).

127. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, TABLE 229 EDUCATIONAL ATTAINMENT BY RACE AND HISPANIC ORIGIN: 1970 TO 2010 (Sept. 30, 2011), *available at* http://www.census.gov/compendia/statab/cats/education.html.

128. See CASEY E. COPEN ET AL., NAT'L HEALTH STATISTICS REPORTS, FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH 1, 5 (2012), *available at* http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf.

129. Burnham, *supra* note 14, at 207–08.

130. *Id.*

unions.[131]

Yet, political leaders in the South worked to eliminate common-law marriage with the purpose of increasing the number of children deemed illegitimate, with such effects falling more heavily on Blacks than their White counterparts.[132] This was at least a part of "the construction of African-American families as deviant, of African-American women as sexually available, and White women as untrustworthy with minimal procreative power remains embedded in the law."[133]

Since slaves could not contract, they could not marry;[134] nor were the incidents of marriage enforceable, including those of support.[135] Wills, a quasi-contract establishing rights of inheritance, were not strictly necessary with a valid marriage. Common-law marriage, dismantled in furtherance of Black illegitimacy, is only a form of oral contract for marriage. Many lay people still believe they may engage in enforceable common-law marriage.

VII. CONCLUSION: FINDING SOLUTIONS COUNTERING SLAVERY

A. Mimicking Slave Families: Multi-Party Parenting

This Article began by pointing out the connections between illegitimacy and slavery[136] as well as modern welfare and laws[137] intended for the support of those children deemed illegitimate, which included punishment to reinforce the stigma of those children and their mothers.[138] It seems that the appropriate remedy for the ills of a system modeled after one created through the institution of slavery are those means for family and self-preservation and survival developed during slavery by slaves and former slaves. Slaves and former slaves routinely cared for the children of relatives and friends, in the hope that the same was being done for their own children, wherever they happened to be.[139] Uncertainty and instability generally

131. FONER, *supra* note 15, at 84.

132. Appleton, *supra* note 37, at 352.

133. Fellows, *Procreative Power*, *supra* note 4, at 521.

134. Burnham, *supra* note 14, at 207–08.

135. *Id.*

136. *See supra* text accompanying notes 8–24.

137. *See supra* text accompanying notes 26–33.

138. *See supra* text accompanying notes 69–76 (characterizing "illegitimate" black children and the mothers who produce them).

139. FONER, *supra* note 15, at 84. "Many families, in addition, adopted the children of deceased relatives and friends, rather than see them apprenticed to white masters or placed in Freedman's Bureau orphanages." *Id.*

prompted cooperative efforts from all who could assist in child rearing. That is to say, legislatures and courts should envision, support and enforce non-traditional and multiple-party parenting arrangements.[140] Some might suggest that the routine search by social service administrators for relatives of a child-needing-placement serves this purpose.[141] Use of regulated contract may also be quite helpful in effective and beneficial formation of such arrangements. The fact is that multi-party arrangements for child-rearing are part of a resistance from the past,[142] but are also emerging, albeit slowly and not without difficulty, in the future of family law, child custody and support matters.[143] After all, parenthood is not only a biological association, but is also a socially constructed status; the social constructs of gender and race are of great relevance.

B. Countering Rights-Denials Arising From Slavery: Allowing Regulated Contract

Denial of contract rights, especially the regulated contracts for marriage, supported the creation and perpetuation of illegitimacy as a form

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140. Aside from the welfare of the child, Fellows suggests reasons based in gender control:

> There are two other equally plausible explanations, however, for the dismissal of the idea of dual paternity. One is that dual paternity destroys the husband's power, accorded to him through the marital presumption, to prevent the biological father from interfering in the husband's relationship with his white legitimate child. Moreover, it would represent a public and legal acknowledgment that a husband had 'lost' control of his wife to another man.

Fellows, *Procreative Power*, *supra* note 4, at 508 (discussing *Michael H.* and the subsequent inconsistent case law). In addition, she points out that "dual paternity would have increased the risk of forced fatherhood outside of marriage. It also would have increased the possibility that a white man would be thrust into fatherhood of an African-American child." *Id.* at 509.

141. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE 7–8 (2000), available at http://aspe.hhs.gov/hsp/kinr2c00/full.pdf. *But see* Rob Geen, *Kinship Foster Care: An Ongoing, Yet Largely Uninformed Debate*, *in* KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE 1 (Rob Geen ed., 2003).

142. *See* Burnham, *supra* note 14, at 218.

143. *See, e.g.*, Mae Kuykendal, *Liberty in a Divided and Experimental Culture: Respecting Choice and Enforcing Connection in the American Family*, 12 UCLA WOMEN'S L.J. 251, 259 (2003) ("Today we are familiar with other phenomena informing the notion of family: single mothers, custodial grandparents, single fathers, surrogacy arrangements and sperm banks, civil unions and gay marriage, blended families, step families, the lesbian baby boom, stay-at-home fathers, de facto parents, the ease of divorce, and so on."); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: an Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 345 n.144 (1990) ("Rather than wholly substituting adoptive for biologic parents, some adoption arrangements might establish hybrid or extended-family bonds that formally included more than two parents drawn from combinations of adoptive and biological relationship . . . . In some ways these arrangements are similar to step-families that arise after divorce. Blended families may include several de facto fathers or mothers for any given child.").

of racial subordination. Perhaps appeal to regulated contract[144] could assist in moving away from this situation. Common law marriage, another regulated oral contract,[145] should be revived for the benefit of children, with or without the marital presumption. Regulated contract may assist in workable formal multiparty parenting. Regulated contract is already the means to facilitate open adoptions.[146] Contract, with regulation, finalizes family form in the artificial reproductive technologies (ART).[147] Quasi-contract forms, such as *de facto* parent,[148] *equitable* parent,[149] and parent by

144. Marriage is an agreement between two people, but is only valid if it conforms to the requirement and regulations of the state. These requirements may be as trivial as the ceremonial form, see WADLINGTON ET AL., DOMESTIC RELATIONS: CASES AND MATERIALS 118–21 (7th ed. 2013), or as essential as to whom one may marry, see *50 State Statutory Surveys: Family Law: Divorce and Dissolution: Grounds for Divorce*, 0080 SURVEYS 9 (2007), *available at* Westlaw.

145. For a valid common law marriage both parties must have capacity, there must be a contemporaneous agreement to marry, and the couple must hold themselves out to the community as husband and wife. *See, e.g.*, Ethridge v. Yeager, 465 So.2d 378 (Ala. 1985) ("[T]here must first have been a present agreement, that is, a mutual understanding to enter at that time into the marriage relationship . . . . followed by public recognition of the existence of the 'marriage . . . .'") (quoting Skipworth v. Skipworth, 360 So.2d 975, 975 (Ala. 1978)); Stringer v. Stringer, 689 So. 2d 194, 195 (Ala. Civ. App. 1997) ("A valid common-law marriage exists in Alabama when the following elements are present: '1) capacity; 2) present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships; and 3) public recognition of the relationship as a marriage and public assumption of marital duties and cohabitation.'") (quoting Boswell v. Boswell, 497 So. 2d 479, 480 (Ala. 1986)); Estate of Alcorn, 868 P.2d 629, 631 (Mont. 1994) (divorce of one party removed impediment to common-law marriage); Most states have abolished formal recognition of common law marriage, unless it is validly established in another state where common law marriage is recognized. *See 50 State Statutory Surveys: Family Law: Marriage: Common Law Marriage*, 0080 SURVEYS 20 (2012), *available at* Westlaw. A number of states have also permitted the filing of an affidavit signed by both parties and notarized, seeking state recognition of their informal marriage. *See id.*

146. Only a small number of states will recognize such arrangements. For those that do, contracts between the relevant parties for visitation and continued parenting are recognized by the courts to the extent they are not contrary to the best interests of the child. See Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1 (2010).

147. *See, e.g.*, JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 98–100 (1994) (discussing in vitro fertilization); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 387–91(2012) (discussing the effect of new reproductive technologies on kinship and families); Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 460 (2009).

148. *See generally* Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103 (2010).

