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## Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children

Solangel Maldonado

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ILLEGITIMATE HARM: LAW, STIGMA, AND DISCRIMINATION  
AGAINST NONMARITAL CHILDREN

*Solangel Maldonado\**

Abstract

No one would dispute that for most of U.S. history, nonmarital children suffered significant legal and societal discrimination. Although many individuals believe that the legal disadvantages attached to “illegitimate” status have disappeared in the last forty years, this Article demonstrates that the law continues to discriminate against nonmarital children in a number of areas, including intestate succession, citizenship, and child support. Societal biases against nonmarital children also remain. A majority of Americans believe that the increase in nonmarital births is a significant societal problem and almost 50% believe that unmarried women should not have children. Some courts are aware of societal biases against nonmarital children and have tried to protect children from the “stigma of illegitimacy.” However, legislative and executive efforts to promote marriage and reduce nonmarital births, along with some courts’ rejection of same-sex marriage on the ground that the state’s goal in creating civil marriage is to discourage nonmarital childbearing, have signaled that nonmarital families are deviant. These messages may serve to strengthen existing societal disapproval of nonmarital families and their children.

The state has an interest in supporting family forms that further children’s well-being, such as stable marriages. The state also has a duty to protect children from the economic, social, and psychic harms caused by legal discrimination against nonmarital children. This Article proposes a model statute that would eliminate remaining legal discrimination against nonmarital children. It also suggests ways lawmakers can alter their messages suggesting that nonmarital families are inherently inferior. The reforms suggested in this Article may reduce remaining societal biases against nonmarital children while allowing the state to support marital and nonmarital children.

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I. INTRODUCTION

No one would dispute that for most of U.S. history, “illegitimate”<sup>1</sup> children suffered significant legal and societal discrimination.<sup>2</sup> Under the common law, nonmarital children had no right to parental support and no right to inherit from or through a parent.<sup>3</sup> They faced legal and societal

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1. Although I prefer the term “nonmarital” when referring to children whose parents never married, occasionally I will use the term the law has traditionally used—“illegitimate”—when discussing historical treatment of nonmarital children or when quoting statutory language or judicial opinions. *See generally In re Estate of Greenwood*, 587 A.2d 749, 751 n.1 (Pa. Super. Ct. 1991) (“Through the years, various appellations have been used to describe this class of individuals. Initially, the term ‘bastards’ was thought fitting. This was superseded by ‘illegitimate children’, and this has largely given way to the nomenclature ‘children born out of wedlock.’”). *But see United States v. Flores-Villar*, 536 F.3d 990, 993 (9th Cir. 2008), *cert. granted*, 2010 U.S. LEXIS 3707 (2010) (using term “illegitimate” at least eight times).

2. *See infra* Part II.A. Traditionally, children who were conceived or born out of lawful wedlock were considered illegitimate even if their parents later married. *See John Witte, Jr., Ishmael’s Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC’Y: THE INT’L J. OF PENOLOGY 327, 334 (2003). In the early 20th Century, states began to treat children who were born out of wedlock but whose parents later married as legitimate. *Id.* at 336.

3. *Trimble v. Gordon*, 430 U.S. 762, 768 (1977).

barriers when they sought public office, entry into professional associations, or to transfer their own property at death.<sup>4</sup>

Many commentators assert that the social and legal disadvantages attached to “illegitimate” status have disappeared in the last forty years.<sup>5</sup> Undoubtedly, discrimination against nonmarital children has decreased significantly since 1968, when the U.S. Supreme Court began striking down laws denying nonmarital children many of the rights available to marital children, including the right to paternal support,<sup>6</sup> intestate succession, government benefits, and damages for the wrongful death of a parent.<sup>7</sup> The Uniform Parentage Act and most state statutes now provide that nonmarital children have the same legal rights as marital children.<sup>8</sup> Additionally, all states have procedures that enable a father to “legitimate” a child, even if he and the child’s mother never marry, thereby providing nonmarital children with virtually all of the legal rights accorded to marital children.<sup>9</sup> Societal disapproval of nonmarital childbearing has also decreased as nonmarital births have become more common. The nonmarital birth rate increased from 5% in 1960<sup>10</sup> to 41% nationwide and more than 70% in some communities today.<sup>11</sup>

Despite these legal and demographic changes, nonmarital children continue to suffer legal and social disadvantages as a result of their birth status. While the Uniform Parentage Act provides that nonmarital children have the same rights under the law as marital children, the comments acknowledge that “the equal treatment principle does not necessarily

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4. *Miscovich v. Miscovich*, 688 A.2d 726, 728 n.2 (Pa. Super. Ct. 1997), *aff’d*, 720 A.2d 764 (Pa. 1998); Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2373 (2007).

5. See Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 211–12 (2009) (noting that the “legal doctrine of ‘illegitimacy’ had all but disappeared”); Ledsham, *supra* note 4, at 2375 (“[I]llegitimacy-based discrimination against children of [opposite-sex] couples has largely faded from the legal (and social) landscape . . .”); *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238, 241 (Mo. 2006) (en banc) (“[T]he law has tended to remove the stigma of illegitimacy by treating illegitimate children the same as children born of a marriage.”).

6. The law already recognized children’s right to maternal support. See, e.g., *Cnty. of Stearns v. Twp. of Fair Haven*, 279 N.W. 707 (Minn. 1938); *Pigford Bros. Constr. Co. v. Evans*, 83 So. 2d 622 (Miss. 1955).

7. See *infra* notes 33–38 and accompanying text.

8. UNIF. PARENTAGE ACT § 202 (last amended 2002), 9B U.L.A. 309 (2001 & Supp. 2010) (“A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.”); see also HAW. REV. STAT. ANN. § 584-2 (West 2010); MINN. STAT. ANN. § 257.53 (West 2010); MO. ANN. STAT. § 210.818 (West 2010); TEX. FAM. CODE ANN. § 160.202 (West 2009).

9. But see *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238, 242 (Mo. 2006) (en banc) (Wolff, C.J., dissenting) (“Although some . . . statutes purport to grant the same rights to legitimate and illegitimate children, there is still a difference between them, as the terminology indicates.”).

10. PEW RESEARCH CENTER, *GENERATION GAP IN VALUES, BEHAVIORS: AS MARRIAGE AND PARENTHOOD DRIFT APART, PUBLIC IS CONCERNED ABOUT SOCIAL IMPACT 15* (2007) [hereinafter *GENERATION GAP*] (noting that 5.3% of all births in 1960 were nonmarital).

11. Brady E. Hamilton et al., *Births: Preliminary Data for 2008*, 58 NAT’L VITAL STAT. REP. 16, Apr. 6, 2010, at 6.

eliminate all distinctions in the application of other substantive laws to different kinds of children.”<sup>12</sup> Indeed, many laws discriminate against nonmarital children, and society continues to stereotype and stigmatize them. Many Americans believe that nonmarital childbearing is a significant social problem.<sup>13</sup> The continued use of the term “illegitimate” or “bastard”<sup>14</sup> reflects this perception.<sup>15</sup>

Parents are aware of society’s disapproval of nonmarital children. For example, some married women have reported taking their husband’s surname to protect their children from assumptions that they are “illegitimate.”<sup>16</sup> Couples who have cohabited for years often get married once they decide to have children, in part, because they do not want their children to be stigmatized as illegitimate.<sup>17</sup> Courts are aware of societal

12. UNIF. PARENTAGE ACT § 202 cmt. (last amended 2002), 9B U.L.A. 309 (2001).

13. GENERATION GAP, *supra* note 10, at 3; *see also* CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., NONMARITAL CHILDBEARING: TRENDS, REASONS, AND PUBLIC POLICY INTERVENTIONS 52 (2008) (discussing policies that could “lessen the *problem* of nonmarital childbearing”) (emphasis added); Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14 (arguing that, “[I]llegitimacy is the single most important social problem of our time—more important than crime, drugs, poverty, illiteracy, welfare, or homelessness, because it drives everything else.”).

14. *See* ALA. CODE § 26-11-2 (West 2010) (“A father of a *bastard* child may seek to legitimate it and render it capable of inheriting his estate by filing a notice of declaration of legitimation . . . .”) (emphasis added).

15. For years, courts used the term “illegitimate” or “the illegitimates” to refer to nonmarital children. The use of the term itself, and its continuing usage today suggests that nonmarital children are somehow different and inferior to marital children. One scholar has noted that “in so far as the law perpetuates the status of legitimacy it must by definition also be maintaining a concomitant status of illegitimacy.” Andrew Bainham, *Is Legitimacy Legitimate?*, 39 FAM. LAW 673, 673 (2009). Furthermore, the modern terms “children born out of wedlock” or “nonmarital” are, as scholars have noted, problematic because they suggest that a family should be comprised of two married parents of the opposite sex. *See* MARTHA T. ZINGO & KEVIN E. EARLY, NAMELESS PERSONS: LEGAL DISCRIMINATION AGAINST NON-MARITAL CHILDREN IN THE UNITED STATES 3 (1994). Although these terms are less objectionable than “bastard,” a term that has not yet been removed from Alabama’s intestacy statute, *see supra* note 14, individuals continue to use degrading terms to describe nonmarital children. For example, a search for “illegitimate child” on *Urban Dictionary*, an “online open-source dictionary of slang,” produced the following definitions: “that a child is not yours”; “party trophy”; “whore child”; “chud . . . someone’s unwanted or unintended bastard offspring.” *Illegitimate Child Definition*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=illegitimate+child> (last visited Jan. 3, 2010); Virginia Heffernan, *Street Smart: Urban Dictionary*, N.Y. TIMES, July 1, 2009, <http://www.nytimes.com/2009/07/05/magazine/05F0B-medium-t.html>. These terms, while hopefully not indicative of most Americans’ views of nonmarital children, suggest that social stigma remains.

16. *See* Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 931 (2010). Mothers are concerned that because most marital children in the United States carry their father’s last name, people will assume that if a mother and her child have different last names, it is because the child’s parents are not married. *See id.* One mother stated “that having a different last name from her children ‘smacked of illegitimacy.’” *Id.*

17. They also want to provide their children with the financial benefits that accrue to marital children—the right to automatically inherit a share of their father’s intestate estate, social security benefits, standing to bring a wrongful death suit for their father’s death—benefits which are available to nonmarital children but which are often more difficult for nonmarital children to secure.

biases against nonmarital children and have upheld doctrines, such as the presumption of legitimacy—the presumption that a child born to a married woman is her husband’s child—partly to protect children from the “stigma of illegitimacy.”<sup>18</sup> Courts have also rejected petitions to open adoption records, partly because doing so would expose children to the “stigma of illegitimacy.”<sup>19</sup> The Massachusetts Supreme Court cited the benefits to children “such as the enhanced approval that still attends the status of being a marital child” as a reason, among others, to extend the right to marry to same-sex couples.<sup>20</sup> These statements suggest that parents and judges recognize that societal biases against nonmarital children persist today.

This Article demonstrates that, despite statements to the contrary, the law continues to discriminate against nonmarital children, imposing economic, social, and psychic harms. First, federal and state laws still treat nonmarital children differently in a number of areas, including support for postsecondary education and rules of intestacy and citizenship. These laws place heavier economic burdens on nonmarital children than on their marital counterparts. These laws also signal to society that there is a material distinction between marital and nonmarital childbirth. Moreover, lawmakers and courts continue to express disapproval of nonmarital families, thereby reinforcing societal biases against nonmarital children. This Article urges elimination of legal distinctions between marital and nonmarital children and of messages by lawmakers and courts suggesting that nonmarital families are inherently inferior.

This Article proceeds as follows. Part II traces the law’s historical treatment of nonmarital children and shows how it continues to disadvantage them in cases involving (1) intestate succession; (2) citizenship; and (3) financial support. This Part also describes the numerous harms nonmarital children suffer as a result of these legal distinctions. Part III shows that, despite high rates of nonmarital childbearing, society continues to disapprove of nonmarital families and, indirectly, nonmarital children. Part IV examines two ways in which the law signals that nonmarital families are deviant, thereby encouraging societal disapproval of nonmarital children. First, lawmakers have devoted significant resources to reducing the “illegitimacy ratio” and promoting marriage.<sup>21</sup> Second, a number of courts have denied same-sex couples the right to marry on the ground that recognizing marriages between couples who cannot procreate naturally might signal that marriage is not “necessary for optimal procreation and child rearing to occur.”<sup>22</sup> This Part argues that by signaling that children should only be reared in marital homes, the law may reinforce societal biases against nonmarital children.

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*See infra* notes 35–38 and accompanying text.

18. *See infra* notes 179–84 and accompanying text.

19. *See infra* notes 186–87 and accompanying text.

20. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003).

21. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2113–14 (codified as amended at 42 U.S.C. § 602 (2006)).

22. *Goodridge*, 798 N.E.2d at 1002 (Cordy, J., dissenting).

Part V argues that the law must abolish legal distinctions between marital and nonmarital children and proposes a model statute and other mechanisms lawmakers should adopt to eliminate these distinctions and remaining societal biases against nonmarital children. This Part recognizes that the state has an interest in promoting family forms that further children's well-being, such as healthy marriages, and grapples with the challenge of supporting marital families without, at the same time, stigmatizing nonmarital children. Ultimately, this Article concludes that the state can express approval and support for stable marital families while also supporting nonmarital children by (1) eliminating legal distinctions between marital and nonmarital children and (2) altering the messages expressed by courts and lawmakers with regard to marriage and nonmarital childbearing.

## II. THE LAW'S TREATMENT OF NONMARITAL CHILDREN

Today, approximately 40% of children are born to unmarried parents, and the majority of these children are born to cohabitating couples and financially successful women.<sup>23</sup> Despite the prevalence of nonmarital families, the law continues to deprive nonmarital children of legal benefits available to their marital counterparts. This Part traces the law's historical treatment of nonmarital children and shows how it continues to disadvantage them in cases involving (1) intestate succession; (2) citizenship; and (3) child support.

### A. Supreme Court Jurisprudence

At common law, a child born out of wedlock was *filius nullius* (the child of no one).<sup>24</sup> Nonmarital children were considered non-persons, incapable of inheriting from a parent, sibling, or any other relatives, and had no legal rights to parental support.<sup>25</sup> They were precluded from holding "positions of social visibility and responsibility,"<sup>26</sup> and had no right to

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23. Hamilton, *supra* note 11, at 3; *see infra* notes 141–42, 145 and accompanying text.

24. Witte, Jr., *supra* note 2, at 335.

25. *See* Trimble v. Gordon, 430 U.S. 762, 768 (1977); Witte, Jr., *supra* note 2, at 334–35 (“[T]he harsh common law of no parental support for bastards persisted in the USA until well into the 20th century.”). Although states amended their intestacy statutes to allow nonmarital children to inherit from their mothers as early as the 1920s, *see* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81–82 (2003), some states did not allow nonmarital children to inherit from their fathers until the late 1970s. *See, e.g.*, 20 PA. CONS. STAT. ANN. § 2107 (West 2010).

The law also restricted nonmarital children's ability to alienate or devise property. Witte, Jr., *supra* note 2, at 335. When illegitimate persons died intestate leaving no surviving spouse or descendants, their property escheated to the state, rather than to collateral heirs. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 115 (8th ed. 2009). Even when illegitimate persons devised their property to surviving spouses and children through proper instruments, their bequests were sometimes subject to special gift and inheritance taxes. Witte, Jr., *supra* note 2, at 335.

26. Witte, Jr., *supra* note 2, at 335 (noting that nonmarital children could not hold high political, military, or judicial office, or serve as prison wardens or coroners).

wrongful death damages, or government benefits available to marital children of a deceased or disabled parent.<sup>27</sup> They were the targets of social opprobrium as evidenced by the terms used to describe them—“bastard”<sup>28</sup> or “illegitimate”<sup>29</sup>—and were frequently denied access to social, professional, and civic organizations.<sup>30</sup> Lawmakers and society justified discrimination against nonmarital children on the ground that it would deter nonmarital childbearing<sup>31</sup> and “preserve and strengthen traditional family life.”<sup>32</sup>

Nonmarital children’s legal status has improved significantly in the last forty years as a result of numerous Supreme Court decisions striking down discriminatory laws on equal protection grounds. Starting in 1968, the Court recognized that “illegitimate children . . . are clearly ‘persons’ within the meaning of the Equal Protection Clause”<sup>33</sup> and later held that it is “illogical and unjust” to punish children for their parents’ actions.<sup>34</sup> In a series of decisions over the next twenty years, the Court struck down numerous laws denying nonmarital children many of the rights available to marital children, including the right to damages for the wrongful death of a parent,<sup>35</sup> the right to paternal support,<sup>36</sup> intestate succession,<sup>37</sup> and

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27. *Id.*; see also *id.* at 328 (noting that nonmarital children had “severely truncated rights . . . to sue or testify in certain courts”).

28. ANN FESSLER, *THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE* 11 (2006); see also ALA. CODE § 26-11-2 (West 2010) (referring to nonmarital child as “a *bastard* child” (emphasis added)). Some states stamped “bastard” on the birth certificates of nonmarital children. RONALD J. NYDAM, *ADOPTEDS COME OF AGE* 56 (1999).

29. See *supra* note 1 (discussing historical terms used to describe nonmarital children).

30. Witte, Jr., *supra* note 2, at 335 (noting that nonmarital children were “denied access to local polls, clubs, schools, learned societies, and licensed professions”). The stigma of illegitimacy is based in part on religious doctrine. See *Deuteronomy* 23:2 (King James) (“A bastard shall not enter into the congregation of the LORD; even to his tenth generation shall he not enter into the congregation of the LORD.”). Religious officials continue to discriminate against nonmarital children. For example, some Catholic priests have recently refused to baptize nonmarital children along with marital children. Jane D. Bock, *Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy*, 14 *GENDER & SOC’Y* 62, 81 (2000).

31. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (“The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage.”); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (quoting *Levy v. State*, 192 So. 2d 193, 195 (La. Ct. App. 1967) (“Denying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock.”)).

32. *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 619–20 (1973) (quoting lower court’s rationale for upholding law denying welfare benefits to nonmarital families).

33. *Levy*, 391 U.S. at 70.

34. *Weber*, 406 U.S. at 175 (“[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”). The Court also recognized that discriminatory treatment of nonmarital children did not deter nonmarital childbearing. See *Trimble v. Gordon*, 430 U.S. 762, 770 (1977) (“[C]hildren can affect neither their parents’ conduct nor their own status.”); *Weber*, 406 U.S. at 175 (“Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.”).

35. *Levy*, 391 U.S. at 72. *But see* FLA. STAT. ANN. § 768.18(1) (West 2010) (providing that

government benefits.<sup>38</sup> Despite strong evidence of discrimination against nonmarital children, the Court did not reject all classifications on the basis of birth status,<sup>39</sup> or require states to satisfy strict scrutiny when making distinctions between marital and nonmarital children.<sup>40</sup> Rather, the Court applied intermediate scrutiny and upheld statutory distinctions between marital and nonmarital children so long as they were “substantially related to permissible state interests.”<sup>41</sup>

Despite this heightened standard of review, the Supreme Court has upheld repeatedly distinctions between marital and nonmarital children.<sup>42</sup> For example, in the context of child support, the Court has held that the fact that a state “must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean . . . that it must adopt procedures for illegitimate children that are coterminous with those

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for purposes of negligence statute, “‘Survivors’ means the decedent’s spouse, children, parents . . . but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child’s support.”); *Bell v. Heitkamp, Inc.*, 728 A.2d 743, 753 (Md. Ct. Spec. App. 1999) (holding that nonmarital child born after his father’s death could not bring wrongful death action because his father never publicly recognized the child as his own). In contrast, a marital child born within 300 days of his father’s death is automatically entitled to recover damages for the wrongful death of his father, even if his father never publicly recognized him as his own or was aware of the child’s conception. *Cf.* UNIF. PARENTAGE ACT § 204 (last revised 2002) (establishing rebuttable presumption that a child born to woman within 300 days of her husband’s death is her husband’s child).

36. *E.g.*, *Clark v. Jeter*, 486 U.S. 456 (1988) (holding that a state’s six-year statute of limitations for paternity actions violates equal protection); *Pickett v. Brown*, 462 U.S. 1 (1983) (holding that a state’s two-year limitations period for paternity actions violates equal protection); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (holding that a state’s one-year statute of limitations on paternity actions brought on behalf of nonmarital children violates equal protection); *Gomez v. Perez*, 409 U.S. 535 (1973) (denying nonmarital children the opportunity to obtain paternal support violates equal protection).

37. *E.g.*, *Trimble*, 430 U.S. at 776 (holding that a state statute allowing illegitimate children to inherit by intestate succession only from their mothers while legitimate children could inherit from both their mothers and fathers violates equal protection).

38. *E.g.*, *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (holding that a provision of Social Security Act denying benefits to illegitimate children born after their father became entitled to disability or death insurance benefits violates equal protection); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (holding that denial of welfare benefits to nonmarital children violates equal protection); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (holding that denial of workers’ compensation benefits to decedent’s illegitimate children violates equal protection).

39. *ZINGO & EARLY*, *supra* note 15, at 93 (analyzing all of the illegitimacy cases and noting that “the Supreme Court has never declared all birth status distinctions to be illegal” but has merely held that the statutes which deny “benefits to non-marital children *solely* on the basis of birth status [are] unconstitutional”).

40. *See Trimble*, 430 U.S. at 767 (holding that classifications based on illegitimacy are not “suspect,” or subject to “our most exacting scrutiny” (quoting *Mathews v. Lucas*, 427 U.S. 495, 506 (1976))).

41. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (plurality opinion); *see also Pickett*, 462 U.S. at 8 (“In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny.”).

42. *Cf. Labine v. Vincent*, 401 U.S. 532, 536 (1971) (“*Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring.”).

accorded legitimate children.”<sup>43</sup> The Court reasoned that states’ interest in reducing the risk of fraudulent paternity claims, a risk that (according to the Court) is much greater in cases involving nonmarital children, justified different burdens and procedures.<sup>44</sup>

Even when paternity has been established, the Court has upheld classifications between marital and nonmarital fathers—and, thus, indirectly, between marital and nonmarital children—based on states’ interests in ensuring that only fathers who have established relationships with their children have legally enforceable parental rights.<sup>45</sup> Based on these state interests, the Court has upheld classifications between marital and nonmarital children in cases involving child support, government benefits, intestate succession, and U.S. citizenship.

In *Linda R.S. v. Richard D.*,<sup>46</sup> for example, the Court rejected, on standing grounds, a challenge to a Texas law authorizing criminal prosecution of divorced noncustodial parents of marital children for nonpayment of child support but which imposed no similar penalty on parents of nonmarital children.<sup>47</sup> The Court held that the petitioner had “failed to allege a sufficient nexus between her injury and the government action” because if the state were to prosecute the father, he would likely end up in jail, and not pay child support anyway.<sup>48</sup> Of course, parents of marital children would also be unlikely to pay support if they were incarcerated. However, the Court did not address this point and upheld the statute even though, in effect, it absolved noncustodial parents of financial responsibilities to their nonmarital children.

Similarly, in *Mathews v. Lucas*, the Court upheld provisions of the Social Security Act that required nonmarital children seeking surviving child insurance benefits to show that at the time of their father’s death their father was either living with them or providing financial support.<sup>49</sup> Marital children were not required to make this showing. They were automatically deemed dependent at the time of their fathers’ death and entitled to benefits regardless of actual dependency.<sup>50</sup> Although it claimed to apply heightened

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43. *Mills v. Habluetzel*, 456 U.S. 91, 97 (1982).

44. *Id.* at 97–100. In cases involving nonmarital children, the law has traditionally required that paternity be proven. However, paternity is presumed (sometimes conclusively and in the face of evidence to the contrary) in cases involving marital children. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 131–32 (1989) (plurality opinion) (rejecting blood test evidence showing that the mother’s husband was not the child’s father); *infra* notes 175–78 (discussing presumption of legitimacy).

45. *See generally* *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that states are not prevented from according different legal rights to parents who have custodial relationships with their children than to parents that abandoned or never established custodial relationships with their children).

46. 410 U.S. 614 (1973).

47. *Id.* at 617–18.

48. *Id.*

49. *Mathews v. Lucas*, 427 U.S. 495, 516 (1976).

50. Nonmarital children who were entitled to inherit from their fathers under the state’s intestacy law, or whose fathers had acknowledged paternity in writing, been adjudicated to be the father, or been ordered to pay child support, were also entitled to a presumption of dependency. *Id.*

scrutiny, the Court upheld the Social Security Act's classifications because they were "reasonably related" to the likelihood that a child was dependent on his father at death and, thus, did not violate equal protection rights.<sup>51</sup> In other words, Congress could presume that marital children were receiving paternal support but that nonmarital children were not.

In *Lalli v. Lalli*, the Court upheld New York's intestacy law, which allowed nonmarital children to inherit from their fathers only if there had been a judicial finding of paternity during the father's lifetime.<sup>52</sup> Marital children were not subject to such requirement. The Court held that the required formal adjudication of paternity was substantially related to the state's interest in the "accurate and orderly disposition of property at death" and protecting heirs from fraudulent claims.<sup>53</sup> According to the Court, the procedural problems in the administration of estates counseled "against treating illegitimate children identically to all other heirs of an intestate father."<sup>54</sup>

Although states have a valid interest in obtaining reliable evidence of paternity and in the orderly and accurate disposition of estates, these cases, *Linda R., Mathews*, and *Lalli*, do not further these interests as shown below. More importantly, they reflect gender-based assumptions about unmarried fathers and their children that reinforce legal and societal distinctions between marital and nonmarital children.<sup>55</sup> For example, in *Mathews*, the Court upheld Congress's decision to presume dependency in certain cases for reasons of administrative convenience—to avoid the burden of case-by-case determinations of dependency in cases where dependency was likely.<sup>56</sup> As noted, the Court held that Congress could reasonably presume that most marital children were receiving paternal support but that nonmarital children were not.<sup>57</sup>

This presumption unfairly burdens nonmarital children and denies them benefits automatically granted to their marital counterparts. Many children whose parents are divorced receive no support from the noncustodial

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at 498–99.

51. *Id.* at 510 (stating that the scrutiny applied "is not a toothless one").

52. *Lalli v. Lalli*, 439 U.S. 259, 261 (1978) (plurality opinion).

53. *Id.* at 274–75 n.11.

54. *Id.* at 269. The Court stated:

The administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences. Fraudulent assertions of paternity will be much less likely to succeed, or even to arise, where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate is in the offing.

*Id.* at 271–72.

55. See generally Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 557–60 (2000) (discussing the role of gender stereotypes in immigration law).

56. *Mathews*, 427 U.S. at 509.

57. *Id.* at 513–14.

parent (usually the father) and, thus, are not dependent at the time of their fathers' death.<sup>58</sup> Yet, these children, by virtue of their parents' marriage, are entitled to a presumption of dependency even though a nonmarital child who lived with his father for many years before his parents separated (the facts in *Mathews*) would not be. This presumption signals that marital children are automatically entitled to support from their fathers but that nonmarital children are not, even when paternity is undisputed (as in *Mathews*). This message is reflected in the Court's statement that Congress could reasonably presume dependency when the nonmarital child is entitled to inherit under the state's intestacy law because "such legislation . . . reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an 'illegitimate' child in other circumstances."<sup>59</sup> The Court not only suggests that society believes that fathers owe fewer obligations to nonmarital as compared to marital children; it also gives legal effect to these societal biases and perpetuates discrimination against nonmarital children. As Justice John Paul Stevens argued in his dissent, these classifications between marital and nonmarital children for the purpose of presuming dependency are "more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates."<sup>60</sup>

These cases also presume that unmarried fathers who do not formally establish paternity have no relationship with their children. They assume that unmarried fathers do not live with their children, support them, or informally acknowledge them. For example, in *Mathews*, the Supreme Court found it reasonable to presume that a nonmarital child was dependent on his father where the father had acknowledged paternity in writing in contrast to cases where no such formal acknowledgment had been made.<sup>61</sup> The Court reasoned that "[m]en do not customarily affirm in writing their responsibility for an illegitimate child unless the child is theirs and a man who has acknowledged a child is more likely to provide it support than one who does not."<sup>62</sup> This statement ignores many nonmarital fathers who live with or support their children even if they never acknowledge paternity in writing. As Justice Stevens reasoned in his *Mathews* dissent, men who informally acknowledge paternity and live with or support their children "may never perceive a need to make a formal written acknowledgment of paternity."<sup>63</sup> Furthermore, as Justice William J. Brennan Jr. noted in *Lalli*, men who lack the foresight to execute a will, which is a simpler process than going to court to establish paternity, are unlikely to know that they must file filiation proceedings or formally

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58. As of 2007, only 62.8% of divorced custodial parents had child support agreements or awards. Only 51.2% of those received all of the payments due and 24.4% received none. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2007, at 7 tbl. 2 (Nov. 2009), available at <http://www.census.gov/prod/2009pubs/p60-237.pdf>.

59. *Mathews*, 427 U.S. at 515.

60. *Id.* at 523 (Stevens, J., dissenting).

61. *Id.* at 514 (majority opinion).

62. *Id.*

63. *Id.* at 522 (Stevens, J., dissenting).

acknowledge their children in writing in order to be legally recognized as the father.<sup>64</sup> State agencies and mothers are also unlikely to file paternity suits against men who are supporting their children.<sup>65</sup>

While the Supreme Court has held that children should not be penalized for their parents' actions, the state does just that when it presumes that nonmarital fathers have no relationship with their children. For example, in *Lalli*, it was undisputed that decedent had informally acknowledged appellant and his sister and had supported them during his lifetime.<sup>66</sup> Yet, they could not inherit under the New York intestacy statute because their father had not formally acknowledged them during his lifetime.<sup>67</sup> Similarly, in *Mathews*, nonmarital children were denied social security benefits that are automatically provided to marital children because of their parents' actions—their father's failure to acknowledge paternity in writing and their mother's failure to file a paternity action during the father's lifetime.<sup>68</sup>

The law's failure to recognize that nonmarital fathers who have not sought legal recognition of parental rights and responsibilities often live with their children, support them, or at least publicly acknowledge them is based on assumptions that nonmarital fathers are generally absent. As shown below, these assumptions continue today and are reflected in the distinctions courts and legislatures make between marital and nonmarital children.

### B. *Continuing Distinctions Between Marital and Nonmarital Children*

When one reads cases such as *Linda R.S.*, *Mathews*, and *Lalli*, one might imagine that they are relics of another era. These cases were decided in the 1970s when the rate of nonmarital births was quite low,<sup>69</sup> paternity was difficult to establish, and the majority of nonmarital children were born to single mothers, not cohabiting or romantically involved couples.<sup>70</sup> Unmarried fathers were automatically deemed unfit and few raised children.<sup>71</sup> This has changed. More than half of all nonmarital children are

64. *Lalli v. Lalli*, 439 U.S. 259, 278 (1978) (Brennan, J., dissenting).

65. *Id.* Mothers are unlikely to know that they need a judicial order of paternity in order to protect their children's right to inherit from their fathers and even if they did, they might hesitate to file a paternity action because they do not want to alienate the fathers. *Id.*; see also Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1003 (2006).

66. *Lalli*, 439 U.S. at 277 (Brennan, J., dissenting); *id.* at 261 (majority opinion).

67. *Id.* at 262, 275–76 (majority opinion). New York has amended its intestacy laws since *Lalli* to provide greater equity between marital and nonmarital children. See *infra* notes 81, 84, 93 and accompanying text. However, it is still inadequate for the reasons stated *infra* Part II.B.1.

68. *Mathews v. Lucas*, 427 U.S. 495, 501 (1976).

69. See *supra* note 10 and accompanying text.

70. See GENERATION GAP, *supra* note 10, at 15.

71. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (holding that statutory presumption of parental unfitness for unmarried fathers violates the Due Process Clause).

born to cohabiting couples,<sup>72</sup> and although the majority of single parents are mothers, 17% of single parents are fathers.<sup>73</sup> In addition, unmarried men who do not have physical custody of their children are increasingly involved in their children's lives.<sup>74</sup> Some nonmarital fathers have stronger relationships with their children than their married or divorced counterparts. These demographic changes challenge assumptions that nonmarital fathers typically have no relationship with their children. Despite these changes, however, courts and legislatures continue to treat children of unmarried fathers differently than marital children when determining inheritance rights, citizenship, and financial support.

### 1. Intestate Succession

All states maintain distinctions between nonmarital and marital children for purposes of intestate succession. Although states may no longer bar nonmarital children from inheriting from their fathers,<sup>75</sup> they require them to satisfy evidentiary burdens not required of marital children. A nonmarital child must establish paternity before she can inherit a share of her father's intestate estate.<sup>76</sup> In contrast, a marital child is entitled to inherit by virtue of her status as a marital child. For marital children, paternity is presumed and need not be proven.

States' requirements for establishing paternity for purposes of intestate succession vary widely.<sup>77</sup> Most statutes allow a nonmarital child to inherit from and through the father if there is a judicial finding of paternity or the father acknowledged paternity in open court or in a signed writing.<sup>78</sup> In other states, evidence that the father "openly and notoriously recognized the child to be his child" during his lifetime is sufficient.<sup>79</sup> Some states also accept as proof of paternity that "[t]he putative father is obligated to support the child under a written voluntary promise or by court order."<sup>80</sup> However, other states expressly reject child support agreements as proof of paternity for purposes of intestate succession.<sup>81</sup> Some states do not allow

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72. See *infra* note 141 and accompanying text.

73. See GRALL, *supra* note 58, at 2.

74. Paul R. Amato, Catherine E. Meyers & Robert E. Emery, *Changes in Nonresident Father-Child Contact From 1976 to 2002*, 58 FAM. REL. 41, 49 (2009) (finding that an increasing number of unmarried fathers since the 1970s are involved in their children's lives); Marcia Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461, 480 (2008) (finding a "high degree of coparenting among custodial mothers and nonresident fathers of young children during the five years after they have a nonmarital birth").

75. See *Trimble v. Gordon*, 430 U.S. 762, 776 (1977).

76. See Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 114.

77. See *id.* at 114–15.

78. See, e.g., WIS. STAT. ANN. § 852.05(1)(a)–(c) (West 2002).

79. See, e.g., MD. CODE ANN., EST. & TRUSTS § 1-208(b)(1)–(4) (LexisNexis 2001).

80. See, e.g., ARK. CODE ANN. § 28-9-209(d) (2004).

81. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(3) (McKinney 1998) ("The existence of an agreement obligating the father to support the non-marital child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made or acknowledgment of paternity . . .").

children to establish paternity after their fathers' death,<sup>82</sup> and those that do require that paternity be proven by "clear and convincing proof."<sup>83</sup> Evidence of a genetic relationship alone is not "clear and convincing proof."<sup>84</sup> Many states require evidence that the decedent was adjudicated to be the child's father during his lifetime or that he acknowledged the child (formally or informally)—for example, by holding him out as his own.<sup>85</sup>

Although the burden of establishing paternity may not appear to be onerous, it penalizes children for their parents' actions or inactions. To illustrate, a minor cannot require his mother to file a paternity action or require his father to formally acknowledge paternity. In addition, many parents incorrectly assume that so long as the father's name is on the child's birth certificate, a nonmarital child can inherit from his father. Similarly, some parents erroneously believe that if an unmarried father has lived with or supported his child at some point, a legal parent-child relationship is automatically established for probate purposes. As a result, they fail to formally establish paternity as required by the majority of states for purposes of intestate succession.<sup>86</sup>

Nonmarital children are also excluded from inheriting *through* their

82. See ALA. CODE § 26-11-2 (West 2010) (requiring that the father have formally legitimated the child during his lifetime for the child to take an intestate share of his father's estate).

