**Hastings Law Journal**

Volume 63 | Issue 5 Article 6

6-2012

# A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections

Allison Anna Tait

# A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections

ALLISON ANNA TAIT*

*Cases targeting family regulation in the 1970s turned, for the first time, on three contrasting and sometimes competing theories of the family: historical households, earned belonging, and natural connections. This Article introduces and defines these three theories and offers a descriptive account of how the theories were used by litigants and the Supreme Court alike to measure discrimination, evaluate the rights of individual family members, and, often, increase household equality. The theory of historical households, developed with great success by Ruth Bader Ginsburg, invoked a Blackstonian family defined by gender hierarchy and the law of coverture, and posited that this model was in need of legal reordering. Earned belonging, offered by Ginsburg as a replacement for historical households, presented a new and more democratic family theory centered on ideas of conduct-based outcomes. The earned belonging theory proposed that an individual could earn her full place in the family through positive conduct and performance. The theory of natural connections, on the contrary, promoted received wisdom about family ordering based on biologic "truths" about sex-based differences. Courts operating according to natural connections theory privileged maternal rights, rejected many paternal claims, and affirmed laws promoting the nuclear, or natural, family. The work of this Article is to present a new and synthetic reading of cases about wives, illegitimate children, and unwed fathers that follows these three logics, revealing how they weave together and why earned belonging provides the strongest support for Ginsburg's original vision of an equalized household.*

* Gender Equity and Policy Postdoctoral Associate, Yale Women Faculty Forum; J.D., Yale Law School, 2011. I owe particular thanks to Joan Williams for inviting me to contribute to this issue and for her many helpful comments. Many thanks also to Ann Alstott and John Langbein for early comments that were useful in shaping the Article; to Judith Resnik for her thoughts, suggestions, and continual support; to Brian Soucek for his feedback; and to Luke Norris for never tiring of talking about the Article or reading revisions. Thanks also to the editors for their wonderful work bringing this Article to publication.

## Table of Contents



## Introduction: The Three Logics of the Family

Every family has a story.[1] And whether happy or unhappy, small or large, every family faces similar questions about household governance, the permeability of family boundaries, and the allocation of resources.

1. With this statement, I invoke Tolstoy, who famously began *Anna Karenina* with the sentence, "All happy families resemble one another, each unhappy family is unhappy in its own way." Leo Tolstoy, Anna Karenina 1 (Louise Maude & Aylmer Maude trans., Oxford Press 1995) (1877).

Courts, when asked to intervene, have reasoned through cases about rights based in the family using various arguments and doctrines about marriage and the best interests of the child to determine benefit allocation, custody, and marital rights. This Article proposes the idea that cases targeting family regulation in the 1970s turned, for the first time, on three contrasting—and sometimes competing—theories of the family in order to determine questions of discrimination, gender typecasting, and the scope of family inclusion. The three blueprints for the family—invoked by advocates and the Supreme Court alike—were theories about historical households, earned belonging, and natural connections. This Article introduces and explicates these three theories for family ordering and subsequently explores the contexts in which they appeared—cases about economic entitlements for husbands and wives, cases about the economic rights of illegitimate children, and cases involving the parenting rights of unwed fathers—offering a new and synthetic reading of these cases based on the theories of the family that are intricately woven through them.

The three forms of logic, which defined the parameters as well as the stakes of family inclusion, first appeared together and coalesced as parts of a dialogue about family in the 1970s. Between 1968 and 1972, three cases—*Levy v. Louisiana*,[2] *Reed v. Reed*,[3] and *Stanley v. Illinois*[4]—all came before the Supreme Court and set the stage for deliberation over rights within the family and family belonging. Leveraging equal protection and due process claims, *Reed*, *Levy*, and *Stanley* formed a triumvirate that heralded a new period of debate about the family and marked a new phase of advocacy efforts to end the multiple forms of separate spheres that restricted family equality. The trio of cases also marked a new phase of judicial understanding about the family, brought about by the Court's confrontation of a range of claims made by wives, illegitimate children, and unwed fathers. The Court connected these seemingly dissimilar claims in synthetic ways, referencing each in discussion of the other and generating a rich analysis about the family as a working unit. During this time—the decade ushered in by *Reed*, *Levy*, and *Stanley* and defined by the cases that followed—the three theories of historical households, earned belonging, and natural connections were very much at the forefront of conversation. These three logics, deployed by advocates and the Court, shaped the contours of conversation, determined the outcome of cases, and set in place the architecture of family definition.

2. 391 U.S. 68 (1968).
3. 404 U.S. 71 (1971).
4. 405 U.S. 645 (1972).

### A. Historical Households

The theory of the historical household posited an outdated, Blackstonian image of family,[5] regulated by the master-servant relationship as embedded in domestic relations law,[6] and proposed that this household was antiquated, out of step with the modern social landscape and in need of legal reordering. Arguing from history enabled the conclusion that the discriminatory legal architecture of the family was the product of a past bias, stemming from historical contingency and not essential reason. This argument from history was substantively developed and favored by Ruth Bader Ginsburg as an advocate and litigator. At the helm of the ACLU Women's Rights Project, Ginsburg continually pushed the Court to reject the historical form of the household and acknowledge the shifting cultural landscape of marriage and family.[7] Social change driven by economic need and cultural trends—women entering the workforce and the decline of the traditional family—gave substance to these claims for reordering.[8] As Ginsburg wrote, "Changes pervasively affecting society set the stage. By the late 1960's, a revived feminist movement spotlighted those changes."[9] By the 1970s, Ginsburg—using the historical household theory—suggested it was time to modify and reform the ossified legal system that regulated family interactions and household rights.[10]

Accordingly, Ginsburg struck out against this system with her vision of equal citizenship and an equalized household. Ginsburg's goal, aligned with a broad feminist push to reshape the family, was to "open up that institution to critical scrutiny and question the justice of a legal regime that . . . permitted, even reinforced, the subordination of some family

---

5. *See* 1 William Blackstone, Commentaries on the laws of England 430 (Robert Bell ed., Layston Press 1967) (1765). For a treatise on the law of husband and wife in the American context, see James Clancy, A Treatise of the Rights, Duties and Liabilities of Husband and Wife 1 (photo. reprint 2010) (1828).