149. *See, e.g.*, Heather Buethe, Note, *Second-Parent Adoption and the Equitable Parent Doctrine: the Future of Custody and Visitation Rights for Same-Sex Partners in Missouri*, 20 WASH. U. J.L. & POL'Y 283 (2006); Sarah Opichka, Note, *Custody Cases and the Expansion of the Equitable Parent Doctrine: When Should "Acting Like" a Parent be Enough?*, 19 WIS. WOMEN'S L.J. 319 (2004).

estoppel,[150] are occasionally used to benefit existing family relationships.

Regulated contract will have its challenges for family governance. Both rights and responsibilities regarding the child must be clearly delineated to ensure these needs are met. Yet these are rational means for navigating conflicts in authority among multiple parties, which may not be any more burdensome than navigating similar conflicts between two parties.

Reformers must be cognizant of contract's use for racial purposes in the past.[151] Secrecy in adoption records should not be used to obscure racial heritage of the child. Secrecy in adoption proceedings and records are still virtually automatic, making the contracts necessary to effectuate open adoptions more challenging and often unenforceable. Open adoptions are most likely to benefit individuals from communities in poverty and communities of color. Allowing the use of regulated contract in more areas of family law may make open adoptions more realistic.

ART regulations have substantially followed the marital presumption.[152] The husband is presumed to be the legal father born into marriage using ART.[153] This is, perhaps, unsurprising since most users of ART are both wealthy and White.[154] It has also been the case, where surrogacy is legal, that surrogates are excluded from parenting the children they have gestated by these regulated contracts. This is also unsurprising as surrogates are often poor and sometimes of color.[155]

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150. *See, e.g.*, Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under The American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285 (2001); Josh Smolow, Note, *Can Equitable Estoppel Be Used as an Effective Way for a Legal Parent to Obtain Child Support for the Children of a Separated Same-Sex Couple?*, 18 CARDOZO J.L. & GENDER 481 (2012).

151. *See supra* notes 84–86 and accompanying text.

152. *See, e.g.*, In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (holding that consent by a husband to the artificial donor-insemination of the wife is proof of legal paternity).

153. *See id.*

154. *See* Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 201–02 (2013) ("The dominant narrative that emanates from a rights lens is that of a married, heterosexual couple, usually White, and wealthy, who access technology in response to failed attempts to have a child through coital means. . . . The dominant narrative of ART exists because the vast majority of those who use ART in the United States are White and heterosexual, even though people of color have higher rates of infertility than Whites.").

155. *See* DOROTHY ROBERTS, THE REPRODUCTIVE RIGHTS READER: LAW, MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 308, 312 (Nancy Ehrenreich ed., 2008); Katha Pollitt, *Checkbook Maternity: When Is a Mother Not a Mother?*, NATION, Dec. 31, 1990, at 825–42. *But see* Erin Nelson, *Global Trade And Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J.L. MED. & ETHICS 240, 247 (2013) ("Contrary to feminist arguments made in the early days of ARTs, the women who act as surrogates are not poor, uneducated women of color who comprise some sort of reproductive 'underclass' to serve the needs of wealthy white women."). Roberts points out that "[b]lack women have, after all, always raised white children without acquiring any rights to them . . . . Now they can breed them, too." *Id.* at 311–12. This racial and financial imbalance has historical roots in the practice of "wet-nursing." *See, e.g.*, BARBARA L.

The suggested remedies of exploring multiparty parenting forms in tandem with more liberal use of contract to benefit children are imperfect. Unfortunately, the current situation is also imperfect, in part because it is based in ideas and a history perpetuating an underclass.[156] Although we may acknowledge the imperfections and challenges, remedies created for survival and family preservation are at least a step in the right direction.

PHILIPP & SHEINA JEAN-MARIE, AFRICAN AMERICAN WOMEN AND BREASTFEEDING (2007), available at http://www.jointcenter.org/sites/default/files/upload/research/files/INFANT%20FINAL%20-%2033%20pages.pdf; Norma Juliet Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1048 (1986) ("In the nineteenth century, poor and mostly non-white women acted as wet nurses, selling their milk to mothers of the upper classes, sometimes depriving their own children in the process.").

156. *See generally* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (2d ed. 2012).