83. See, e.g., IDAHO CODE ANN. § 15-2-109(b)(1)–(2) (LexisNexis 2010); KY. REV. STAT. ANN. § 391.105(1)(a)–(b) (LexisNexis 2010); MO. ANN. STAT. § 474.060.2(1)–(2) (Vernon 1992); NEB. REV. STAT. § 30-2309(2) (2010); TENN. CODE ANN. § 31-2-105(a)(2)(B) (2007); *In re Estate of Greenwood*, 587 A.2d 749, 752 (Pa. Super. Ct. 1991) ("Within the ambit of the Act of 1978 . . . a person born out of wedlock is not foreclosed from proving parentage, by clear and convincing evidence, after the person claimed to be the father dies."); Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-marital Children*, 39 U. TOL. L. REV. 1, 23, 24 & n.175 (2007).

84. See, e.g., N.Y. EST. POWERS & TRUST LAW § 4-1.2(a)(2)(D) (McKinney 1998) (providing that, "A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if . . . a blood genetic marker test had been administered to the father which together with other evidence establishes paternity by clear and convincing evidence."); *In re Estate of Burden*, 53 Cal. Rptr. 3d 390, 397 (Ct. App. 2007) ("The fact that the Legislature did not amend the statute to allow DNA tests to establish a right to intestate succession indicates that the Legislature did not want to make such an amendment."); *In re Davis*, 812 N.Y.S.2d 543 (App. Div. 2006) (finding that court could only order posthumous genetic testing after the nonmarital child established that the decedent had openly and notoriously acknowledged paternity). *But see* *Alexander v. Alexander*, 42 Ohio Misc. 2d 30, 34 (1988) (allowing nonmarital child seeking to inherit from his putative father's intestate estate to prove paternity by genetic testing). Genetic testing is sufficient evidence of paternity in a child support proceeding but is generally not sufficient for purposes of intestate succession. See Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857, 874–75 (2008) (arguing that genetic testing should be sufficient evidence of paternity for purposes of intestate succession).

85. See *Davis*, *supra* note 25, at 84–85 (noting that for purposes of intestate succession, "[S]imply proving paternity is not sufficient. Rather, in many states the applicable statutes . . . require that the father have acknowledged or adjudicated paternity prior to his death.").

86. Lewis, *supra* note 83, at 32–33. For purposes of intestate succession, the father's name on the birth certificate is sufficient proof of paternity in only two states—Arkansas and Georgia—and those states require the father's consent to the placement of his name on the birth certificate. *Id.* at 32 & n.227.

fathers in some cases, even if paternity is established in accordance with the statutory requirements. For example, until 2008, Uniform Probate Code § 2-705(b) provided that in construing a gift made by someone other than a parent to the natural children of a particular individual, a child that never lived with that parent or with that parent's siblings or that parent's parents as a minor would not be considered a natural child.<sup>87</sup> To illustrate, if Bisola executed a will devising "*Blackacre to Ramon's children*," only Ramon's children that lived with Ramon or with Ramon's siblings or Ramon's parents at some point during their childhood would share Blackacre.<sup>88</sup> As commentators have noted, this provision "has a disproportionate effect on nonmarital children,"<sup>89</sup> who are less likely than marital children to have lived with their fathers or their fathers' relatives. The example below illustrates UPC § 2-705(b) and demonstrates that its drafters were aware that nonmarital children would likely be excluded from class gifts. The illustration provides:

*Example.* G's will created a trust, income to G's son, A, for life, remainder in corpus to A's descendants who survive A, by representation. A fathered a child, X; A and X's mother, D, never married each other, and X never lived while a minor as a regular member of A's household or the household of A's parent, brother, sister, spouse, or surviving spouse.

*Solution.* Never having lived as a regular member of A's household or of the household of any of A's specified relatives, X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.<sup>90</sup>

Although UPC § 2-705(b) was amended in 2008 to eliminate the requirement that a child have lived with the natural parent or that parent's specified relatives, the amended provision has a similarly disparate impact on nonmarital children. It provides that "a child of a genetic parent is not considered the child of the genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached [18] years of age."<sup>91</sup> Thus, a

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87. UNIF. PROBATE CODE § 2-705(b) (amended 2008). Eighteen states have adopted the Uniform Probate Code, at least in part. See Megan Pendleton, Note, *Intestate Inheritance Claims: Determining a Child's Right to Inherit When Biological and Presumptive Paternity Overlap*, 29 CARDOZO L. REV. 2823, 2836 n.93 (2008) (listing states); *Uniform Probate Code Locator*, CORNELL LEGAL INFO. INST. (last visited Feb. 4, 2011), <http://www.law.cornell.edu/uniform/probate.html>.

88. The rationale was that a donor "who is not the natural (biological) parent of a child would want the child to be included in a class gift as a child of the biological parent only if the child lived while a minor as a regular member of the household of that biological parent (or of specified relatives of that biological parent)." UNIF. PROBATE CODE § 2-705(b) cmt. (amended 2008).

89. UNIF. PARENTAGE ACT § 202 cmt. (amended 2002), 9B U.L.A. 22–23 (Supp. 2010).

90. UNIF. PROBATE CODE § 2-705(b) cmt. (amended 2008).

91. UNIF. PROBATE CODE § 2-705(e) (2008).

nonmarital child whose father (let's call him David) had little contact with her (even though paternity is undisputed), and thus never functioned as a parent, would not be considered David's genetic child for purposes of a third party's bequest to "David's descendants."

Courts and legislatures are aware that the law precludes many nonmarital children from inheriting from their fathers and from receiving government benefits that base eligibility on the inheritance laws where the child's father was domiciled.<sup>92</sup> However, they never intended to treat marital and nonmarital children the same. As one New York court recently held, probate laws were not enacted "to create rights for all nonmarital children, but to insure the rights of nonmarital children known to the decedent and *openly acknowledged by the decedent during his lifetime.*"<sup>93</sup> Thus, even when paternity is proven, only certain nonmarital children are entitled to the benefits that automatically accrue to marital children by virtue of their parents' marriage.

## 2. Citizenship

The Supreme Court has upheld distinctions between marital and nonmarital children in cases involving acquisition of U.S. citizenship by foreign-born children of U.S. citizen fathers. Section 1409 of the Immigration and Naturalization Act provides that the foreign-born child of an unmarried father who is a U.S. citizen must be legitimated before the age of eighteen in order to obtain citizenship through the U.S. citizen father.<sup>94</sup> Specifically, the Act requires that the unmarried father have agreed in writing to support the child until the age of eighteen and have, before the child's eighteenth birthday, (1) legitimated the child under the law of the child's residence or domicile; (2) acknowledged paternity in writing under oath; or (3) obtained a court order of paternity.<sup>95</sup> In contrast, the foreign-born child of an unmarried U.S. citizen mother is automatically entitled to U.S. citizenship (subject to U.S. residency requirements for the U.S. citizen mother).<sup>96</sup>

Section 1409 has served to deny citizenship to nonmarital children even when paternity is proven. For example, in *Miller v. Albright*,<sup>97</sup> the

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92. The intestate succession laws are important even if decedent had few or no assets at death. For example, in order to qualify for child survivor benefits under the Social Security Act, a child must show (1) that she is entitled to inherit from decedent under the law of intestate succession of the state where decedent was domiciled at the time of death; or (2) decedent had acknowledged the child as his or her own in a signed writing; or (3) decedent had been decreed by a court to be the child's parent; or (4) satisfactory evidence that the applicant is the decedent's child and decedent was living with the child or providing support at the time of death. *See* 42 U.S.C. § 416(h)(2)(A), (3) (2010).

93. *In re Davis*, 27 A.D.3d 124, 128–29 (N.Y. App. Div. 2006) (emphasis added).

94. 8 U.S.C. § 1409 (2006).

95. 8 U.S.C. § 1409(a) (2006).

96. 8 U.S.C. § 1409(c) (2006).

97. *Miller v. Albright*, 523 U.S. 420 (1998).

Supreme Court upheld the denial of U.S. citizenship to the foreign-born nonmarital daughter of a Filipino citizen mother and a U.S. citizen father because her father did not establish paternity until after her eighteenth birthday.<sup>98</sup> Similarly, in *Nguyen v. INS*,<sup>99</sup> the Supreme Court upheld the denial of U.S. citizenship to the nonmarital son of a Vietnamese citizen mother and U.S. citizen father, even though the child had lived in the United States with his father since the age of five, because his father did not legitimate him before the age of eighteen as required by § 1409.<sup>100</sup> Nguyen and his father argued that § 1409's different requirements for the attainment of citizenship based on whether the U.S. citizen parent is the mother or the father violates equal protection.<sup>101</sup>

The Supreme Court upheld § 1409, reasoning that Congress's decision to impose different requirements on unmarried fathers as compared to unmarried mothers served important governmental objectives: (1) "assuring that a biological parent-child relationship exists" and (2) "ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."<sup>102</sup> As to the first objective, the Court reasoned that in the case of mothers, unlike fathers, the biological parent-child relationship was verifiable at the moment of the child's birth.<sup>103</sup> As to the second objective, the Court held that, for mothers, the opportunity to develop a meaningful parent-child relationship "inheres in the very event of birth."<sup>104</sup> In contrast, the majority reasoned, fathers do not automatically have the same opportunity to develop a meaningful relationship with the child at birth and might not even be present during the birth or know of the child's existence.<sup>105</sup> As in *Mathews* and *Lalli*, the Court assumed that nonmarital fathers are generally absent and have no relationship with their children.

Most scholars have analyzed *Miller v. Albright* and *Nguyen v. INS* as gender discrimination cases.<sup>106</sup> However, immigration and citizenship laws do not only make distinctions on the basis of gender; they also discriminate

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98. *Id.* at 424–27, 440–45.

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

100. *Id.* at 57–58. Nguyen's father did not obtain a filiation order until after Nguyen pled guilty to two felonies and was about to be deported on the ground that he was an alien who had committed two crimes of moral turpitude. *Id.*

101. *Id.* at 58.

102. *Id.* at 62, 64–65.

103. *Id.* at 62.

104. *Id.* at 65.

105. *Id.*

106. *But see* 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 by focusing on the statute's distinction between mothers and fathers, the Court overlooked the law's discriminatory effect on illegitimate children); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 255 (2003) (asserting that Nguyen's failure to argue that § 1409 impermissibly discriminated on the basis of birth status was unfortunate).

against nonmarital children on the basis of birth status. Section 1409's requirements only apply to foreign-born nonmarital children of U.S. citizen fathers.<sup>107</sup> They do not apply to marital children. A marital child of a U.S. citizen parent and a non-citizen parent is automatically entitled to U.S. citizenship (subject to U.S. residency requirements for the U.S. citizen parent) regardless of whether the U.S. citizen parent is the mother or the father.<sup>108</sup> In other words, marital children are entitled to U.S. citizenship so long as one parent is a U.S. citizen (subject to U.S. residency requirements for the U.S. citizen parent),<sup>109</sup> but nonmarital children of U.S. citizen fathers must be legitimated before the age of eighteen and obtain a written agreement of paternal support in order to obtain the same citizenship rights.<sup>110</sup> Had Miller and Nguyen been marital children, they would have automatically acquired U.S. citizenship through their U.S. citizen fathers without any requirement of legitimation, a court order of paternity, or written acknowledgment of paternity before their eighteenth birthday.<sup>111</sup>

At least one court has recognized that the immigration laws discriminate on the basis of birth status. In *LeBrun v. Thornburgh*,<sup>112</sup> a federal district court held that requiring a foreign-born child of an unmarried U.S. citizen father to be legitimated before the age of majority made citizenship of nonmarital children "subject to the personal vagaries and consciences of their fathers" and discriminated against nonmarital children in violation of the Equal Protection Clause.<sup>113</sup> However, in light of *Nguyen, Miller*, and the Supreme Court's willingness to uphold

107. 8 U.S.C. § 1409 (2006).

108. 8 U.S.C. § 1401(g) (2006).

109. *Id.*

110. 8 U.S.C. § 1409 (2006).

111. This is not the only immigration provision that discriminates against nonmarital children. The Supreme Court has granted certiorari in a case challenging the different U.S. residency requirements imposed on mothers and fathers of nonmarital children seeking to transmit citizenship to a child. *See United States v. Flores-Villar*, 536 F.3d 990, 993 (9th Cir. 2008), *cert. granted*, 2010 U.S. LEXIS 3707 (2010). In addition, 8 U.S.C. § 1101(b)(1) requires that a nonmarital father sponsoring a child for immigration preferences have legitimated the child before the age of eighteen or demonstrated a "bona fide parent-child relationship" with the child. A marital father need not show a bona fide relationship with the child in order to sponsor him or her, and legitimation is not required since marital children are "legitimate" and need not establish paternity—it is presumed. *Id.*

In 2006, the United Kingdom abolished all distinctions between married fathers and unmarried fathers for purposes of conveying British citizenship on a child. Children born after July 1, 2006, to a British father can derive U.K. citizenship from their unmarried fathers just as easily as from their unmarried mothers. Andrew Bainham, *Is Legitimacy Legitimate?*, 39 FAM. L. 673, 678 (2009).

112. *LeBrun v. Thornburgh*, 777 F. Supp. 1204 (D.N.J. 1991).

113. *Id.* at 1206. The court added that "[t]hose who have no choice in the marital state of their parents should not be so penalized or stigmatized . . ." *Id.* Congress has plenary power to determine the requirements for entry into the United States and acquisition of U.S. citizenship. *Rogers v. Bellei*, 401 U.S. 815 (1971). However, as the court noted in *LeBrun*, cases challenging the denial of citizenship rights to the nonmarital children of U.S. citizen fathers do not challenge Congress's power to make laws governing immigration and citizenship but rather challenge the constitutionality of provisions that discriminate against nonmarital children. *See LeBrun*, 777 F. Supp. at 1213.

distinctions between marital and nonmarital children,<sup>114</sup> lower courts are unlikely to find that the immigration laws discriminate on the basis of birth status.

### 3. Child Support

As shown, nonmarital children are less likely than marital children to inherit from their fathers or to attain citizenship rights through them. They are also less likely to receive financial support from their noncustodial parents. Although parents are legally required to support their children until they reach the age of majority, without regard to birth status, nonmarital children are significantly less likely than marital children to have a child support order or to receive any payments.<sup>115</sup>

Nonmarital children are also less likely to receive support for college. Divorcing parents increasingly include provisions for post-majority educational support in their enforceable property settlement agreements. Parents of nonmarital children, however, are unlikely to have a child support agreement of any kind, especially one that addresses college expenses.

Differences in child support payment rates and support for college are generally not the result of facially discriminatory laws, but rather derive from lawmakers' failure to devise adequate mechanisms for establishing child support orders for nonmarital children comparable to those in place for marital children.<sup>116</sup> Some states authorize courts to order divorced or separated parents of a child who has attained the age of majority and is attending college to provide financial support for the child's college education.<sup>117</sup> However, at least one state expressly discriminates against

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114. See *supra* notes 42–54 and accompanying text (discussing *Linda R.S.*, *Mathews*, and *Lalli*).

115. See GRALL, *supra* note 58, at 7 tbl.2. In 2007, 62.8% of divorced parents had a child support order as compared to only 43.5% of never married parents. *Id.* And 51.2% of divorced parents with a child support order received the full amount owed as compared to less than 40% of never married parents. *Id.* at 7–8.

116. See OFFICE OF CHILD SUPPORT ENFORCEMENT, MINORITY FAMILIES AND CHILD SUPPORT: DATA ANALYSIS 35, 63 (2007) [hereinafter CHILD SUPPORT ENFORCEMENT], available at <http://www.acf.hhs.gov/programs/cse/pol/DCL/2007/dcl-07-43a.pdf> (finding the “child support process is most responsive to divorced parents and least responsive to never-married parents” and concluding “that this is because the marital dissolution process usually builds in a formal discussion about child support”).