6. For a discussion of the original master-servant orientation of family law as well as its transformation, see Janet Halley, *What is Family Law?: A Genealogy, Part I*, 23 Yale J.L. & Human. 1, 2 (2011).

7. *See infra* Part I.

8. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. U. L.Q. 161, 167–68.

9. Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 Tul. L. Rev. 451, 457 (1978).

10. Family law was not the only legal domain in which ossified statutes riddled the books. For example, the 1970s saw the demise of mortmain statues in a number of states through either legislative repeal or a ruling of unconstitutionality. *See* Shirley Norwood Jones, *The Demise of Mortmain in the United States*, 12 Miss. C. L. Rev. 407, 458 (1992). Guido Calabresi describes the phenomenon as "Choking on Statutes" and discusses the judicial role in addressing legal obsolescence, as he calls the problem of outdated statutes. *See* Guido Calabresi, A Common Law for the Age of Statutes 1 (1982). Calabresi writes about the use of constitutional law, and the equal protection doctrine in particular, to remedy these obsolescences. In this context, Calabresi mentions sex discrimination cases, in particular *Wiesenfeld* and *Goldfarb*, and mentions the Court's debate over whether or not the statutes in question were "archaic." *Id.* at 9–10.

members to others."[11] In litigating cases, Ginsburg both uncovered discriminatory historical practices and gave the Court the tool of historical analysis with which to understand social change. "Ginsburg's antistereotyping approach was not simply hostile to sex classification or sex differentiation; she opposed traditional sex stereotypes insofar as they were part of a system of social roles and understandings that anchored women's inequality."[12] The goal was to "liberate individuals and families from the paternalism of the previous era,"[13] and Ginsburg developed "new claims voiced in terms of individual rights, autonomy, and equality."[14] The civil rights movement provided a model for new equality claims, and the women's rights movement introduced that model into the household, transforming the home into a locus of substantive transformation and exemplary social reordering.

History, Ginsburg taught her colleagues and members of the Court, was a way of marking change, a method for identifying disjunctive moments when law did not match social realities, and a tool for revealing the constructed quality of gendered assumptions. And while history certainly had other uses and senses, this was the dominant set of meanings mobilized by Ginsburg in her argumentation before the Supreme Court. Ginsburg, reviewing the work of the Court in the 1970s, wrote, "[T]he Supreme Court . . . has been tugged in a new direction by arguments urging accommodation of constitutional doctrine to a changed social climate."[15] It was Ginsburg herself who tugged the Court in the direction of overturning history, suggesting that household regulation should mirror contemporary and actual practice rather than historical assumption and inherited conventions.[16]

### B. Earned Belonging

The second vector of analysis, promoted by both advocates and the Court as a measure of the rights of individual family members, was the idea of earned treatment and belonging. The earnings argument was a new argument putting forth the idea that even though individuals acquired family relationships through birth and marriage, they truly earned legal rights of family belonging and resource sharing though

11. Katharine T. Bartlett, *Feminism and Family Law*, 33 Fam. L.Q. 475, 475 (1999).

12. Reva Siegel & Neil Siegel, Struck *by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 Duke L.J., 771, 789–90 (2010).

13. Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890–1990*, 28 Ind. L. Rev. 273, 289 (1995).

14. *Id*.

15. Ginsburg, *supra* note 8, at 171. Ginsburg also noted that the path to progress was rocky because "original understanding" presented a counterweight to doctrinal change. *Id.* "It is more difficult to elaborate bold doctrine regarding sex discrimination when even a starting point is impossible to anchor to the constitutional fathers' design." *Id.* at 172.

16. *See infra* Part I.

personal investment and conduct.[17] At its core, the earnings theory was one of earned treatment, just reward, and conduct-based regulation. The earnings theory was especially useful at this point in time because it provided an alternative to the historical household argument. Often both advocates and the Court proffered it to fill the void left when historical household regulation was found to be unconstitutional and impermissibly discriminatory. Earnings theory was a replacement for historical households, a new and more democratic family theory that centered on ideas of economic justice and reward for hard work.

Ginsburg promoted the earnings logic in the *Reed* brief, stating the case for "women seeking to be judged on their individual merits."[18] Invoking the race analogy in the context of equal protection, Ginsburg explained the replacement of history with earnings: "Through a process of social evolution, racial distinctions have become unacceptable. The old social consensus that race was a clear indication of inferiority has yielded to the notion that race is unrelated to ability or performance."[19] The status of women, Ginsburg argued, was undergoing the same transformation—from social consensus that gender confined a woman to the home and an inferior position both within and outside of the household to more modern notions of performance-based assessment—and therefore deserved legal protection. Women deserved, according to this logic of earnings, to have their work valued equally with the work of men; likewise, wives and husbands were entitled to equal statutory benefits because each spouse had invested labor and worked hard to provide comfort and security for the other.

It was no different with the status of illegitimate children. Reiterating the holding of the Supreme Court that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,"[20] advocates for illegitimate children proposed that it was time to replace history with earnings. The Court agreed and spelled out the argument very clearly in *Weber v. Aetna Casualty and Surety Co.*, with Justice Powell writing that "imposing 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."[21] Illegitimate children were entitled to family benefits because they were participating—and blameless—members of an informal family unit. These "hapless children" who suffered from unjust

17. *See infra* Part II.
18. Brief for Appellant at 10, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4).
19. *Id.* at 16.
20. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
21. 406 U.S. 164, 175 (1972).

"social opprobrium"[22] had done nothing to earn their marginal social status or being barred from recovering the same economic benefits legitimate children received. Wives and illegitimate children had, in this view, earned the right to be judged according to merit just as they had not earned the penalties accorded to them because of stereotyping and bias. The earnings theory provided a new standard for family participation and inclusion, and introduced the idea that an individual could earn her full place in the family (and her right to family resources) through positive conduct and performance.

### C. Natural Connections

The natural connections argument represented a logic on the opposite end of the spectrum from the historical household logic, promoting received wisdom about gender roles and family ordering based on biologic "truths" about sex-based differences. The theory of natural connections embraced motherhood, rejected many forms of paternal involvement in child rearing, and vigorously protected the model of the nuclear, or *natural*, family. "The nuclear family," in determinations made using the natural connections theory, was "sanctified as neutral, essential, and inevitable."[23] According to this theory, the nuclear family represented nature expressed in family design.

This "traditional legal family"[24]—which was, of course, a historical construct in its own right[25]—"counted as sacred because it expresse[d] and reformulate[d] images of 'appropriateness' or 'naturalness' found in the larger society."[26] These notions of naturalness in the family correlated with sociocultural values of "monogamy, procreation, industriousness, [and] insularity."[27] The nuclear or natural family was based primarily on an established sexual tie between a man and woman, and the Court paid serious attention in the adoption cases to the relationship between the mother and father, making plain "[c]onstitutional doctrine's clear

---

22. *Id.* at 176.

23. Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 Utah L. Rev. 387, 390. Martha Fineman writes that the

> veneration of the nuclear family is coercive, with the state through its regulatory mechanisms (whether they be the criminal justice system, child welfare laws, or tax codes and other regulatory civil laws) defining and securing for the nuclear family a privileged if not exclusive position in regard to the sanctified ordering of intimacy.

*Id.* at 388–89.

24. *Id.* at 390.

25. *See* Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. Chi. Legal F. 1, 2. Fineman states that the nuclear family was "[d]efined initially through religious precepts in ecclesiastical courts in England" and historically constructed from there. *Id.*

26. Fineman, *supra* note 23, at 390.

27. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 Yale L.J. 1236, 1256–57 (2010).

preference for the marital nuclear family above other alternatives."[28] The parental relationship also constituted a major part of the nuclear family, and the other *natural* relationship that held great purchase in judicial reasoning was the mother-child relationship. Opinions in the adoption cases cited to anthropological literature positing a unique relationship between a mother and her child—a relationship not available to the father—and repeated supposed common knowledge that unwed fathers were uninterested parents.[29]

Reasoning about natural family connections and the natural family unit provided a form of judicial analysis to counter the historical household theory. Primarily, the natural family theory came up in the context of unwed fathers and their rights to block adoptions or gain custody rights.[30] Analyzing cases about the rights of unwed fathers, the Court focused not on the arc of history but rather on the state of nature. If history had any place in this analysis, a quick scan of custom reinforced for the Court the idea that an unwed father's historical positioning neither encouraged nor tolerated the unwed father to become a parent. History, in the context of the unwed father, did not lay bare aged constructs of discrimination but rather confirmed the naturalness of conventional assumptions.

The natural connections argument also highlighted the limits of the earnings argument, overcoming evidence of earned belonging with truisms about the natural—and different—characteristics of men and women as parents. The earnings criteria often worked against unwed fathers and confirmed their role as nonparticipants in the family. Some adoption cases suggested that unwed fathers had not earned a right to contest the adoption of their children because they had not contributed sufficient income or other resources to the family unit. These same cases also suggested that the unwed father had failed to earn the right to parenthood because he had failed to belong to the nuclear family in a cognizable way—engaging in a marriage-like relationship with the mother and being a parent of the daily household.[31]

The work of this Article, then, is to follow these three logics through the cases about wives, illegitimate children, and unwed fathers, uncovering when and how they thread together. Part I of the Article is an analysis of the historical household theory at work in many of the cases that Ruth Bader Ginsburg helped to litigate while at the helm of the ACLU's

---

28. *Id.* at 1252. Alice Ristroph and Melissa Murray posit the importance and primacy of the "marriage model" in Supreme Court jurisprudence. *Id.* ("As a general matter, marriage historically has been a conduit to family formation, as law channeled individuals (and their sexual behavior) into marriage, and from marriage into coupled parenthood.").

29. *See infra* Part III.

30. *See infra* Part III.

31. *See infra* Part III.B.