117. See Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. 5/513(a)(2) (2010); *In re Marriage of Crocker*, 22 P.3d 759, 761–62 (Or. 2001). Divorced parents have challenged these statutes, which do not apply to married parents, as discriminating on the basis of marital status in violation of the Equal Protection Clause. Some courts, applying rational basis review, have rejected these challenges, reasoning that “the legislature could rationally conclude that absent judicial involvement, children of divorce may be less likely than children of intact families to receive college financial support from both of their parents.” *LeClair v. LeClair*, 624 A.2d 1350, 1357 (N.H. 1993), *superseded by statute*, N.H. REV. STAT. ANN. § 461-A:14 (2008); *In re Marriage of Urban*, 293 N.W.2d 198, 202 (Iowa 1980) (“The legislature could find, too, that most parents who remain married to each other support their children through college years. On the other hand,

nonmarital children seeking support for college expenses. Iowa's statute authorizes courts to order divorced parents to contribute to their children's college education but does not authorize courts to order the same from parents of nonmarital children.<sup>118</sup> In *Johnson v. Louis*, the Iowa Supreme Court rejected the claim that Iowa's statute discriminated against nonmarital children in violation of the Equal Protection Clause.<sup>119</sup> The court reasoned that "[t]he educational benefit is a quid pro quo for the loss of stability resulting from divorce" and concluded that nonmarital children could not "claim the loss of stability such change in status brings."<sup>120</sup>

The *Johnson* court presumed that marital and nonmarital children's family structures are somehow different in quality. It suggests that nonmarital relationships are inherently unstable; consequently, nonmarital children experience no loss of stability when their parents separate. The court not only deprives nonmarital children of the financial support guaranteed to marital children; it also suggests, as the Supreme Court did in *Mathews v. Lucas*, that unmarried parents do not owe the same duties to their children as marital parents do.<sup>121</sup>

### C. Harms of Legal Distinctions

In short, the law continues to make distinctions between marital and nonmarital children, to the detriment of nonmarital children. The presumption of legitimacy facilitates much of this discrimination against nonmarital children by allowing marital children to automatically receive benefits that are not available to nonmarital children, including child support, inheritance, U.S. citizenship, wrongful death damages for the death of the father, government benefits, and many other benefits. These

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even well-intentioned parents, when deprived of the custody of their children, sometimes react by refusing to support them as they would if the family unit had been preserved."); see also Nicholas Bala, *Child Support for Adult Children: When Does Economic Childhood End?*, at 1 n.1 (Queen's University Faculty of Law Legal Studies Research Paper Series, Working Paper No. 08-01, 2008) ("The experience in the United States . . . is that after separation, relatively few non-custodial parents assist their children with the costs of post-secondary education . . ."). In contrast, other courts, applying the same standard of review, have held that these laws discriminate against divorced or separated parents in violation of the Equal Protection Clause. See *Curtis v. Kline*, 666 A.2d 265, 267-70 (Pa. 1995).

118. IOWA CODE ANN. § 598.21F (West 2010).

119. *Johnson v. Louis*, 654 N.W.2d 886, 891 (Iowa 2002). Interestingly, although the court stated that it was basing its decision on the Constitution and added that it deemed the "federal and state Equal Protection Clauses to be identical in scope, import, and purpose," *id.* at 890, it applied the rational basis test rather than the heightened scrutiny standard the Supreme Court has applied to classifications based on illegitimacy. *Id.* at 891. But see *Clark v. Jeter*, 486 U.S. 456 (1988) (applying heightened scrutiny).

120. *Johnson*, 654 N.W. 2d at 891.

121. See *supra* note 59 and accompanying text. But see *Ex parte Jones*, 592 So. 2d 608, 609-10 (Ala. 1991) (rejecting argument that court cannot order nonmarital father to pay for child's college expenses, even though it could order the same for children of divorce, and holding that, "It is firmly established in this State that parental obligations do not differ with regard to whether the parents of the child are married.").

benefits are conveyed to marital children without proof of paternity, but nonmarital children must produce such proof (and often more). In addition, the presumption of legitimacy protects marital children's interest in support from two parents. For example, when determining whether to allow a husband to rebut the presumption of legitimacy, courts often ask whether there is another man who will be financially responsible for the child.<sup>122</sup> If there is not, some courts have held that it is not in the child's best interest to allow the presumption to be rebutted. In contrast, when a man has acknowledged paternity of a nonmarital child, he may later challenge paternity if he discovers that the child is not his. Although estoppel might prevent him from challenging paternity in some cases, in the majority of cases, the child will lose the financial support of a second parent.<sup>123</sup>

The harms to nonmarital children resulting from the law's continued distinctions on the basis of birth status are significant. As Professor Harry Krause argued more than forty years ago, these legal distinctions deny nonmarital children "those private resources that ought to be available to give [them] an even start in life."<sup>124</sup> Forty years later, the law continues to burden the ability of nonmarital children to inherit from their fathers, to obtain parental financial support for college, and to attain U.S. citizenship. In contrast, marital children are automatically entitled to resources from both parents, resources that give them a competitive advantage over nonmarital children. As shown below, children who grow up in single-parent homes, many of whom are nonmarital, are more likely than children raised by married parents to experience poverty, suffer emotional and behavioral problems, underperform in school, drop out of high school, become teen parents, and engage in delinquent behavior.<sup>125</sup> These poorer outcomes may be the result of growing up with fewer resources. As noted, nonmarital children are less likely than children of divorced parents to receive financial support from the noncustodial parent.<sup>126</sup> Children who do not receive parental support are less likely to attend college even after controlling for family income.<sup>127</sup> Since higher education generally results in higher wages, the difference in parental support might also explain why nonmarital children tend to earn lower wages as adults.

Legal distinctions between marital and nonmarital children also impair

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122. *Hubbard v. Hubbard*, 44 P.3d 153, 155–56 (Alaska 2002).

123. See Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 253–54 (2006). I am indebted to Professor Jane Murphy for this observation.

124. Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 830 (1966).

125. See *infra* note 167 and accompanying text.

126. See *supra* Part II.B.3.

127. Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47, 66, 74 (stating that children in single-parent families are less likely to attend college); John F. Coverdale, *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475, 492 (1998) (attributing lower college attendance rates for children from single parent families to lack of financial support for college from noncustodial parent).

the latter's ability to acquire property and wealth. The United States is currently experiencing the largest intergenerational wealth transfer in its history.<sup>128</sup> While children often use part of their inheritance for a down payment on a home, to start a business, or to fund their own children's education, nonmarital children are denied the same access to intergenerational wealth. A nonmarital child may be precluded from inheriting a share of his father's estate and that of other relatives, such as paternal grandparents.

These legal distinctions may also stigmatize nonmarital children. In his critique of *Linda R.S.*, Professor Thomas Healy argued that "the state's exclusion of illegitimate children from a law designed to ensure parental support placed a stamp of dishonor on those children . . . ."<sup>129</sup> Decisions like *Johnson v. Louis* do the same by signaling that fathers' responsibilities to their children depend on whether they are marital or nonmarital and by suggesting that nonmarital families are inherently unstable. Denying U.S. citizenship to the children of unmarried fathers unless their fathers legitimated them and expressly agreed to support them similarly signals that nonmarital children are not automatically entitled to support; if they were, there would be no reason to require their fathers to expressly agree to support them. These messages may make it easier for fathers to provide fewer resources (including financial and emotional support) to their nonmarital children. Signaling that a man's relationship with a nonmarital child is of a lesser quality than that with a marital child might facilitate paternal disengagement and discourage nonmarital fathers from functioning as fathers to their children.

These legal distinctions disproportionately harm the children of racial and sexual minorities. For example, they disproportionately harm African-American and Latino children, who are more likely than white and Asian-American children to be nonmarital and, consequently, are less likely to receive child support.<sup>130</sup> They also disproportionately harm the foreign-born children of U.S. soldiers—children who are generally of mixed-race—who cannot attain U.S. citizenship through their fathers in many cases. These legal distinctions also disproportionately harm the children of same-sex couples—couples who cannot marry in the majority of states and, thus, are not able to confer on their children the benefits accorded to

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128. See John J. Havens & Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN. 11 (2003) (estimating that at least \$41 trillion will be transferred from one generation to the next between 1998 and 2052).

129. Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 479–80 (2007); see also *Linda R.S. v. Richard D.*, 410 U.S. 614, 621 (1973) (White, J., dissenting) (noting that the Texas law rendered illegitimate children and their mothers "nonpersons").

130. See Hamilton et al., *supra* note 11, at 6; see also CHILD SUPPORT ENFORCEMENT, *supra* note 116, at 3–4 (finding that in 2002, 66% of white mothers but only 48% of African-American mothers had child support orders); *id.* at 8 (concluding that the difference in child support rates is "largely due to racial and ethnic family formation differences"); GRALL, *supra* note 58, at 7 tbl.2 (reporting that in 2007, only 41.7% of African-American custodial parents received the full amount of child support due as compared to 49.3% of white parents); *supra* note 115 and accompanying text (stating that nonmarital children are less likely to receive child support).

marital children.<sup>131</sup> For example, when a woman and her female partner have a child together using donor sperm, that child has no legal connection to the birth mother's partner unless she adopts the child in a second-parent adoption.<sup>132</sup> If the birth mother's partner dies before adopting the child, the child is not entitled to a share of her intestate estate, wrongful death damages, or child survivor social security benefits and other government benefits. However, had the mother and her partner been married, the child would enjoy all of the benefits of a marital child even absent a genetic relationship.<sup>133</sup>

The law does not only harm nonmarital children directly; it also harms them indirectly by facilitating societal discrimination. For example, society discriminates against individuals on the basis of socioeconomic status. As shown, legal distinctions between marital and nonmarital children may have long-term socioeconomic consequences. These consequences facilitate societal discrimination against nonmarital children, not because they are nonmarital per se but because they are poor or less educated. Further, by continuing to make distinctions between marital and nonmarital children, the law may encourage individuals to make negative assumptions about unmarried parents and their children. As Professor Healy has argued, "when law treats members of a group as second-class citizens, it invites others to discriminate against that group as well."<sup>134</sup> This "invitation" to discriminate may be strengthened by implicit and explicit messages that nonmarital families are a social problem and should be discouraged. Part IV addresses these messages, but first, it is necessary to demonstrate that societal biases against nonmarital children persist, biases which the law reinforces when it makes legal distinctions between marital and nonmarital children and suggests that nonmarital families are inherently inferior.

### III. SOCIETAL BIASES AGAINST NONMARITAL CHILDREN

Until recently, the American public's image of a nonmarital child was that of an African-American child<sup>135</sup> with a welfare-dependent mother and

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131. See Polikoff, *supra* note 5, at 264.

132. *But see id.* at 233 (discussing the District of Columbia's parentage statute, which provides that a person who consents to a woman's insemination with the intent to parent is a parent).

133. Ironically, the law's distinction between marital and nonmarital children creates different opportunities for children of same-sex couples: (1) children whose parents reside in a state that recognizes same-sex marriage and whose parents marry; and (2) children whose parents reside in states that deny legal recognition to same-sex couples or whose parents decide, for whatever reason, not to marry. The children of same-sex couples who marry are on par with the marital children of heterosexual couples while the children of unmarried same-sex couples continue to face legal discrimination and denial of benefits. See generally Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307 (2010).

134. Healy, *supra* note 129, at 452.

135. In fact, the early illegitimacy cases decided by the Supreme Court in the late 1960s and early 1970s involved African-American children. See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (reversing denial of claim brought on behalf of nonmarital African-American children for wrongful death of their mother); *Labine v. Vincent*, 401 U.S. 532, 539–40 (1971) (upholding denial of claim brought on behalf of nonmarital African-American child for a share of her father's intestate

an absent father.<sup>136</sup> This perception of nonmarital children as nonwhite was reinforced by the 1965 report *The Negro Family: The Case for National Action* (known as the Moynihan Report), which argued that the widening educational attainment and wage gap between African-Americans and other groups was the result of the “family structure of lower class [African-Americans].”<sup>137</sup> The Moynihan Report focused on high rates of nonmarital births to African-American women and concluded that the “typical” mother receiving public assistance was African-American and had an “illegitimate child.”<sup>138</sup> This image of nonmarital children as African-American and dependent on welfare was cemented in the 1980s and 1990s as policymakers complained of increasing welfare caseloads and lazy “welfare queens”<sup>139</sup> who bore additional nonmarital children in order to increase their public assistance payments.<sup>140</sup>

Despite these perceptions of nonmarital children as nonwhite and poor, the family structures, racial, ethnic, and socioeconomic backgrounds of

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estate). Professor Harry Krause, who advocated for the rights of nonmarital children, argued that laws discriminating against nonmarital children disproportionately impacted African-American children. HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 257–67 (1971); *see also id.* at 259–60 (noting that 95.8% of persons impacted by the statute at issue in *Levy v. Louisiana* were African-American).

136. *See* Davis, *supra* note 25, at 107 (noting longstanding “association between illegitimacy and race”). Although unmarried minority fathers are often actively involved in their children’s upbringing, the stereotype of absent African-American fathers remains. *See* Dorothy Roberts, *The Absent Black Father*, in *LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA* 145, 146 (Cynthia R. Daniels ed., 1998); Vivian L. Godsdon 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, 395 (2003); Harry D. Krause, *Reflections on Child Support*, 1983 *U. ILL. L. REV.* 99, 112 (noting that “subculture theories . . . relegate black fathers to lower levels of social responsibility” than middle class whites although many African-American “unmarried fathers voluntarily aided their illegitimate children”); Maldonado, *supra* note 65, at 993–94 (“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.”).

137. OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY, THE CASE FOR NATIONAL ACTION* ch. II (1965) [hereinafter *MOYNIHAN REPORT*], *available at* <http://www.dol.gov/oasam/programs/history/webid-meynihan.htm>.

138. *Id.*

139. Commentators have noted that the term “welfare mother” almost inevitably conjures the image of an African-American woman in the minds of most Americans. Franklin D. Gilliam, Jr., *The ‘Welfare Queen’ Experiment: How Viewers React to Images of African-American Mothers on Welfare*, *NIEMAN REPORTS*, Summer 1999, <http://www.nieman.harvard.edu/reports/article/102223/The-Welfare-Queen-Experiment.aspx>.

140. The Honorable Pete Wilson, Governor of Cal., *Kicking America’s Welfare Habit: Politics, Illegitimacy, and Personal Responsibility*, Lecture to the Heritage Foundation 3 (Sept. 6, 1995), *available at* <http://www.heritage.org/Research/Welfare/HL540.cfm> (arguing that welfare must stop “rewarding women with bigger welfare checks for having more and more children out of wedlock”); *see also* Karen McCormack, *Stratified Reproduction and Poor Women’s Resistance*, 19 *GENDER & SOC’Y* 660, 661 (2005); Lorraine D. Higgins & Lisa D. Brush, *Personal Experience Narrative and Public Debate: Writing the Wrongs of Welfare*, 57 *C. COMPOSITION & COMM.* 694, 710 (2006); Gilliam, Jr., *supra* note 139.

nonmarital children are as varied as the individual children themselves. More than 50% of all nonmarital children today are born to cohabiting couples,<sup>141</sup> 15% of which marry within a year of the child's birth.<sup>142</sup> Another 14% are born to divorced women, some of which have children from a previous marriage,<sup>143</sup> and 22% are born to teenage mothers.<sup>144</sup> While many nonmarital children are born to low-income women, many others are born to financially successful women.<sup>145</sup> Nonmarital birth rates also vary by race and ethnicity. Twenty-nine percent of children born to white women in 2008 were nonmarital, as were 53% of children born to Latinas, and 72% of children born to African-American women.<sup>146</sup>

The societal disapproval that nonmarital families and their children experience depends on a variety of factors: the age of the mother; whether both parents reside with the child; the child's race, cultural background, and socioeconomic status; the parents' sexual orientation; and the community in which the family resides.<sup>147</sup> Despite these differences, when

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141. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., VITAL & HEALTH STATS. SER. 23, NO. 28, MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 4 (2010), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_028.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf) ("By 2001, the majority of nonmarital births (52%) occurred within cohabiting unions . . ."). Some studies have found that the increase in nonmarital births is almost completely the result of an increase in cohabiting, two-parent families. Davis, *supra* note 25, at 110. In one study of low-income, unmarried mothers, 51% were cohabiting and another 32% were romantically involved with the child's father at the time of the child's birth. See Marcia J. Carlson & Sara S. McLanahan, *Fragile Families, Father Involvement, and Public Policy*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 461, 466 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002). Cohabitation rates vary by race. Nonmarital Latino children are more likely than nonmarital African-American or white children to live with cohabitating parents. Laura Wherry & Kenneth Finegold, *Marriage Promotion and the Living Arrangements of Black, Hispanic, and White Children*, in NEW FEDERALISM: NATIONAL SURVEY OF AMERICA'S FAMILIES at 6 (URB. INST. SER. B, No. B-61, 2004), available at [http://www.urban.org/UploadedPDF/311064\\_B-61.pdf](http://www.urban.org/UploadedPDF/311064_B-61.pdf). Unmarried African-American mothers are much less likely than unmarried white or Latino mothers to be cohabitating when they give birth. *Id.*

142. SOLOMON-FEARS, *supra* note 13, at 17; see also Bendheim-Thoman Ctr. for Research on Child Wellbeing, Princeton Univ., *Parents' Relationship Status Five Years After a Non-Marital Birth*, 39 FRAGILE FAMILIES RESEARCH BRIEF 1 (2007), available at <http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief39.pdf> (finding that 55% of couples who were cohabiting when their child was born were still together five years later, either married (26%), still cohabiting, or romantically involved).

143. SOLOMON-FEARS, *supra* note 13, at 28–29.

144. Hamilton, *supra* note 11, at 3. In contrast, teen "mothers accounted for 52% of nonmarital births" in 1975. *Id.*

145. SOLOMON-FEARS, *supra* note 13, at 15–16 (reporting that in 2007, 41% of women with nonmarital children had incomes below the poverty level while 19% had incomes above \$50,000).