Women's Rights Project. In the brief for *Reed*, Ginsburg set out the historical argument for modern gender equality, and subsequent cases continued to showcase the historical discrimination that women suffered, particularly the economic disability inflicted on women by outdated coverture laws. Part II offers a reading of the illegitimacy cases, starting with *Levy*, and explores the full articulation of the earned belonging theory. This Part analyzes how these cases cemented the rights of illegitimate children by affirming the unearned nature of their unequal treatment. Part III of the Article addresses the unwed father cases and the alternate analytic framework of natural connections that the Court used in considering the question of adoption rights. This Part illustrates how the natural connections theory countered the historical household and limited the effectiveness of earned belonging. The Article introduces and defines three theories of the family and then offers a descriptive account of how these theories were used by litigants and the Court to increase household equality, measure discrimination, and evaluate the rights of individual family members. The Article investigates the benefits as well as the burdens of these logics individually and describes how and at what points they intersect, ultimately suggesting a normative preference for family design based the ideology of earned treatment and intimate investment.

## I. HUSBANDS, WIVES, AND HOME ECONOMICS

Spearheading and collaborating with colleagues to effect much of the change that transformed the household in the 1970s was Ruth Bader Ginsburg. A scholar of civil procedure and a comparativist who was interested in Sweden, Ginsburg created the ACLU Women's Rights Project in 1972 and was at the forefront of gender litigation in the 1970s.[32] Ginsburg wrote numerous briefs for Supreme Court cases, argued frequently before the Supreme Court, and still continued to publish as a legal and constitutional scholar.[33] Excelling in each of these roles, her vision of an equalized household was a guiding compass in the project of dismantling the barriers that created separate domains for different categories of family members. A pioneer in bringing sophisticated understandings of gender politics to law, Ginsburg's vision of gender equality held that men and women would "create new traditions by their actions, if artificial barriers [were] removed, and avenues of opportunity held open to them."[34] A first step in instantiating this vision was getting

32. *See Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff.

33. Carol Pressman, *The House That Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L. SCH. J. HUM. RTS. 311, 314–15 (1998).

34. KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, SEX-BASED DISCRIMINATION: TEXT, CASES, AND MATERIALS, at xii–xiii (1974).

the Court to strike down "[t]housands of state laws, most of them historical hangovers, [that] typecast men and women."[35] Litigating *Reed v. Reed* was an important opening move. *Reed* gave Ginsburg the full opportunity to articulate both her analysis of historical gender discrimination as well as her understanding of the untenable way in which "historical hangovers"[36] were negatively impacting women's equal opportunity. *Reed* was a foundational underpinning in Ginsburg's strategy to equalize the rights held by men and women with respect to home management and economy. The broad goal was nothing less than the disruption and end of coverture law.

### A. *REED V. REED*: DISMANTLING THE HISTORIC HOUSEHOLD

The facts in *Reed* were simple and allowed Ginsburg to press forcefully on the idea of legal "historical hangovers." When Richard Lynn Reed, the adopted son of Sally and Cecil Reed, died intestate on March 29, 1967, his parents—and only heirs—were separated and living apart.[37] Sally Reed went to the Ada County courthouse in Idaho and filed her petition for probate of her son's estate, requesting that she be named administrator of his estate.[38] Cecil Reed also petitioned the court for letters of administration.[39] The probate court entered an order appointing Cecil Reed administrator, noting that each of the parties was equally entitled to letters of administration under the Idaho probate code,[40] but that the probate code also entitled Mr. Reed to preference on account of his sex.[41] The relevant provision in the probate code stated: "Of several persons claiming and equally entitled . . . to administer, males must be preferred to females, and relatives of the whole to those of the half blood."[42] Sally Reed appealed and the Idaho district court reversed the order of the probate court on the grounds that it violated the Equal Protection Clause. Cecil Reed subsequently appealed to the Supreme Court of Idaho, who reversed the district court,[43] and the case finally made its way to the U.S. Supreme Court.

Writing the brief for the Supreme Court case, Ginsburg began with a substantive overview of the historical landscape informing the gendered partitioning of separate spheres. Citing to Blackstone's famous

35. Ginsburg, *supra* note 8, at 174.
36. *Id.*
37. Reed v. Reed, 404 U.S. 71, 71 (1971).
38. *Id.* at 71–72.
39. *Id.* at 72.
40. *Id.* at 73.
41. *Id.*
42. *Id.* (quoting IDAHO CODE ANN. § 15-314 (1942)).
43. *Id.* at 74.

formulation of coverture[44] as well as to Tennyson's verse, Ginsburg hit the historical note, observing that the "common law heritage, a source of pride for men, marked the wife as her husband's chattel, 'something better than his dog, a little dearer than his horse.'"[45] That concept of family governance, she suggested, still held strong in the modern formulation of "head of the family" and served as an organizing principle for family life. In many states, Ginsburg pointed out, "head of household" statutes were still on the books.[46] An Idaho statute, on the books at the time, stated that: "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto."[47] These laws—holdovers from coverture—were ubiquitous in both federal and state statutory regulation and gave men, as heads of household, all rights of family governance, including the right to choose a domicile and the right to manage and allocate family assets.[48] In contrast, married women suffered from a range of disabilities due to their status as wives. Wives had limited ability to engage in independent business outside the home (following the historic sole trader laws) and often were unable to act as full and independent financial agents, for example as a guarantor for assets.[49] An appendix to the *Reed* brief listed nine areas, ranging from the right to determine domicile to the preference for males in guardianship of minors and as estate administrators, in which coverture law embedded in statutes still detrimentally affected married women.[50]

Case law, Ginsburg suggested, was little better, and the common law tradition also made manifest the discrimination and typecasting that continued to plague women, most especially married women.[51] Only a decade before *Reed*, in *Hoyt v. Florida*, the Court had stated that the "woman is still regarded as the center of home and family life."[52] Citing other examples of the "Victorian" thinking that still held sway in the form of persistent gender stereotyping, Ginsburg also referred to *Goesaert v. Cleary*,[53] in which the Court had upheld a Michigan law

44. Brief for Appellant, *supra* note 18, at 27–28. Blackstone's formulation of coverture was that "the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 BLACKSTONE, *supra* note 5, at 442; *see* Brief for Appellant, *supra* note 18, at 28.

45. Brief for Appellant, *supra* note 18, at 27 (citing ALFRED LORD TENNYSON, *Locksley Hall*, *in* POEMS (1842)).

46. *Id.* at 32.

47. *Id.* (quoting IDAHO CODE ANN. § 32-902 (1942)).

48. *See, e.g.*, *id.* at 69–88.

49. *See id.* at 60–65.

50. *Id.* at 69–88.

51. *See id.* at 41–54.

52. 368 U.S. 57, 62 (1961).

53. 335 U.S. 464 (1948).

prohibiting women from serving as bartenders (but allowing them to be waitresses in a bar): "The majority opinion in *Goesaert* reflects an antiquarian male attitude towards women—man as provider, man as protector, man as guardian of female morality."[54] Both statutes and cases, Ginsburg concluded, "illustrate [that] the law-sanctioned subordination of wife to husband, mother to father, woman to man, is not yet extinguished in this country."[55] Historic household status was still circumscribing the place and power of modern women who, Ginsburg believed, deserved a position within and opportunity outside of the household equal to men.

Clarifying the notion that this historical discrimination was based on nothing other than the accident of gender and bolstering the idea of historical discrimination's modern inappositeness, Ginsburg's approach was to put the analogy between race and gender front and center. Drawing on the work of Pauli Murray, Ginsburg wrote that "[l]egal and social proscriptions based upon race and sex have often been identical, and have generally implied the inherent inferiority of the proscribed class to a dominant group. Both classes have been defined by, and subordinated to, the same power group—white males."[56] The relationship between the two identity groups was more, however, than a strict historical transference of race-based claims into the domain of gender. Ginsburg suggested that there was a fluid boundary between the two groups:

> [H]istory of western culture, and particularly of ecclesiastical and English common law, suggests that the traditionally subordinate status of women provided models for the oppression of other groups. The treatment of a woman as her husband's property, as subject to his corporal punishment, as incompetent to testify under canon law, and as subject to numerous legal and social restrictions based upon sex, were precedents for the later treatment of slaves.[57]

Race and gender both were historical markers of inequality that were mutually reinforcing, justified through the logic of the dominant class, and made visible through household organization. Race and gender

---

54. Brief for Appellant, *supra* note 18, at 46.

55. *Id.* at 48.

56. *Id.* at 18–19. As Reva Siegel has explained regarding the durability of historical household hierarchy,

> Anglo-American common law situated persons in explicitly hierarchical relationships. Thus, the common law organized the "domestic" relations of husband/wife and master/servant as relations of governance and dependence, with the law specifying the rights and obligations of superior and inferior parties. The American common law modeled chattel slavery on this "domestic" analogue as well.

Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1114 (1997) (quoting Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253, 257 (1971)).

57. Brief for Appellant, *supra* note 18, at 18.

were, as Ginsburg emphasized, "categories of differentiation" that had been similarly deployed in order to justify unequal treatment.[58]

What the race analogy also stressed was that discriminatory treatment based on either race or gender was both unearned and undeserved.[59] In this "grandmother brief"[60]—the matriarch and progenitor of a string of briefs that would come after *Reed*—Ginsburg was "seeking to demonstrate that in most contexts, to make assumptions about individuals based on such immutable characteristics was a violation of basic principles of equality and fairness."[61] Discrimination on the basis of gender had no grounding in individual behavior and was therefore injurious because of the lack of correspondence between personal action and earned outcome.[62] Ginsburg highlighted this idea by stating that it was "impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control."[63] For Ginsburg, one signal importance of the race-gender analogy was located in the idea that gender, like race, was not an intrinsic marker of blame or reward and therefore could not be a factor in creating structures of legal disadvantage. "Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference."[64] Determining the capacity of an individual to be an estate administrator on the basis of sex, Ginsburg argued, was invalid because "differences between the sexes bear no relationship to the duties performed by an administrator."[65] History was not, in fact, destiny, and Ginsburg stated that "however much some men may wish to preserve Victorian notions about woman's relation to man, and the 'proper' role of women in society, the law cannot provide support for obsolete male prejudices or translate them into statutes that enforce sex-based discrimination."[66]

The Supreme Court agreed. Chief Justice Burger, writing for the Court, found that legitimate state interests in avoiding intrafamily conflict

---

58. *See* Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1798 (2008).

59. Brief for Appellant, *supra* note 18, at 20.

60. Mayeri, *supra* note 58, at 1798.

61. *Id.*

62. Brief for Appellant, *supra* note 18, at 5–6.

63. *Id.* at 5.

64. *Id.*

65. *Id.* at 7. Because gender was like race, gender also deserved to occupy a special status in legal analysis as a "'suspect classification' requiring close judicial scrutiny." *Id.* at 5. Invoking the heightened scrutiny applied to race-based cases, Ginsburg stated that "the Idaho Code, mandating subordination of women to men without regard to individual capacity, creates a 'suspect classification' for which no compelling justification can be shown." *Id.* at 9.