146. Hamilton, *supra* note 11, at 6. In 2008, 65.8% of all births to American Indian or Alaska Native women and 16.9% of all births to Asian or Pacific Islander women were nonmarital. *Id.*

147. See Bock, *supra* note 30, at 65 (noting that "[t]he levels of stigma . . . vary according to the class, race, and age of the mother" and "underclass young urban minority women who become mothers today wear heavier 'illegitimate' labels than do their middle-class midlife suburban white counterparts") (internal citations omitted).

lawmakers and pundits talk about the problem of “illegitimacy,” they make no distinction between these diverse groups of children and lump them all into one category—nonmarital or illegitimate.<sup>148</sup> Thus, while not all nonmarital children experience the same level of societal disapproval, it is important to examine any biases that are based, at least in part, on a child’s status as nonmarital.<sup>149</sup>

Many Americans believe that it is wrong for unmarried persons to have children.<sup>150</sup> Seventy-one percent of participants in a recent Pew Research Center study believe that the increase in nonmarital births is a “big problem” for society and 44% believe that it is always or almost always *morally* wrong for an unmarried woman to have a child.<sup>151</sup> Some participants agreed with the statement that a man who does not marry the woman he impregnated is irresponsible.<sup>152</sup> Notably, 42% of Americans believe that the increase in nonmarital births is the result of “[b]ad morals,” a “[b]reakdown in family structure,” “[i]rresponsible / [c]areless” behavior, or “not taking responsibility.”<sup>153</sup> While 36% of respondents also attributed the increase in nonmarital births to other factors, such as “[s]ocietal changes,” changes in women’s roles, “[I]ack of information,” or “[t]oo much sex / [s]ex at a young age,”<sup>154</sup> it is clear that many Americans make moral judgments about men and women who have children outside of marriage.

Societal disapproval of nonmarital childbearing is not limited to single parents but also extends to cohabiting couples. Fifty-nine percent of participants in the study disapproved of cohabiting couples having children.<sup>155</sup> They were slightly more supportive of gay and lesbian couples having children—50% thought it was bad for society—presumably because gay and lesbian couples do not have the option of marriage in the majority of states.<sup>156</sup> Not surprisingly, there are generational differences with regard to views on whether nonmarital childbearing is bad for society. However,

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148. Cf. Davis, *supra* note 25, at 109 (arguing that, “[I]llegitimacy classifications . . . reflect the stereotype of the weak black family . . .”).

149. Cf. Bock, *supra* note 30, at 63 (arguing that single mothers by choice “inherit the stigma” that is attached to poorer, younger single mothers and that middle and upper class single mothers claim to be different from “Black teen mothers who are more typically the target of social criticism”).

150. See GENERATION GAP, *supra* note 10, at 5 (finding that 59% of Americans believe that unmarried women having children is wrong and 66% believe that “[s]ingle women having children” is bad for society).

151. *Id.* at 20, 24. More men (73%) than women (60%) believe that single women having children is bad for society. *Id.* at 50. Interestingly, most participants (67%) thought that children are better off when unhappy parents divorce as opposed to staying together. *Id.* at 6. Americans are more accepting of divorce than of nonmarital childbearing. Interestingly, although Latinos and African-Americans have higher nonmarital birth rates than whites, they were almost as likely as whites to believe that nonmarital childbearing is wrong. *Id.* at 8–9.

152. *Id.* at 20.

153. *Id.*

154. *Id.*

155. *Id.* at 5, 50.

156. *Id.* at 5.

the majority (57%) of adults ages 18–64 believe that unmarried couples having children is bad for society, and 73% of adults who attend church at least weekly believe the same.<sup>157</sup>

Although few people would want to stigmatize nonmarital children, society seems to have no objection to stigmatizing their parents. Unmarried mothers are stereotyped as “sexually irresponsible,” “lazy and unmotivated,”<sup>158</sup> and low-income unmarried fathers are seen as “uncaring and irresponsible.”<sup>159</sup> Low-income unmarried mothers, whom society assumes will rely on public assistance to support their children, are often demonized.<sup>160</sup> Single mothers themselves are aware of society’s disapproval. One study found that privileged single mothers (those who are highly educated, older, and financially secure) are fully aware of the ways in which single mothers in the United States are stigmatized and ostracized.<sup>161</sup> As a result, they have appropriated the term “Single Mothers by Choice” (SMC)<sup>162</sup> to suggest that they are different from other single mothers—those that are young, poor, and, in the minds of SMCs, less responsible.<sup>163</sup> While SMCs hope that their middle class status will protect them and their children from the stigma of illegitimacy, they recognize that society disapproves of their decision and try to protect themselves and their children by figuring out in advance how they will explain their single-parent status to family members, friends, and even strangers.<sup>164</sup>

Although policymakers never publicly denigrate nonmarital children, they denigrate unmarried parents and, in the process, indirectly stigmatize the children that are the fruits of the parents’ allegedly “irresponsible” behavior.<sup>165</sup> Despite recognition that children are not responsible for the

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157. *Id.* at 7. Seventy-three percent of adults ages 65 and over believe that nonmarital childbearing is bad for society. *Id.*

158. Bock, *supra* note 30, at 63; *see also* Solangel Maldonado, *Discouraging Racial Preferences in Adoption*, 39 U.C. DAVIS L. REV. 1415, 1422 (2006) (noting that, “African American women are often stereotyped as ‘promiscuous welfare mothers’ with high rates of nonmarital births and weak family values.”).

159. JOHNSON ET AL., FATHERS’ FAIR SHARE: HELPING POOR MEN MANAGE CHILD SUPPORT AND FATHERHOOD 4 (1999) (stating that fathers of children on welfare “are almost universally stigmatized” and are “[w]idely viewed as uncaring and irresponsible”).

160. RUTH SIDEL, KEEPING WOMEN AND CHILDREN LAST: AMERICA’S WAR ON THE POOR 1 (1998) (arguing that “poor single mothers” are “despised, denigrated, ostracized[,] [and] . . . demoniz[ed]”); Bock, *supra* note 30, at 66 (arguing that society perceives “welfare mothers” and their children as a burden on taxpayers).

161. Bock, *supra* note 30, at 82–83.

162. Single Mothers by Choice is a national organization that provides support and information to single women considering single motherhood or who have already chosen to become single mothers. The majority of its members are professional women in their 30s and 40s. *See* SINGLE MOTHERS BY CHOICE, <http://www.singlemothersbychoice.com/> (last visited Jan. 5, 2011).

163. Bock, *supra* note 30, at 82–83.

164. *Id.* at 69, 73.

165. As Professors Martha Zingo and Kevin Early have argued, “it is impossible to gain full equality for [nonmarital] children . . . unless equality is also gained for their family unit.” ZINGO & EARLY, *supra* note 15, at 1; *cf.*, Ledsham, *supra* note 4, at 2374 (stating that nonmarital children continue to suffer “legal disabilities that persist not because legislatures still actively seek to discriminate against illegitimate children vis-à-vis legitimate children, but rather because

actions of their parents, individuals make assumptions (conscious and unconscious) about children's behavior, values, and likelihood of success based on their family background. They assume, for example, that nonmarital children will themselves bear nonmarital children that they cannot support.<sup>166</sup>

Individuals may also assume that nonmarital children will experience greater behavioral problems and worse outcomes than marital children. One reason for this assumption is that studies suggest that children who grow up in a single-parent home (or a home with a biological parent and a stepparent) are more likely than children who live with married biological parents to suffer emotional and behavioral problems, be poor, underachieve academically, drop out of high school, become teen parents, and engage in delinquent behavior.<sup>167</sup> However, social scientists cannot explain the reasons for these poorer outcomes.<sup>168</sup> Some researchers have

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legislatures and the legal structures they create discriminate against unmarried couples vis-à-vis married couples, and thus against their children as well”).

166. Witte, Jr., *supra* note 2, at 338 (suggesting that individuals associate nonmarital children with dependence on welfare programs, “with all the stigmatizing . . . that such dependence often induces”). Some studies suggest that nonmarital children are more likely to have nonmarital children themselves. GENERATION GAP, *supra* note 10, at 12 (finding that 32% of study participants whose parents never married had nonmarital children themselves). However, as noted, the majority of nonmarital children are born to cohabiting parents, and most nonmarital parents support their children without public assistance. *But see* STEVEN NOCK & CHRISTOPHER J. EINOLF, THE ONE HUNDRED BILLION DOLLAR MAN: THE ANNUAL PUBLIC COST OF FATHER ABSENCE 3 (2008), available at <http://www.fatherhood.org/Document.Doc?id=136> (finding that the federal government spends approximately \$100 billion each year in financial aid to single-mother (both divorced and never married mothers) families).

167. SOLOMON-FEARS, *supra* note 13, at 31–32; *see also* JEFF GROGGER & NICK RONAN, THE INTERGENERATIONAL EFFECTS OF FATHERLESSNESS ON EDUCATIONAL ATTAINMENT AND ENTRY-LEVEL WAGES 2 (U.S. Dep’t of Labor, Nat’l Longitudinal Surv. 96-30, 1995) (finding that children in single-parent homes have lower educational attainment and adult wages), available at <http://www.bls.gov/ore/pdf/n1950080.pdf>; Sara McLanahan, *Growing Up Without a Father*, in LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA 86–87 (finding that children in single-parent homes are “twice as likely to drop out of high school[] [and] 2.5 times as likely to become teen mothers”); Whitehead, *supra* note 127 (stating that children in single-parent families are more likely to experience academic difficulties, to abuse drugs, commit crimes, or get in trouble with the law). These studies include both nonmarital children and children whose parents are separated or divorced. However, one study found little difference in outcomes for nonmarital children as compared to children of divorced parents after controlling for other family characteristics. *See* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 77 (1994). Interestingly, at least one study suggests that while whites and Latinos raised in single-parent families tend to have lower levels of educational attainment than children raised by married parents, African-American children in single parent homes may acquire more education than African-American children living with both parents. GROGGER & RONAN, *supra*, at ii–iii; *see also* McLanahan, *supra*, at 88 (“[W]ith respect to educational achievement, father absence has the most harmful effects among Hispanics and the least harmful effects among Blacks.”).

168. MARY PARKE, CTR. FOR LAW & SOC. POLICY, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECT OF FAMILY STRUCTURE ON CHILD WELL-BEING 8–9 (2003); SOLOMON-FEARS, *supra* note 13, at 32 (stating that, “[A]lthough marriage of biological parents is associated with greater child well-being, little is known about why or how much of the

speculated that “the effect of marriage on child well-being is derived not from marriage itself, but rather from the distinctive characteristics of the individuals who marry and stay married.”<sup>169</sup> In other words, people who marry may be more committed and future-oriented—characteristics that are associated with the relationship stability that children need. Marital children may also benefit from individuals’ positive attitudes towards them. Society values marriage and marital families derive numerous tangible and intangible benefits, including psychological benefits from the legal and societal approval of their family structure. For example, married couples receive more support, including financial support, from relatives than do cohabiting couples.<sup>170</sup>

Other scholars argue that these poorer outcomes are the result of growing up with fewer resources, which is positively correlated with negative outcomes for children.<sup>171</sup> Single-parent and cohabiting-parent families are more likely to be poor, in part, because they tend to have lower levels of educational attainment than married parents. They also lack access to legal benefits, such as health insurance through their partner and tax benefits, that are available to married couples only. As the court concluded in *Goodridge v. Department of Public Health*, “marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children.”<sup>172</sup>

Recent studies suggest that marriage’s positive effect on children may be almost entirely the result of factors other than marriage itself.<sup>173</sup> Regardless of the reasons why children with married parents have better outcomes, the majority of children who grow up in single-parent families do not experience emotional or behavioral problems and most become

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relationship is caused by marriage and how much by other factors.”).

169. SOLOMON-FEARS, *supra* note 13, at 32; Parke, *supra* note 168, at 7.

170. Vivian E. Hamilton, *Family Structure, Children, and Law*, 24 WASH. U. J.L. & POL’Y 9, 11–12 (2007).

171. Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father*, 54 AM. PSYCHOLOGIST 397, 399 (1999) (arguing that “it is the negative effects of poverty, rather than the absence of a father, that lead[s] to negative developmental outcomes” for children); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 104–05 (1995); Douglas B. Downey, *The School Performance of Children from Single-Mother and Single-Father Families: Economic or Interpersonal Deprivation?*, 15 J. FAM. ISSUES 129, 131–32 (1994); SOLOMON-FEARS, *supra* note 13, at 32; Parke, *supra* note 168, at 7–8. It is worth noting that even if all children grew up in two-parent families, the high school dropout rate would decrease by only 33%. McLanahan, *supra* note 168, at 87. Thus, being raised in a single-parent home cannot be the primary reason behind children’s poorer educational outcomes.

172. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 956–57 (Mass. 2003) (listing the numerous federal and state benefits available to married couples); *see also* 10 U.S.C. § 1072(6)(A) (2006) (defining a dependent child as “an unmarried legitimate child”); David B. Howlett, *Illegitimate Children and Military Benefits*, 132 MIL. L. REV. 5, 33 (1991) (noting that nonmarital children of male service members are denied medical benefits available to marital children unless they can show dependency even though marital children are automatically entitled to these benefits).

173. Hamilton, *supra* note 170, at 13–21 (summarizing studies).

productive adults.<sup>174</sup> However, individuals assume that nonmarital children will experience significantly poorer outcomes than children with married parents and may have lower expectations with regard to their ability to achieve academically, economically, and socially.<sup>175</sup>

Although some commentators state that there is no longer any social stigma attached to illegitimacy, some courts and scholars have recognized that societal biases against nonmarital children persist. For example, in a 2003 article, Professor John Witte Jr. acknowledged that “the social and psychological burdens of illegitimacy remain rather heavy.”<sup>176</sup> Similarly, courts have refused to abolish certain doctrines, such as the marital presumption of legitimacy,<sup>177</sup> partly to protect children from the stigma of illegitimacy. The presumption of legitimacy has been weakened significantly and many states now allow it to be rebutted with blood test evidence.<sup>178</sup> However, some courts allow its rebuttal only if it is in the child’s best interests and will consider the potential harm to the child such as the “[s]ocietal stigma that may result or be perceived by . . . placing the child’s birth outside of the traditional wedlock setting.”<sup>179</sup> In rejecting a husband’s petition for paternity testing in order to rebut the presumption, one court recently held that “[a]lthough . . . illegitimacy is not nearly as stigmatizing as it was in the past,” the court must “consider[] the silent societal stigma attached to illegitimacy.”<sup>180</sup> Another court similarly refused

174. SOLOMON-FEARS, *supra* note 13, at 32.

175. These assumptions are inextricably linked to stereotypes about minorities and the poor. For example, the 1965 Moynihan report asserted that “[a]s the result of family disorganization,” many African-American children had not been properly socialized. MOYNIHAN REPORT, *supra* note 137, ch. V. It also attributed high rates of juvenile delinquency and adult crime by African-Americans to “family disorganization.” *Id.* The perceptions of nonmarital African-American children as lacking proper socialization and of “disorganized families” as partly or largely responsible for juvenile delinquency and crime persist today.

176. Witte, Jr., *supra* note 2, at 338.

177. At common law, a child conceived during a marriage was conclusively presumed to be a child of the marriage unless the woman’s husband was impotent, infertile, or had no access to the wife during the possible period of conception. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion). The primary policy rationale underlying the presumption of legitimacy was an “aversion to declaring children illegitimate.” *Id.*; *C.C. v. A.B.*, 550 N.E.2d 365, 370 (Mass. 1990) (observing the “common law principle that motivated the presumption of legitimacy—that there is a strong interest in not bastardizing children”).

178. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1317 (2005) (noting that more than twenty states permit putative fathers to establish paternity even over the objections of the mother and her husband); Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 550 (2000). For examples of presumption of legitimacy statutes, see ALA. CODE § 26-17-204 (West 2010); D.C. CODE § 16-909 (West 2010), FLA. STAT. ANN. § 742.091 (West 2010); N.Y. DOM. REL. LAW § 24 (West 2010); TEX. FAM. CODE ANN. § 160.204 (West 2009). Thirty-five states retain the presumption of legitimacy. Rebecca Moulton, Note, *Who’s Your Daddy?: The Inherent Unfairness of the Marital Presumption for Children of Unmarried Parents*, 47 FAM. CT. REV. 698, 700 n.18 (2009).

179. *M.F. v. N.H.*, 599 A.2d 1297, 1302 (N.J. Super. Ct. App. Div. 1991).

180. *S.Y. v. W.S.Y., Jr.*, 2008 WL 183208, at \*4 (N.J. Super. Ct. App. Div. Jan. 23, 2008); *see also T.W. v. A.W.*, 541 A.2d 265, 270 (N.J. Super. Ct. App. Div. 1988) (rejecting the husband’s

to allow a mother to challenge her husband's paternity of the child, in part, "to avoid the stigma of illegitimacy."<sup>181</sup> The Supreme Court has upheld the presumption of legitimacy, noting that "the law retain[s] a strong bias against ruling the children of married women illegitimate."<sup>182</sup>

Courts have sought to protect children from the stigma of illegitimacy in other contexts. For example, in cases where a nonmarital child has no legal father, courts have allowed the child to establish paternity after the putative father's death, partly because doing so may help eliminate the stigma of illegitimacy. In *Estate of Greenwood*, the court allowed a nonmarital child to obtain samples of his deceased putative father's blood for purposes of establishing paternity, reasoning that "public policy is in favor of eliminating the stigma of illegitimacy."<sup>183</sup> In other words, proving that the decedent was his father would not only potentially entitle the child to a pecuniary benefit—a share of his father's estate—but would also help eliminate the stigma of illegitimacy. Another court recently upheld a statute restricting public access to paternity proceedings, reasoning that "the Legislature had a legitimate purpose in protecting children from the stigma of 'illegitimacy' . . ."<sup>184</sup> One court noted that "[t]he social stigma of illegitimacy . . . may itself," apart from economic considerations, justify a paternity action.<sup>185</sup>

Similarly, in closed adoption cases, courts have refused to unseal adoption records reasoning that "[s]ealing the birth records . . . protects the child from any possible stigma of illegitimacy which, though fading, may still exist . . ."<sup>186</sup> The New Jersey Catholic Conference, as recently as 2010, cited protecting children from any remaining stigma of illegitimacy as one reason for opposing a bill that would allow adult adoptees to learn the identity of their birth parents.<sup>187</sup>

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petition to rebut the presumption of legitimacy, reasoning that "[a]bsence of paternal lineage must still be considered a significant harm in a society where the stigma of illegitimacy continues, despite changing social values").