66. *Id.* at 46.

and expediting probate court processes by giving preference to men as administrators did not overcome the need to consider women as mandated by equal protection law.[67] With this holding, the Court signaled a new judicial understanding of gender and gave voice to the great possibility that gender-based law reflected historical prejudices rather than natural capacities. Likewise, the decision signaled that local rules governing private household economies were subject to constitutional analysis and intervention, putting states on notice. In the constellation of cases that Ginsburg and her colleagues argued following *Reed*, the Court's understanding of gender as a historical construct deepened and the Court struck down a panoply of "archaic"[68] laws meant to perpetuate gender stereotypes about household provisioning and to entrench the notion of the traditional separate spheres. In the same cases, the Court also picked up on Ginsburg's implicit proposition that equal treatment meant evaluating family members according to their contributions and earned rights instead of historical household status. In this way, the Court began to work out a theory of the family absent historical values and based on the concept of earning.

### B. Rejecting "Archaic" Law and Rewarding Work

On the heels of *Reed*, Ginsburg found a cadre of new cases that, like *Reed*, highlighted how outdated assumptions about household provisioning still animated law. Using tactics similar to those in *Reed*, Ginsburg focused on the unequal treatment of men and women who were similarly situated and strategically took on cases that showcased men being victimized by the gender presumptions inherent in both state and federal statutes. Focusing on formal equality enriched by an antistereotyping principle, as Cary Franklin notes, "Ginsburg pressed the claims of male plaintiffs in order to promote a new theory of equal protection founded on an antistereotyping principle. . . . [that] dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles."[69] Cases like *Frontiero v. Richardson*,[70] *Weinberger v. Wiesenfeld*,[71] and *Califano v. Goldfarb*[72] all

67. Reed v. Reed, 404 U.S. 71, 76–77 (1971). "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 76. Justice Burger also went so far as to mention that, although the Court had not been asked to rule on any question concerning the section that set out the order of preference for administrators—rather the challenge was to the "modifying appendage" that gave direction in cases of conflict—the question of gender equity was equally present in that section as well because of the higher level of preference given to brothers over sisters in the hierarchy. *Id.* at 77.

68. Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975).

69. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 88 (2010).

70. 411 U.S. 677 (1973).

targeted statutes based on the logic of coverture—presuming that a wife had no economic identity apart from her husband—and Ginsburg litigated these cases to redress the gender inequity embedded in the statutory allotment of economic benefits. These cases struck at the dying heart of coverture and effectively eliminated persistent traces of a wife's economic disability that still existed in both state and federal statutory schemes. The cases also did significant work in undoing the gender-based typecasting that created and perpetuated the notion of separate spheres for husbands and wives. Women, as Ginsburg argued in her brief for *Reed*, could no longer be relegated to a domestic sphere while men exclusively participated in the sphere of the market and economic earning.[73] In deciding these cases, the Court demonstrated a strong sense of the need to replace historical understandings of gender roles as evident in statutory schemes with an updated concept of the family. As the series of cases unfolded, the Court worked through and began to articulate just such an updated concept, based on ideas of work, earnings, and just reward.

### *1. The Reality of Romantic Paternalism: "Not on a Pedestal, but in a Cage"*

Two years after *Reed* came *Frontiero v. Richardson*, a due process case about the unequal allotment of military benefits to spouses according to gender and the first case that Ginsburg tried before the Supreme Court.[74] The question at hand was why the military automatically granted certain benefits to a serviceman with a wife, but required a servicewoman to prove that her husband was dependent on her for more than one-half of his support.[75] Justice Brennan, writing for the plurality, came out in strong support of Frontiero's claim and, following Ginsburg's argument from *Reed*, went to great lengths to highlight the historical discrimination faced by women. Using and citing a substantial amount of material from Ginsburg's *Reed* brief,[76] Brennan wrote: "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism'

71. 420 U.S. 636.

72. 430 U.S. 199 (1977).

73. Brief for Appellant, *supra* note 18, at 25–26.

74. 411 U.S. at 678–79.

75. *Id.*

76. Justice Brennan cites to KIRSTEN AMUNDSEN, THE SILENCED MAJORITY: WOMEN AND AMERICAN DEMOCRACY (1971); LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969); GUNNAR MYRDAL, AN AMERICAN DILEMMA 1073 (20th anniversary ed. 1962); THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE (1970); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971).

which, in practical effect, put women, not on a pedestal, but in a cage."[77] Demonstrating a strong responsiveness to the historical argument and the logic of legal modernization, Justice Brennan remarked on the changing status of women in American society, saying, "It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination."[78] Justice Brennan also observed that institutional change was afoot, adding that "over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications."[79]

Continuing to reason from history, Brennan adopted Ginsburg's analogy between gender- and race-based discrimination to highlight the burden of historical discrimination that women had faced because of coverture law:

> [O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.[80]

Intent on finding the structural parallels, Justice Brennan may have elided some of the more subtle and connective parts of Ginsburg's analogy, failing to recognize the unique history of gender discrimination[81] or the intersectionality between race and gender claims.[82] Nonetheless, the analogy proved eminently useful in the sense that "it recast practices

---

77. *Frontiero*, 411 U.S. at 685. Justice Brennan observed (as Ginsburg had in both the *Frontiero* and *Reed* briefs) that, while conditions for women were improving, women still constituted a minority in positions of political and economic power. *Id.* at 686. Justice Brennan mentioned, pointedly, that there had never been "a female member of this Court." *Id.* at 686 n.17.

78. *Id.* at 685–86 (footnotes omitted).

79. *Id.* at 687.

80. *Id.* at 685.

81. Reva Siegel has pointed out that "the analogy between race and sex that founds sex discrimination jurisprudence would seem to be premised on the assumption that there is no constitutional history of relevance to sex discrimination law." Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 963 (2002). Siegel suggests that, while history is a directive principle in *Frontiero*, there "is no suggestion in *Frontiero*, or in subsequent opinions of the Court, that history might help identify the traditional sites or distinctive forms of discrimination directed against women." *Id.* at 962.

82. Serena Mayeri notes, "Although the WRP briefs recounted the interconnections between struggles for racial justice and women's rights campaigns, the analogy articulated by Justice Brennan in the *Frontiero* plurality opinion was merely comparative rather than connective." Serena Mayeri, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1075 (2001).

once viewed as chivalric concessions to women as discrimination worthy of redress."[83]

Speculating about the presence of "chivalric concessions" in legislative intent with respect to the differential treatment of male and female servicemembers, Justice Brennan presumed that the intent corresponded with the assumption that "the husband in our society is generally the 'breadwinner' in the family."[84] Whereas *Reed* had challenged the general notion that a man rather than a woman was better suited to administering household affairs, *Frontiero* upended the underlying assumption that gave substance to the "head of household" theory—breadwinning.[85] *Frontiero* was, in this way, a radical extension of *Reed* because the *Frontiero* decision questioned the time-honored assumption that a man was the family breadwinner while his wife was the economic dependent.[86] Contradicting the norms of historical household provisioning, *Frontiero* confronted the Court with a modern example of household ordering in which the wife was the primary breadwinner and the husband her dependent—in contravention of all the premises of coverture—and asked why a husband should be disadvantaged solely because he was enacting a nontraditional household status.[87]

Using the dual precedents of *Reed* and *Frontiero*, the Court subsequently proceeded to take on two cases very similar to *Frontiero* in that they involved unequal benefits for men and women. The first, *Weinberger v. Wiesenfeld*, in 1974 involved the Social Security provision gamely entitled "Mother's insurance benefits," which allowed for differential allocation of benefits based on whether the earnings were from a deceased husband and father or a deceased wife and mother.[88] Two years after *Wiesenfeld*, the Social Security Act was once again at issue in *Califano v. Goldfarb*, this time with respect to the Federal Old-Age, Survivors, and Disability Insurance Benefits program.[89] The program regulated survivor benefits such that benefits based on the earnings of a deceased husband were payable to the widow without question, while

83. Mayeri, *supra* note 58, at 1799.

84. *Frontiero*, 411 U.S. at 681. Such an assumption, the district court had suggested, would produce "a considerable saving of administrative expense and manpower." *Id.* at 681–82. Justice Brennan, however, observed that "the Constitution recognizes higher values than speed and efficiency." *Id.* at 690 (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)). And citing subsequently to *Reed*, Justice Brennan concluded that "any statutory scheme which draws a sharp line between the sexes, [s]olely for the purpose of achieving administrative convenience . . . involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].'" *Frontiero*, 411 U.S. at 690 (citing Reed v. Reed, 404 U.S. 71 (1971)).

85. *See* 411 U.S. at 681.

86. *See id.*

87. *See id.*

88. 420 U.S. 636, 638 n.1 (1975).

89. 430 U.S. 199, 201–02 (1977).

benefits on the basis of the earnings of a deceased wife were payable to the widower only if he had been receiving over half of his support from his deceased wife.[90]

Justice Brennan wrote for the Court in both cases and in both decisions he made clear the outdated nature of the legislative assumptions undergirding the statutes. Justice Brennan pointed out in *Wiesenfeld* that the legislative purpose of "Mother's insurance benefits" was to protect widowed mothers who, presumably, were not and never had been a part of the labor market and therefore would require extra support.[91] The opinion stated, however, that this supposition was based on "an 'archaic and overbroad' generalization not tolerated under the Constitution, namely, that male workers' earnings are vital to their families' support, while female workers' earnings do not significantly contribute to families' support."[92] In *Goldfarb*, the inherent presumption was identical—that "wives are usually dependent."[93] Justice Stevens explained, in a concurrence, that "this discrimination against a group of males [was] merely the accidental byproduct of a traditional way of thinking about females."[94] Both Justice Stevens and Justice Brennan repeated the phrasing of *Wiesenfeld* and stated that these presumptions concerning gender and the traditional roles of provider and dependent were "based on 'archaic and overbroad' generalizations"[95] about gender roles and the household economy. Ginsburg, writing about *Goldfarb*, stated that "the Court thus understood that equations of the kind embraced in the Social Security Act, lump classifications still riddling federal and state lawbooks, channel and constrain individuals."[96] In every one of these of the cases, Ginsburg's argument for dismantling the

---

90. *Id.*

91. 420 U.S. at 648–49.

92. *Id.* at 636.

93. 430 U.S at 217.

94. *Id.* at 223 (Stevens, J., concurring). *Wiesenfeld*, besides challenging the idea of the male breadwinner, also brought up the question of the father as parent and challenged the idea that the husband would not be available for or interested in taking care of the child was also out of place in this new family design. 420 U.S. at 651–53.

> [The] fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.

*Id.* at 651–52. Recognizing the dual gender stereotypes at work in the logic of the Act—mothers as good dependents and fathers as unlikely caretakers—Justice Brennan observed that fathers had custody and care rights equal to those of mothers and cited to the case of *Stanley v. Illinois*, 405 U.S. 645 (1972), which the Court had heard three years earlier with the result of increased due process rights for widowers with respect to caretaking claims. *See Goldfarb*, 430 U.S. at 227. The synchronicity between the two cases enabled *Wiesenfeld* to offer a wide window into the allocation of family roles and facilitate a deep understanding of the antistereotyping principle, focusing as the case did on disassembling multiple forms of family stereotypes.