181. *Leger v. Leger*, 829 So. 2d 1101, 1103 (La. App. 2002); see also *In re Marriage of Gregory F.*, No. A095647, 2002 WL 31888785, at \*8 n.28 (Cal. Ct. App. Dec. 30, 2002) (refusing to allow husband to rebut presumption of legitimacy and noting that a "court may properly act to protect a minor from the social stigma of being branded a child of an adulterous relationship").

182. *Michael H.*, 491 U.S. at 125.

183. *In re Estate of Greenwood*, 587 A.2d 749, 756 (Pa. Super. Ct. 1991).

184. *Bren v. Gold*, No. B190299, 2007 WL 1666807, at \*6 (Cal. Ct. App. June 11, 2007).

185. *Codynah v. Mullen*, No. CH02-781, 2003 WL 122628, at \*2 (Va. Cir. Ct. Jan. 6, 2003).

186. *In re Adoption of Baby S.*, 705 A.2d 822, 824 (N.J. Super. Ct. App. Div. 1997); see also *In re Christine*, 397 A.2d 511, 513 (R.I. 1979) (stating that, "The confidentiality shield protects the adoptee from any possible stain of illegitimacy . . ."); see also Jennifer Flowers, Case Note, *Family Law—Adoption—Retrospective and Prospective Opening of Adoption Records to Adopted Persons Twenty-One Years of Age or Older*, 67 TENN. L. REV. 1019, 1030 (2000) (noting that opponents of unsealing adoption records argue that opening records will "subject adopted persons to the 'stigma of illegitimacy' against which the closing of the records was originally intended to protect") (emphasis added).

187. Press Release, Patrick R. Brannigan, Exec. Dir., N.J. Catholic Conference, Statement in Opposition to Senate Bill 799 (Mar. 4, 2010), <http://www.njcathconf.com/docs/Family%20Life/3-4-10%20Statement%20of%20PRB%20in%20opposition%20to%20S-799.pdf>; see also Carol Sanger,

Courts have also recognized the “stigma of illegitimacy” in cases involving children’s surnames. In cases where a divorced father has little or no contact with his child, some custodial mothers have petitioned the court to change the child’s surname from that of the absent father to the mother’s surname.<sup>188</sup> Courts in these cases have considered the stigma that may arise when people assume that the child must be illegitimate since the majority of marital children bear the father’s surname.<sup>189</sup> Fathers opposed to the child taking the mother’s surname have argued that “the child will suffer societal opprobrium as an apparent ‘bastard.’”<sup>190</sup> Judges have expressed similar concerns.<sup>191</sup>

When courts and society think about nonmarital children, they often imagine single-parent homes. As noted, however, the majority of nonmarital children are born to cohabiting couples.<sup>192</sup> These couples include same-sex couples who cannot marry in the majority of states. Their children are stigmatized as illegitimate because their parents are not married. The plaintiffs challenging California’s Proposition 8 argued that denying same-sex couples the right to marry harms their children because it deprives them of “the legitimacy that marriage confers on children and the sense of security, stability, and increased well-being that accompany that legitimacy.”<sup>193</sup> They also argued that “certain tangible and intangible benefits flow to a married couple’s children by virtue of the State’s (and society’s) recognition of that bond.”<sup>194</sup> Thus, these plaintiffs recognize that society confers certain approval on marital children that is denied to nonmarital children.

Other groups have similarly recognized that society continues to disapprove of nonmarital children. The American Psychological Association and New Jersey Psychological Association have argued that:

When same-sex partners cannot marry, their biological children are born “out-of-wedlock,” conferring a status that historically has been stigmatized as “illegitimacy” and

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*Separating from Children*, 96 COLUM. L. REV. 375, 444 (1996) (noting that once an adoption is final, a new birth certificate is issued in the name of the adoptive parents to “remove the stigma of both illegitimacy and adoption”). The original birth certificate is sealed. *Id.* at 489.

188. See Merle H. Weiner, “*We Are Family*”: *Valuing Associationalism in Disputes over Children’s Surnames*, 75 N.C. L. REV. 1625, 1724–25 (1997) (citing cases).

189. Even though many nonmarital children take their fathers’ surnames, traditionally, nonmarital children have borne their mother’s surname. *Id.*

190. *Id.*; see also *Lufft v. Lufft*, 424 S.E.2d 266, 267 (W. Va. 1992); Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Name Change Proceedings*, 99 W. VA. L. REV. 1, 51 n.202 (1996) (citing cases).

191. See Weiner, *supra* note 188, at 1725; see also *Garrison v. Knauss*, 637 N.E.2d 160, 161 (Ind. Ct. App. 1994).

192. See *supra* notes 141–42 and accompanying text.

193. Plaintiffs’ and Plaintiff-Intervenor’s Resp. to Court’s Questions for Closing Args. at 18, *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (No. 09-CV-2292 VRW), 2010 WL 3170286, at \*23.

194. *Id.*

“bastardy.” Although the social stigma attached to illegitimacy has declined in many parts of society, being born to unmarried parents is still widely considered undesirable. As a result, children of parents who are not married may be stigmatized by others, such as peers or school staff members.<sup>195</sup>

The New Jersey Civil Union Review Commission similarly concluded that the children of same-sex couples are stigmatized because they are nonmarital. The Commission’s recent report states that “although the children from civil unions are legally legitimate, children born into these relationships are born outside of marriage and still may be faced with the stigma of illegitimacy in the eyes of their peers.”<sup>196</sup> The children themselves have reported feeling shame and being teased by their peers because their parents are not married.<sup>197</sup>

Courts are starting to recognize that denying same-sex couples the right to marry stigmatizes their children as illegitimate. In *Goodridge*, the Massachusetts Supreme Court concluded that marital children enjoy “enhanced approval” by virtue of their status as marital children.<sup>198</sup> The court’s acknowledgment of society’s “enhanced approval” of marital children suggests that it recognizes that society disapproves of nonmarital children to some extent.

Admittedly, children of same-sex couples are also stigmatized because their parents are of the same sex. In other words, even if same-sex couples were allowed to marry, their children might still be stigmatized because their family is not comprised of two parents of the opposite sex. That being said, children’s perception that they are stigmatized, at least in part because their parents are not married, suggests that society continues to disapprove of nonmarital families.<sup>199</sup>

As noted in Part II.C, children suffer numerous harms as a result of legal distinctions between marital and nonmarital children. They also face potential psychic harms that result when one is the object of societal disapproval. This harm includes the awareness that one could be looked down upon or that individuals will make assumptions about one’s

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195. Brief for American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants at 51–52, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005) (No. A-2244-03T5).

196. N.J. CIVIL UNION REVIEW COMM’N, *THE LEGAL, MEDICAL, ECONOMIC AND SOCIAL CONSEQUENCES OF NEW JERSEY’S CIVIL UNION LAW 17* (2008) (quoting Judith Glassgold, president of the New Jersey Psychological Association).

197. *Id.*

198. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 957 (2003); *see also Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 474–76 (Conn. 2008) (holding that “the ban on same sex marriage is likely to have an especially deleterious effect on the children of same sex couples” and denies them “the immeasurable advantages that flow from the assurance of a stable family structure”).

199. *But cf. Ledsham, supra* note 4, at 2374 n.12 (“Although much of the stigma that children of same-sex parents face is rooted in their parent’s sexual orientation rather than in their own illegitimacy, the unavailability of marriage to their parents reinforces that stigma.”).

academic potential, values, or work ethic. For example, teachers sometimes make assumptions about students' potential, behavior, and motivation to excel based on their family background. The child who is aware that his teacher expects less of him or feels sorry for him faces an additional psychological burden that other students do not bear.<sup>200</sup> He might be motivated to work hard and prove his teacher wrong, or he might conclude that his teacher is right to expect less of him.<sup>201</sup> The internalization of these negative stereotypes about nonmarital families and their children—that they are irresponsible and more likely to underachieve and experience behavioral problems—may lead to self-fulfilling prophecies.<sup>202</sup> Children who are expected to misbehave often will, and children who are expected to do poorly in school often do.

Societal disapproval of nonmarital families may also negatively affect nonmarital children's self-esteem.<sup>203</sup> Researchers have shown that our self-identities are influenced by what others think of us.<sup>204</sup> If others think highly of us, we are more likely to have high self-esteem; if they disapprove of us, we are more likely to have low self-esteem.<sup>205</sup> A nonmarital child such as that in *Johnson v. Louis* who learns that his parents have no legal obligation to help pay for college, even though the divorced parents of his friends do, may conclude that he is, in fact, less deserving or valuable than other children.<sup>206</sup>

The implicit messages that nonmarital families are socially undesirable perpetuate the tangible and intangible harms already suffered by nonmarital children. The next Part examines these messages.

#### IV. SIGNALS THROUGH LAW: DISAPPROVAL OF NONMARITAL CHILDREN

There is a rich body of scholarship theorizing the law's ability to influence social norms in the context of marriage, divorce, parenting, discrimination, tax compliance, contracts, crime, corporate law, and even recycling and smoking.<sup>207</sup> The law can weaken or reinforce stigma against

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200. See Jennifer Crocker et al., *Social Stigma*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 504, 516–17 (4th ed. 1998); Carol T. Miller & Brenda Major, *Coping with Stigma and Prejudice*, in THE SOCIAL PSYCHOLOGY OF STIGMA 243, 244–45 (Todd F. Heatherton et al. eds., 2000); Healy, *supra* note 129, at 453–54.

201. See Miller & Major, *supra* note 200, at 253.

202. Lee Jussim et al., *Stigma and Self-Fulfilling Prophecies*, in THE SOCIAL PSYCHOLOGY OF STIGMA 374, 375–78, 391–92 (Todd F. Heatherton et al. eds., 2000) (discussing stigma and self-fulfilling prophecies generally).

203. See Miller & Major, *supra* note 200, at 244.

204. Delia Cioffi, *The Looking Glass Self Revisited: Behavior Choice and Self-Perception in the Social Token*, in THE SOCIAL PSYCHOLOGY OF STIGMA 184, 185 (Todd F. Heatherton et al. eds., 2000); Jennifer Crocker & Diane M. Quinn, *Social Stigma and the Self: Meanings, Situations, and Self-esteem*, in THE SOCIAL PSYCHOLOGY OF STIGMA 153, 155 (Todd F. Heatherton et al. eds., 2000).

205. Cf. Healy, *supra* note 129, at 454–56 (discussing studies showing that stigmatization impacts self-esteem but acknowledging that some studies have shown that stigmatization does not necessarily result in lower self-esteem).

206. Cf. Crocker et al., *supra* note 200, at 518 (discussing social influences on identity and self-worth).

207. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021

certain groups. For example, no-fault divorce laws have weakened the stigma that historically surrounded divorce while strong child support laws have served to strengthen social stigma against “deadbeat” fathers.<sup>208</sup> Lawmakers are aware of the communicative power of law and its ability to stigmatize certain behavior. For example, lawmakers have posted photographs of “deadbeat” fathers in government buildings or “boot[ed]” their cars, in part, to stigmatize parents who have failed to support their children.<sup>209</sup>

Lawmakers sometimes inadvertently stigmatize certain groups. For example, the failure to grant standing in certain cases inadvertently stigmatized racial minorities and nonmarital children.<sup>210</sup> Although courts have repeatedly held that nonmarital children should not be penalized for their parents’ behavior, the law’s discriminatory treatment of nonmarital children in certain contexts may serve to reinforce any remaining social stigma of illegitimacy. As shown in the context of citizenship, intestate succession, and post-secondary educational support, the law’s distinction between marital and nonmarital children suggests that there are meaningful differences between marital and nonmarital children and that parents’ responsibilities toward their children differ based on the child’s status as marital or nonmarital. The law’s expressed preference for marital families and view of marriage as the only desirable institution for childbearing may further facilitate societal disapproval of nonmarital children. This Part argues that government efforts to promote marriage and reduce nonmarital births, along with some courts’ assertions that, as a normative matter, marriage is a prerequisite to procreation, signal that nonmarital families are inferior as compared to marital families. This message may reinforce society’s perception that nonmarital children do not deserve the same protections and benefits as marital children.

### A. *Pro-Marriage Initiatives and Welfare Reform*

Most Americans are aware of the benefits of marriage, albeit, a healthy,

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(1996); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231 (2001); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (1999); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2000); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000); Gertrud M. Fremling & Richard Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1069 (1999); see also Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 935–37 (2005) (using social norms theory to explore how the law may have contributed to fathers’ disengagement after divorce and how law can facilitate a norm of involved fatherhood).

208. See Scott, *supra* note 207, at 1947–54 (2000) (discussing the effect of changing societal norms on changes in divorce and child support laws and vice versa).

209. See Maldonado, *supra* note 207, at 935–37.

210. Healy, *supra* note 129, at 476–81 (discussing cases); see also *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (refusing to find standing for illegitimate child to challenge failure of application of criminal penalty statute for non-payment of child support to illegitimate children).

low-conflict marriage. The media frequently reports on studies finding that married individuals are healthier, happier, and wealthier than their single counterparts<sup>211</sup> and that children who grow up with two married parents do better than children raised in other types of family structures.<sup>212</sup> The federal government has also publicized the benefits of a healthy marriage.<sup>213</sup>

Most individuals in the United States, including nonmarital parents, hold marriage in high esteem and report that they would like to marry someday.<sup>214</sup> However, marriage rates have declined in recent years.<sup>215</sup> The federal government, in an effort to encourage more Americans to marry, recently funded a national media campaign publicizing the benefits of marriage.<sup>216</sup> This is part of the federal Healthy Marriage Initiative, which the Bush administration launched in 2005, and earmarks \$150 million each year for five years to fund programs that promote healthy marriages and responsible fatherhood.<sup>217</sup> While some commentators argue that the government has no business using tax dollars to promote marriage, others point out that the government frequently finances campaigns that seek to

211. Sharon Jayson, *Holding Up the Value of Marriage: Federally Funded Ad Campaign Aimed at Conflicted Young Adults*, USA TODAY, Feb. 18, 2009, at D1; Tara Parker-Pope, *Divorce, It Seems, Can Make You Ill*, N.Y. TIMES, Aug. 4, 2009, at D5; Tara Parker-Pope, *Is Marriage Good For Your Health?*, N.Y. TIMES, Apr. 18, 2010, at MM46; see also Paul R. Amato & Juliana M. Sobolewski, *The Effects of Divorce and Marital Discord on Adult Children's Psychological Well-Being*, 66 AM. SOC. REV. 900, 904 (2001) (finding that as compared to single individuals, married persons have higher self-esteem, better physical health, and fewer symptoms of psychological distress).

212. See *supra* note 167 and accompanying text (discussing greater likelihood of problems for children of single-parent homes than children with two biological parents at home).

213. See *Healthy Marriage Initiative General Information*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/healthymarriage/about/mission.html> (last visited Jan. 5, 2011) (listing the benefits of healthy marriages for men, women, and children).

214. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 6 (2005); Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J.L. & FAM. STUD. 279, 287 (2008). Interestingly, even persons whose first marriages end in divorce try again. See MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, U.S. DEP'T OF HEALTH & HUMAN SERVS., VITAL & HEALTH STATISTICS, SER. 23, NO. 22, COHABITATION, MARRIAGE, DIVORCES, AND REMARRIAGE IN THE UNITED STATES 22, 78 tbl.37 (2002) (finding that 75% of divorced women remarry within ten years), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_022.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf); see MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, U.S. DEP'T OF HEALTH & HUMAN SERVS., VITAL & HEALTH STATISTICS SER. 23, NO. 28, COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES 22, 78 tbl.37 (2002), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_022.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf).

215. See Jayson, *supra* note 211.

216. *Id.*

217. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (codified in scattered sections of 42 U.S.C. § 1305 (2010)). Funded programs must use the funds for "eight specified activities, including marriage education, marriage skills training, public advertising campaigns, high school education on the value of marriage and marriage mentoring programs." *ACF Healthy Marriage Initiative General Information*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/healthymarriage/about/mission.html> (last visited Jan. 5, 2011).

change behavior such as the Reagan administration's "Just Say No" to drugs campaign, no smoking campaigns, and most recently First Lady Michelle Obama's campaign against childhood obesity.<sup>218</sup>

At first glance, the Healthy Marriage Initiative, which is described as "helping couples, who have chosen marriage for themselves, gain greater access to marriage education services, on a voluntary basis, where they can acquire the skills and knowledge necessary to form and sustain a [h]ealthy marriage,"<sup>219</sup> appears unobjectionable. Research shows that a healthy marriage benefits the couple and their children. Furthermore, according to the government, the Healthy Marriage Initiative is not about "[c]oercing anyone to marry or remain in unhealthy relationships" or "[w]ithdrawing supports from single parents, or diminishing, either directly or indirectly, the important work of single parents."<sup>220</sup> In addition, programs that seek funding as part of the Healthy Marriage Initiative must address issues of domestic violence in its programs.<sup>221</sup> Based on this description, the Healthy Marriage Initiative seems to benefit marital children, without necessarily harming nonmarital children. Upon closer scrutiny, however, it is evident that the Healthy Marriage Initiative and other initiatives that preceded it stigmatize nonmarital families and their children. In order to explain, it is important to understand the origins of the Healthy Marriage Initiative.

In 1996, Congress adopted a welfare reform law known as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>222</sup> PRWORA provides that "[m]arriage is the foundation of a successful society" and "is an essential institution of a successful society which promotes the interests of children."<sup>223</sup> PRWORA has four purposes, three of which promote marriage and seek to reduce nonmarital births:

(2) [to] end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;

(3) [to] prevent and reduce the incidence of out-of-wedlock pregnancies, and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and

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218. Jayson, *supra* note 211.

219. *Healthy Marriage Matters*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., [http://www.acf.hhs.gov/healthymarriage/about/factsheets\\_hm\\_matters.html](http://www.acf.hhs.gov/healthymarriage/about/factsheets_hm_matters.html) (last visited Jan. 5, 2011).

220. *ACF Healthy Marriage Initiative General Information*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/healthymarriage/about/mission.html> (last visited Jan. 5, 2011).

221. *Id.* ("Applicants for funds must commit to consult with experts in domestic violence; applications must describe how programs will address issues of domestic violence and ensure that participation is voluntary.")

222. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 100 Stat. 2105 (1996) (codified as amended primarily in scattered sections of 42 U.S.C.).

223. *Id.* at § 101.

(4) [to] encourage the formation and maintenance of two-parent families.<sup>224</sup>

PRWORA also created Temporary Aid to Needy Families (TANF), which provides each state with a block grant.<sup>225</sup> Although TANF funds are used primarily to fund cash welfare for low-income families with children, states can also use the grants to fund programs and services that reduce nonmarital births and promote marriage.<sup>226</sup> To further the goal of reducing nonmarital births, PRWORA authorized a \$100 million annual “Bonus to Reward Decrease in Illegitimacy Ratio” to be awarded to five states that reduced the number of nonmarital births the most in a given year without increasing the state’s abortion rate.<sup>227</sup>

States began promoting marriage as soon as PRWORA was enacted.<sup>228</sup> For example, in 1996, West Virginia increased welfare payments by 10% for couples who married. In 2000, this “marriage bonus” was increased to a flat \$100 month.<sup>229</sup> As one commentator noted, given that the average grant was only \$400 per month, the \$100 bonus was significant.<sup>230</sup> Other states combined cohabiting couples’ incomes, thereby reducing the welfare

224. *Id.* at § 401(a). The other purpose is to “provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives.” *Id.*

225. *Temporary Assistance to Needy Families*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., [http://www.acf.hhs.gov/programs/fbci/progs/fbci\\_tanf.html](http://www.acf.hhs.gov/programs/fbci/progs/fbci_tanf.html) (last visited Jan. 10, 2011).

226. Pub. L. No. 104-193, § 401(a), 100 Stat. 2105, 2113 (1996) (codified at 42 U.S.C. § 601 (2006)). States that reduce the number of families receiving welfare can use the “savings” to fund other programs allowed by the TANF grant. For example, in 1999, Oklahoma set aside \$10 million of TANF funds for its marriage initiative programs. See *OMI History*, OKLA. MARRIAGE INITIATIVE, <http://www.okmarriage.org/ProgramHighlights/MarriageProblems.asp> (last visited Jan. 6, 2011).

Many scholars have critiqued PRWORA because it placed lifetime caps on assistance (an individual may receive benefits for a total of five years during her lifetime) and requires mothers with small children to work outside the home. Supporters of the reform law point out that welfare caseloads have declined dramatically since PRWORA’s enactment, from 5.1 million families in 1994 to 1.9 million families in 2006. COMM. ON WAYS & MEANS, *Section 7—Temporary Assistance for Needy Families in 2008 GREEN BOOK* (2008): BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS (2008).

227. PWORA of 1996, Pub. L. No. 104-193, § 403(a)(2), 100 Stat. 2105, 2113 (1997); see also *Out-of-Wedlock Birth Reduction Bonus*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/ofa/data-reports/annualreport6/chapter08/chap08.htm#bonus> (last visited Jan. 12, 2011).

228. THEODORA OOMS ET AL., CTR. FOR LAW & SOC. POLICY, *BEYOND MARRIAGE LICENSES: EFFORTS IN STATES TO STRENGTHEN MARRIAGE AND TWO-PARENT FAMILIES 7* (2004), [http://www.clasp.org/publications/beyond\\_marr.pdf](http://www.clasp.org/publications/beyond_marr.pdf); see also Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 66–70 (2003) (discussing states’ marriage initiatives).

229. Spaht, *supra* note 228, at 66–70.

230. Betty Holcomb, *Conservatives Push for Marriage Promotion Programs*, WOMEN’S ENEWS (Oct. 15, 2002), <http://www.womensenews.org/story/washington-outlookcongresswhitehouse/021015/conservatives-push-marriage-promotion-programs>.

benefits paid to their children.<sup>231</sup> Other states tried to implement similar marriage incentives but the bills never passed.<sup>232</sup>

Many states have implemented marriage promotion initiatives that focus on advertising the benefits of marriage and creating educational programs to encourage couples to marry and stay married.<sup>233</sup> For example, Oklahoma set aside \$10 million in TANF funds for a marriage initiative that seeks to reduce the state's divorce rate and also provides marriage education workshops.<sup>234</sup> It also encourages state employees working with TANF clients and other low-income groups to promote marriage.<sup>235</sup> Arizona earmarked \$1 million in TANF funds for marriage skills workshops, including a marriage handbook, and vouchers for low-income parents to use to attend marriage-skills training courses.<sup>236</sup> Utah used TANF funds for a marriage-education video, marriage-enrichment materials, vouchers for counseling for low-income couples, and an annual marriage conference.<sup>237</sup>

Tennessee and Vermont use a different approach to encourage unmarried parents to marry. Both states forgive any child support arrears that the non-custodial parent owes the state if the parents marry.<sup>238</sup> Many low-income nonmarital fathers owe thousands of dollars in child support arrears to the state, amounts which they are unlikely to be able to repay.<sup>239</sup> Child support arrears are not dischargeable in bankruptcy and subject the obligor to numerous penalties including suspension of his driver's license, seizure of his tax refund, incarceration, booting of obligor's car, and garnishment of up to 60% of his wages.<sup>240</sup> Thus, forgiveness of arrears may provide a very strong incentive for an obligor to marry the child's custodial parent.

PRWORA funded TANF through 2002. After numerous extensions of

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231. KAREN N. GARDINER ET AL., STATE POLICIES TO PROMOTE MARRIAGE: FINAL REPORT pt. III.E (2002), available at <http://aspe.hhs.gov/hsp/marriage02f>.

232. *Id.* For example, in 1997, the Washington State Senate considered a bill that would have given welfare recipients who married and left the welfare rolls "a lump-sum check worth four times the value of their last welfare check." Spaht, *supra* note 228, at 69 n.401. A few years later, the Mississippi Senate considered a similar but more generous bill; the lump sum amount would have been "worth 75% of the annual welfare payment." *Id.* at 69 n.399. The Colorado House of Representatives passed a bill that would have authorized "counties to give a one-time 'bonus' to welfare [recipients] who married." *Id.* at 69 n.396. All of these bills died in committee. *Id.* at 69 nn.396, 399 & 401.

233. Ooms, *supra* note 228, at 11 (reporting that forty states have government-funded programs to promote marriage and seven of those states have used significant TANF funds for these programs).

234. GARDINER ET AL., *supra* note 231, pt. III.C.

235. *Id.* pt. III.E.

236. *Id.* pt. III.C.

237. Spaht, *supra* note 228, at 68.

238. GARDINER ET AL., *supra* note 231, pt. III.E. When a custodial parent has received TANF for the child, the non-custodial parent's child support obligation would be owed to the state to reimburse the state for its payments for the child. See Maldonado, *supra* note 65, at 1003.

239. Maldonado, *supra* note 65, at 1001-02.

240. *Id.* at 1000.

the TANF grant, Congress adopted the Deficit Reduction Act of 2005 (DRA), which extends funding for TANF through 2010 and also allocates \$150 million per year for initiatives that promote healthy marriages and responsible fatherhood.<sup>241</sup> While the Healthy Marriage Initiative claims not to “diminish[], either directly or indirectly, the important work of single parents,” it does seek to “[i]ncrease the percentage of children who are raised by two parents in a healthy marriage.”<sup>242</sup> While this language can be interpreted to mean that the government wants to increase the percentage of children raised in healthy marriages as opposed to unhealthy marriages, other provisions and funding decisions suggest that the government continues to pursue the goal of the PRWORA—to reduce nonmarital births and promote marriage. For example, one of the projects that received a grant from the Healthy Marriage Initiative describes the goal of the program as providing “African American and Hispanic unmarried cohabiting couples with a variety of marriage enhancing services to increase the number of marriages before conception . . . .”<sup>243</sup> Further, in determining whether a funded program has been successful, the federal government looks at whether the program has achieved “[a] reduction in out of wedlock births” and “[m]ore children living in healthy two-parent (married) households.”<sup>244</sup> The language is clear—it is not sufficient for children to be living in healthy two-parent homes, but rather, these homes must be comprised of married parents.<sup>245</sup>

The goals of PRWORA and the Healthy Marriage Initiative clearly signal that the government believes that nonmarital childbearing is undesirable and should be strongly discouraged. When combined with courts’ rejection of same-sex marriage for the reasons described below, the message is clear—nonmarital families are a social problem.

### B. *Marriage Before Procreation*

In 2003, Massachusetts became the first state to recognize the right of same-sex couples to marry.<sup>246</sup> Three justices dissented and each wrote separate dissents.<sup>247</sup> In his dissenting opinion, concluding that there is no constitutional right to same-sex marriage, Justice Robert Cordy argued that

241. COMM. ON WAYS AND MEANS, *supra* note 226, at 7-4 to 7-5, 7-95.

242. *ACF Healthy Marriage Initiative General Information*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/healthymarriage/about/mission.html> (last visited Jan. 5, 2011).

243. *Hispanic-Targeted Healthy Marriage Programs*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., [http://www.acf.hhs.gov/healthymarriage/about/hmi\\_programs.html](http://www.acf.hhs.gov/healthymarriage/about/hmi_programs.html) (last updated May 12, 2010).

244. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., AFRICAN AMERICAN HEALTHY MARRIAGE INITIATIVE FISCAL YEAR 2009 LOGIC MODEL 1, *available at* [http://www.acf.hhs.gov/healthymarriage/pdf/2009\\_logicmodel.pdf](http://www.acf.hhs.gov/healthymarriage/pdf/2009_logicmodel.pdf).

245. *See id.*

246. *See* William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1058 (2005).

247. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 974, 978, 983 (Mass. 2003).

the purpose of marriage is to promote responsible procreation.<sup>248</sup> In Justice Cordy's view, limiting the right to marry to opposite-sex couples signals that marriage is a prerequisite to procreation.<sup>249</sup> He reasoned that "[a]s long as marriage is limited to opposite-sex couples who can at least theoretically procreate, *society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor.*"<sup>250</sup> According to Justice Cordy, legal recognition of same-sex marriages "could be perceived as an abandonment of this claim."<sup>251</sup> In short, Justice Cordy feared that recognition of marriages between couples who cannot naturally procreate might signal that marriage is not "necessary for optimal procreation and child rearing to occur."<sup>252</sup>

A number of state courts have adopted Justice Cordy's marriage and procreation argument as a reason to limit the right to marry to opposite-sex couples.<sup>253</sup> These courts have held that legislators could reasonably conclude that they must provide the benefits of marriage to opposite-sex couples as an incentive to "ensure that *accidental* procreation is channeled into a stable family relationship."<sup>254</sup> For example, the Indiana Court of Appeals reasoned that the legislature could "legitimately create the institution of opposite-sex marriage . . . to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and *to discourage unplanned, out-of-wedlock births.*"<sup>255</sup> The New York Appellate Division similarly stated that society "sets up heterosexual marriage as the cultural, social and legal ideal in an effort to *discourage unmarried childbearing.*"<sup>256</sup>

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248. *See id.* at 995 (Cordy, J., dissenting). Specifically, he stated:

Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. . . . [A]n orderly society requires some mechanism for coping with the fact that sexual intercourse [between a man and a woman] commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.

*Id.*

249. *Id.*

250. *Id.* at 1002 (emphasis added).

251. *Id.*

252. *Id.*

253. *See Morrison v. Sadler*, 821 N.E.2d 15, 24–25 (Ind. App. 2005); *Hernandez v. Robles*, 26 A.D.3d 98 (N.Y. App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 982 (Wash. 2006); *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010) (summarizing argument made by proponents of Proposition 8 that "responsible procreation is really at the heart of society's interest in regulating marriage").

254. *In re Marriage Cases*, 183 P.3d 384, 431 (Cal. 2008), *superseding constitutional amendment stayed by Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010).

255. *Morrison*, 821 N.E.2d at 24–25 (emphasis added).

256. *Hernandez*, 26 A.D.3d at 104 (emphasis added). As Professor Katherine Franke has noted, "While the zone of the non-married parent is portrayed as a site of pathology, stigma, and injury to children, marriage is figured as the ideal social formation in which responsible reproduction can and should take place," marriage is treated as the "proper, if not divine, site for the

While these cases are primarily about the rights of same-sex couples, they are also about the role of marriage in reproduction. By signaling that marriage is the only proper place for childbearing, these cases serve to reinforce societal disapproval of nonmarital families and children. For example, Justice Cordy's statement that limiting marriage to opposite-sex couples signals that marriage is a necessary component of procreation<sup>257</sup> also sends the message that nonmarital families are inferior. While lawmakers may not have consciously intended to suggest that nonmarital children are undesirable or less valuable than marital children, the messages expressed in the PRWORA, states' efforts to comply with its mandate, and the Healthy Marriage Initiative clearly signal that nonmarital childbearing is inherently a significant social problem. As commentators have noted, bonus payments to states that reduced their "illegitimacy ratio" served to stigmatize single-parent families and their children.<sup>258</sup> Courts' recent statements that marriage and procreation go hand in hand further reinforce this message that nonmarital families are deviant. Despite the increase in nonmarital births, nonmarital children will continue to suffer harms not experienced by their marital counterparts so long as legal and societal distinctions between marital and nonmarital children remain. The next Part explores how the law can begin to eliminate all legal and societal disadvantages deriving from birth status.

## V. EQUALITY FOR ALL CHILDREN

### A. *Eliminating Legal Distinctions*

For centuries, the law discriminated against nonmarital children to discourage extramarital sex and nonmarital childbearing. Although the law can no longer intentionally penalize children for the actions of their parents, the Supreme Court has upheld statutes that distinguish between marital and nonmarital children based on concerns of proving paternity, facilitating the orderly disposition of estates, and fostering stronger relationships between children and their fathers. However, these concerns can be addressed without discriminating against nonmarital children. First, the concerns about establishing paternity are present regardless of whether the child is marital or nonmarital. Some marital fathers, unbeknownst to them, share no genetic relationship with their marital children.<sup>259</sup> Others know that their marital children are not their biological children but cannot

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bearing and rearing of children." Katherine Franke, *Sexuality and Marriage: The Politics of Same Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 242 (2006).

257. *Goodridge*, 798 N.E.2d at 1002 (Cordy, J., dissenting).

258. Holcomb, *supra* note 230.

259. It is estimated that 2%–4% of marital children whose fathers believe they are their biological children are not. *See* Polikoff, *supra* note 5, at 213 n.38; *see also* Singer, *supra* note 123, at 266 (noting that empirical studies suggest that more than 10% of marital children are not biologically related to the mother's husband); Ruth Padawer, *Who Knew I Was Not the Father*, N.Y. TIMES, Nov. 17, 2009, <http://www.nytimes.com/2009/11/22/magazine/22Paternity-t.html> (discussing marital fathers who discovered that they were not their children's genetic fathers).

challenge paternity because the presumption of legitimacy prevents them from doing so. Others choose not to challenge paternity even when they can rebut the presumption. In all of these cases, marital children reap the benefits of the presumption of legitimacy despite conclusive evidence, in some cases, that the marital father is not the biological father. Furthermore, while establishing paternity may have been impossible until recently, now it is quite simple. If lawmakers wanted to establish paternity for every child, they could require that paternity be proven (not merely presumed) in all cases for both marital and nonmarital children through blood test evidence. However, they do not. The presumption of legitimacy suggests that biology is not a necessary requirement for the establishment of paternity or parenthood.

Some scholars have suggested that the law should eliminate the distinctions between marital and nonmarital children by abolishing the marital presumption and requiring all children to prove paternity.<sup>260</sup> Although appealing in its simplicity, this approach creates more problems than it solves. First, it would likely destabilize many marriages and parent-child relationships, as many fathers would discover that the children they believed to be their own are not their biological children. Second, paternity testing reinforces the notion that parenthood is based on biology and that a biological connection is a prerequisite to a parent-child relationship. However, a genetic relationship is neither sufficient nor a prerequisite to parentage. When a married woman gives birth to a child, the presumption of legitimacy recognizes her husband as the child's natural father even in the absence of a genetic relationship. Thus, biology is not a prerequisite to parentage. Conversely, an unmarried biological father has no parental rights until he demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child."<sup>261</sup> Thus, biology alone is not sufficient to establish parentage. Finally, achieving equality for nonmarital children should not require that the law take benefits away from marital children but rather that it extend those benefits to all children regardless of birth status. All of these reasons counsel against abolishing the presumption of legitimacy.

The law can eliminate many of the legal distinctions between marital and nonmarital children by extending the presumption of parentage to nonmarital children in cases where a person has held the child out as his or her own regardless of a biological link. This proposed presumption builds on the Uniform Parentage Act's and some states' attempts to eliminate

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260. See, e.g., 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, 1067–68 (2003); Nancy E. Dowd, *Parentage at Birth: BirthFathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 926, 929 (2006).

261. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); see also *id.* at 261 n.17 (“[T]he unwed father’s interest springs not from his biological tie with his illegitimate child, but rather, from the relationship he has established with and the responsibility he has shouldered for his child . . . .” (quoting John T. Wright, Comment, *Caban v. Mohammed: Extending the Rights of Unwed Fathers*, 46 BROOK. L. REV. 95, 115–16 (1979))).

legal distinctions between marital and nonmarital children.<sup>262</sup> For example, under § 7611 of the California Family Code, a man is “presumed to be the natural father of a child . . . if he receives the child into his home and openly holds out the child as his natural child.”<sup>263</sup> Similar to the marital presumption of legitimacy, there is no requirement that paternity be proven. In addition, in the same way that the marital presumption cannot be rebutted in all cases through proof of a lack of a genetic relationship, the presumption of paternity under § 7611 is not automatically rebutted when the presumed father is not the child’s genetic father.<sup>264</sup> The court may decide that it is not in the child’s best interest to allow the presumption to be rebutted.<sup>265</sup>

The presumption of parenthood under § 7611(d) also applies to women, thereby protecting the children of same-sex parents.<sup>266</sup> A woman who receives her same-sex partner’s child into her home and holds the child out as her child is a presumed parent. As such, the child is entitled to inheritance rights and federal benefits, such as social security, which depend on whether the survivor child is entitled to inherit from the deceased parent under the law of the state where the parent died.

Despite its efforts to eliminate distinctions between marital and nonmarital children, § 7611 fails to extend to nonmarital children all of the protections enjoyed by marital children. To create a presumption of parenthood under § 7611(d), the man or woman must “receive[] the child into his [or her] home.”<sup>267</sup> This requires that the man or woman live with

262. See UNIF. PARENTAGE ACT § 204(a)(5) (amended 2002), 9B U.L.A. 23–24 (Supp. 2010); see also MINN. STAT. ANN. § 257.55(1)(d) (West 2010); MONT. CODE ANN. § 40-6-105(1)(d) (West 2009); NEV. REV. STAT. ANN. § 126.051(1)(d) (West 2009); N.J. STAT. ANN. § 9:17-43 (West 2010).

263. CAL. FAM. CODE § 7611(d) (West 2009); see also HAW. REV. STAT. ANN. § 584-4(a)(4) (LexisNexis 2010).

264. See, e.g., *In re Nicholas H.*, 46 P.3d 932, 933 (Cal. 2002); see also UNIF. PARENTAGE ACT § 608(a) (amended 2002), 9B U.L.A. 54–55 (Supp. 2010). The Uniform Parentage Act provides that a court may deny a motion to rebut the presumption of paternity if “(1) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.” *Id.*

265. See *In re Nicholas H.*, 46 P.3d at 933 (holding that while the presumption of parenthood “may be rebutted in an appropriate action only by clear and convincing evidence,” an action in which no other man claims parental rights to the child and rebuttal of presumption will render child fatherless, is not an appropriate action for rebuttal of presumption).

266. See *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (extending presumption of paternity under California Family Code § 7611(d) to a woman who brought her lesbian partner’s twins into her home and held them out as her natural children even though she lacked a genetic relationship with the children); *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003) (“Though most of the decisional law has focused on the definition of the presumed father, the legal principles concerning the presumed father apply equally to women seeking presumed mother status.”); *In re Karen C.*, 124 Cal. Rptr. 2d 677, 681 (Ct. App. 2002) (stating that § 7611(d) “should apply equally to women”).

267. CAL. FAM. CODE § 7611(d). This provision is based on the original Uniform Parentage Act. UNIF. PARENTAGE ACT § 4(4) (1973). The drafters later concluded that “[b]ecause there was no time frame specified in the 1973 act, the language fostered uncertainty about whether the presumption could arise if the receipt of the child into the man’s home occurred for a short time or

the child. In contrast, the presumption of legitimacy applies to all marital children regardless of whether the marital father lived with the child. It applies in cases where the mother's husband died before the child's birth as long as the child is born within 300 days of his father's death and no genetic evidence of paternity is required. In contrast, there is no presumption of parenthood under § 7611(d) if the alleged parent never lived with the nonmarital child.

In at least one state, the presumption of parenthood is triggered even if the adult did not reside with the nonmarital child. New Jersey's statute provides that "[a] man is presumed to be the biological father of a child if . . . [w]hile the child is under the age of majority, he provides support for the child and openly holds out the child as his natural child."<sup>268</sup> However, even this provision imposes higher burdens on nonmarital children than on marital children. To illustrate, a marital child benefits from the presumption of legitimacy even if his father never lived with him, supported him, or held him out as his own. The presumption applies even if the father abandoned his pregnant wife or died before the child's birth. The mother's husband is presumed to be the child's father even absent any evidence of intent to assume parental responsibilities.

In order to treat nonmarital and marital children alike, the presumption of parenthood would have to apply in cases where the alleged parent never lived with the child, never supported the child, and never held the child out as his or her own. However, the law is unlikely to extend to nonmarital children the benefits automatically granted to marital children without some evidence of parentage or actions that evince an intent to assume parental responsibilities. The law treats marriage as a proxy for parentage or intent to assume parental responsibilities. Thus, nonmarital children must also show a proxy for parentage or intent to assume parental

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took place long after the child's birth." UNIF. PARENTAGE ACT § 204 cmt. (amended 2002), 9B U.L.A. 24 (Supp. 2010). They amended the Uniform Parentage Act in 2002 to provide that an individual must live with the child for the first two years of the child's life. UNIF. PARENTAGE ACT § 204(a)(5) (amended 2002) ("A man is presumed to be the father of a child if . . . for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.").

Although the comments to the revised Uniform Parentage Act state that the amendment would "more fully serve the goal of treating nonmarital and marital children equally," I believe that the 2002 "first two years" provision serves to widen the gap between the treatment of nonmarital and marital children. The marital presumption of paternity applies even if the mother's husband never lived with the child. By requiring that a nonmarital father live with the child for the first two years of the child's life, the Uniform Parentage Act deprives nonmarital children whose parents died or separated before their second birthday of many benefits that accrue to marital children automatically by virtue of their parents' marriage. For example, although almost 50% of nonmarital children in 2008 were born to cohabitating parents, many of those parents will separate before the child's second birthday. Under the amended Uniform Parentage Act provision, the children who remained with their birth mothers would not benefit from the presumption of parenthood. Under the amended provision, Elisa B., *see supra* note 266, the woman who received her lesbian partner's children into her home and held them out as her own, would not be a presumed parent because she only lived with the children until they were eighteen months old.

268. N.J. STAT. ANN. § 9:17-43 (West 2010).

responsibilities. Holding out a child as one's own should be that proxy, the equivalent of marriage for marital children. This Article proposes that states adopt the following presumption of parenthood:

*A person is presumed to be the biological parent of a child if, while the child is under the age of majority, the person openly holds out the child as his or her child.*

This proposed statute simply eliminates § 7611's requirement that the person have resided with the child in order to be a presumed parent. Without the requirement that the presumed parent and child have resided together, many more nonmarital children will be able to assert entitlement to the many benefits currently available to marital children by virtue of their parents' marriage. There might be cases where more than two adults may qualify as presumed parents. While a few courts have suggested that a child may have more than two parents,<sup>269</sup> this proposal does not require such a result. The presumption of parenthood would be rebuttable and courts would determine, as they do now both in the context of the marital presumption and § 7611, whether it would be in a child's best interests to allow the presumption to be rebutted in a particular case.<sup>270</sup> Of course,

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269. See *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007) (imposing support obligations on three parents—the biological father, the mother, and her lesbian partner); *Geen v. Geen*, 666 So. 2d 1192, 1197 (La. Ct. App. 1995) (recognizing dual paternity and the mother's legal parental status); *Smith v. Cole*, 553 So. 2d 847 (La. 1989) (same). Some scholars have argued that the law should recognize multiple parents. See Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 236 (2007) (arguing that the law should recognize “that a child may have multiple parents, not simply two”); Melanie Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 312 (2007) (“[W]e need to recognize that more than two individuals can assume the many roles and obligations that traditional parentage has entailed, and children can benefit from the legal recognition of all of those individuals as parents.”); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 12 (2009); Brian Bix, *The Boogeyman of Three (or More) Parents 1–2* (Univ. of Minn. Law Sch. Legal Studies Research Paper Series No. 08-22), available at <http://ssrn.com/abstract=1196562>; see also AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 203 (defining parent by estoppel and de facto parent).

270. See *supra* notes 180–81 and accompanying text (discussing when courts allow rebuttal of the marital presumption of legitimacy); see also *supra* notes 264–65 and accompanying text (discussing when courts allow presumption of parenthood under § 7611(d) to be rebutted). To illustrate, a woman becomes pregnant by her boyfriend, Jack. He tells everyone that he is going to be a father, and after the child's birth, he openly holds the child out as his own. A year later, Jack and the mother break up, and Jack moves to another country and does not support the child or maintain contact. When the child is three years old, the mother meets another man, Sawyer. She and the child move in with Sawyer and he openly holds the child out as his child. When the child is seven years old, the mother and Sawyer separate and he seeks visitation claiming that he is a presumed father. The mother opposes visitation. Both Jack and Sawyer qualify as presumed fathers under the proposed standard because they have each openly held the child out as their child. The mother seeks to rebut the presumption of parenthood as to Sawyer. Given that Jack has disappeared and that rebuttal of the presumption of fatherhood as to Sawyer would leave the child with only one parent (his mother) to support him, the court may decide, following *Nicholas H.*, that this is not an appropriate action for rebuttal of the presumption. See *supra* note 265 (discussing *Nicholas H.* and

similar to § 7611, proof of a lack of a genetic relationship between the presumed parent and the child would not automatically rebut the presumption of parenthood.<sup>271</sup>

### B. *Altering the Messages*

Cases like *Nguyen*, *Mathews*, and many intestacy cases would be decided differently under this proposed statute while still respecting states' interest, as expressed by the majority in *Nguyen*, in ensuring that children share more than just a genetic relationship with their fathers.<sup>272</sup> However, this proposed presumption of parenthood will not eliminate societal disapproval of nonmarital children so long as courts continue to give effect to societal biases against nonmarital children and lawmakers continue to suggest that nonmarital families are inherently inferior.

As noted, courts have recognized that societal biases against nonmarital children persist and have attempted to protect nonmarital children from these biases. These efforts are simultaneously laudable and problematic. On one level, it is difficult to fault judges for trying to protect children as their *parens patriae* duty requires. At the same time, however, efforts to protect nonmarital children from the stigma of illegitimacy may actually perpetuate the stigma of illegitimacy.<sup>273</sup> For example, by refusing to unseal adoption records in order to protect children from the stigma of illegitimacy, courts ensure that the stigma surrounding birth status remains. Similarly, when courts express concern about changing a child's surname from that of his absent father to his mother's surname in order to protect the child from societal biases based on birth status, courts give legal effect to these biases.<sup>274</sup> The Supreme Court has recognized that society stigmatizes children based on their family form.<sup>275</sup> However, in the context of race-based biases, the Court has held that the law cannot take societal biases into account. "The Constitution cannot control such prejudices but neither can it tolerate them."<sup>276</sup> Biases against nonmarital children are no different. Although courts do not have to pretend that the stigma of illegitimacy does not exist, they must stop giving these private biases legal effect.<sup>277</sup>

Given the social science evidence suggesting that children raised in stable marital homes have better outcomes, the government *should* support marriage and eliminate any legal barriers to marriage, such as restrictions

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the rebuttal of presumption).

271. *See supra* note 264 and accompanying text.

272. *See supra* notes 102 and accompanying text.

273. I am grateful to Charles Sullivan for this observation.

274. *See supra* notes 188–91 and accompanying text.

275. *See* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1983) (acknowledging that, given racial and ethnic prejudices at the time, a child living with a stepparent of a different race might be subjected to certain societal biases).

276. *Id.*

277. *Id.* ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

on same-sex marriage. However, even if we assume that, all other things being equal, marriage leads to better outcomes for children, it does not justify denying nonmarital children the resources and legal benefits available to marital children. First, discrimination against nonmarital children will not lead to more stable marriages. As noted, nonmarital parents already value marriage—they hold marriage in such high esteem that they chose to delay marrying until they are financially stable and in a stable relationship. They understand that a marriage plagued by high conflict and chronic lack of resources does not benefit them or their children.<sup>278</sup> Furthermore, if nonmarital children are at greater risk of poorer outcomes, as the social science suggests, shouldn't lawmakers and society provide *more* resources and support (or at least as much as provided to marital children) in order to decrease the risk of negative outcomes?

In addition to making the same benefits available to children regardless of birth status and family form, the government must take care to support marriage without simultaneously expressing disapproval of single parent and cohabitating parent families. For example, the government should continue to offer “marriage education” and “marriage skills training,” as authorized by the Healthy Marriage Initiative, to married couples seeking to develop stronger communication skills. It should offer similar programs to cohabiting parents. The government should also provide resources and education to parents (married or unmarried) who are not adequately prepared for the responsibilities and challenges of parenting. It should also educate teenagers about the difficulties *all* young parents face (married or unmarried) and the economic disadvantages and poorer outcomes children of teen parents (marital and nonmarital) experience without suggesting that nonmarital childbearing per se is a social problem. There is a significant and qualitative difference between offering marital enrichment programs and trying to reduce teen parenting rates versus providing marriage bonuses to welfare recipients and “illegitimacy ratio” reduction bonuses to states. These latter initiatives do not promote marriage but rather stigmatize unmarried parents and their children.

The Obama administration has indicated that it will direct some of the funding that the Bush administration earmarked to promote marriage to create jobs for unmarried parents and low-income families. Ironically, these efforts that do not focus on marriage might actually increase marriage

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278. As Professor Stephanie Coontz has argued, “[a] woman who marries a man with few job prospects may end up having to support him as well as their children. Even if the marriage does improve her economic well-being, its stability may be undermined by chronic economic and neighborhood stress.” STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 288 (2005) (noting that low-income women who marry and divorce later have higher poverty rates than women who never marry at all, and their children may suffer more emotionally as well). The divorce rate for people who live below the poverty rate is twice as high as that of the general population. See Kathleen Mullan Harris, *Family Structure, Poverty and Family Well-Being*, 10 EMP. RTS. & EMP. POL’Y 45, 57 (2006).

rates for low-income parents, something that the Bush administration's marriage promotion campaign did not do.<sup>279</sup> As noted, low-income unmarried mothers want to marry but do not believe that they can afford to do so since the partners available to them are often unemployed and have limited economic opportunities.<sup>280</sup> As other scholars have argued, by providing greater economic opportunities for low-income parents, the government actually promotes stable marriages, thereby making marriage less "risky" for low-income mothers who want to marry but cannot afford to marry someone who will be an economic burden.<sup>281</sup> Marriage rates for low-income men and women are significantly lower than those of middle-class Americans.<sup>282</sup> By decreasing the income gap, the government might decrease the marriage gap.

Although the Obama administration's plan is a step in the right direction, societal disapproval of nonmarital families will remain so long as courts continue to suggest that the state's goal in creating and supporting heterosexual marriage is to "discourage unmarried childbearing."<sup>283</sup> These courts have been concerned with the issue before them—whether denial of the right to marry to same-sex couples violates the state constitution. They probably never envisioned that their decisions might signal that nonmarital families and their children are deviant. Nevertheless, courts must be vigilant and take care not to inadvertently stigmatize nonmarital children.

## VI. CONCLUSION

Some readers have asked whether, in adopting PRWORA, the Healthy Marriage Initiative, and Justice Cordy's marriage and procreation argument, lawmakers might have sought to intentionally stigmatize nonmarital families precisely because the societal stigma of illegitimacy has decreased in recent years. While anything is possible,<sup>284</sup> I prefer to

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279. David Ray Papke, *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 IND. L. REV. 583, 594–95 (2009) (noting that marriage promotion programs did not lead low-income parents to marry).

280. EDIN & KEFALAS, *supra* note 214, at 6; Martha Albertson Fineman, *The Nature of Dependencies and Welfare Reform*, 36 SANTA CLARA L. REV. 287, 306 n.41 (1996) (noting that, "Poor men are the most likely partners for poor women."); Jason DeParle, *Raising Kevion*, N.Y. TIMES, Aug. 22, 2004, <http://www.nytimes.com/2004/08/22/magazine/raising-kevion.html> (noting that only 52% of young, unskilled African-American men reported having job in late 1990s).

281. See Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J.L. FAM. L. STUD. 279 (2008); Julie Nice, *Promoting Marriage Experimentation: A Class Act?*, 24 WASH. U. J.L. & POL'Y 31, 38 (2007); Papke, *supra* note 279, at 591 (discussing studies finding that lack of financial stability is the most common barrier to marriage).

282. Papke, *supra* note 279, at 589 (citing study finding that, as of 2005, poor men and women were half as likely to marry as individuals with incomes at least three times above the poverty level).

283. *Hernandez v. Robles*, 26 A.D.3d 98, 104 (N.Y. App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006).

284. One commentator proposed denying any economic support to single mothers, including subsidized housing and food stamps, in part, because it will serve to "regenerate" stigma—"to make

believe that lawmakers are not actively seeking to disadvantage nonmarital children or to encourage societal disapproval of children who have no control over the actions of their parents. In the end, it may not matter whether the law's express or tacit disapproval of nonmarital families is intentional or inadvertent. The tangible and intangible harms to nonmarital children are the same and should be removed.

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an illegitimate birth the socially horrific act it used to be." See Murray, *supra* note 13; cf. Papke, *supra* note 279, at 596 (arguing that, "[M]arriage promotion programs implicitly, and sometimes explicitly, deplore the poor for their lifestyles.").