95. *Goldfarb*, 430 U.S. at 207, 224.

96. Ginsburg, *supra* note 9, at 470.

historical household model found favor with the Court, gained new momentum for gender-based claims, and dealt a new blow to the calcified perimeters of separate spheres.

*2. Earned Protection and Dignity for Families*

Building on Ginsburg's argument of earned treatment—that gender-based discrimination was unfair because it failed to recognize the relationship between behavior and outcome—the cases that followed *Reed* also paid great attention, as well as tribute, to the work done by wives on behalf of their families. Ignoring the connection between behavior and reward, the Court concluded in *Frontiero*, was not only unconstitutional but also contravened an American sense of democracy. Citing to *Weber v. Aetna Casualty and Surety Co*., a case about the unequal rights of illegitimate children, Justice Brennan observed that gender-based discrimination violated "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[97] Gender-based categorizations were constitutionally unacceptable because the "sex characteristic frequently bears no relation to ability to perform or contribute to society."[98] The related ideas of performance for and contribution to both polity and family became an organizing principle for family and offered a central value for determining the strength and cohesion of a family.

The Court reiterated this theme from *Frontiero* and connected action with outcome in both *Wiesenfeld* and *Goldfarb*. Paula Wiesenfeld, the Court mentioned, had "worked as a teacher for five years before her marriage, [and] continued teaching after her marriage. Each year she worked, maximum social security contributions were deducted from her salary. Paula's earnings were the couple's principal source of support during the marriage, being substantially larger than those of appellee."[99] Paula Wiesenfeld had put in long hours at work and paid all her social security tax through her paychecks in order to obtain economic security for the family.[100] To withhold her benefits from her husband upon her death, the Court plainly stated, was unfair. Such deprivation meant that Paula Wiesenfeld "not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others."[101] The gender stereotyping inherent in the statute was unconstitutional, the

97. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

98. *Id.*

99. *Wiesenfeld*, 420 U.S. at 639.

100. *Id.* at 645.

101. *Id.*

Court observed, but so was the "gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men."[102]

Similarly, in *Goldfarb*, the Court led with the fact that "Mrs. Hannah Goldfarb worked as a secretary in the New York City public school system for almost 25 years until her death in 1968. During that entire time she paid in full all social security taxes."[103] Hannah Goldfarb was "survived by her husband, Leon Goldfarb . . . a retired federal employee," who applied for widower's benefits and was subsequently denied.[104] Addressing this denial of benefits, the *Goldfarb* Court cited extensively and approvingly from *Wiesenfeld* and reinforced the idea of fair reward for hard work.[105] The Court mentioned at several points in the opinion that "social security taxes were deducted from Hannah Goldfarb's salary during the quarter century she worked as a secretary."[106] As a worker and a wife, the Court concluded, "Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to . . . her husband's welfare should she predecease him."[107] Work done on behalf of the family and to support the family, the Court suggested, was not to be diminished because of statutory historical hangovers that apportioned benefits according to gendered assumptions about breadwinning.[108] Work for the family, in this case Hannah Goldfarb's work done on behalf of the family, was to be valued.

In deciding this set of cases, the Court not only marked the need for law to reflect the historical evolution in household norms but also deployed the earnings argument to equalize entitlements for husbands and wives. In so doing, the Court also provided a logic that pointed the way to a new conception of the earned family.

## II. FROM *FILIUS NULLIUS* TO FAMILY MEMBER

While gender-based distinctions were being debated in the Supreme Court, so too were questions about legitimacy and the rights of nonmarital children.[109] The two conversations were connected. According to Ginsburg, writing as a scholar, the issues of illegitimacy and gender-

102. *Id.*
103. Califano v. Goldfarb, 430 U.S. 199, 202–03 (1977).
104. *Id.* at 203.
105. *See generally id.*
106. *Id.* at 206.
107. *Id.* at 204.
108. *Id.* at 206–07.
109. *See* Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 22 (1977) ("Sex discrimination, discrimination against illegitimate children or their parents, age discrimination, differential treatment on the basis of wealth—all have been debated . . . .").

based discrimination were all part of a litigation strategy meant to challenge "traditional stereotypes,"[110] and the two questions "present[ed] various faces of a single issue: the roles women are to play in society."[111] Judging by the frequency with which Supreme Court decisions about gender and legitimacy referenced one another, it seemed that the Justices also observed an intimate connection between the two concerns. Marital benefits cases like *Frontiero* cited to illegitimacy cases like *Weber*, speaking to the idea of earned treatment. In a dissenting opinion in *Goldfarb*,[112] Justice Rehnquist framed his discussion of constitutional doctrine and suspect classifications around the analogy between gender- and legitimacy-based classifications.[113] Advocates like Harry Krause and Norman Dorsen, working for the ACLU, argued that illegitimacy, like race and gender, was an immutable characteristic that an individual acquired not through default in responsibility but through accident of birth.[114] Additionally, illegitimacy, like race and gender, was a trait that historically had been used to marginalize individuals within the household hierarchy.[115] Even into the 1970s, bastardy laws riddled state statute books, and the regulation of illegitimacy was "an uncertain mixture of old English common law tempered with occasional flashes of modern thought."[116]

Historically, the status of illegitimacy rendered nonmarital children outsiders within the conventional family, prohibited them from inheriting, and branded them with social opprobrium.[117] Continental law, beginning in the late medieval period, held illegitimate children to be a social evil

---

110. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN'S RTS. L. REP. 361, 361 (1992).

111. *Id.*

112. Justice Rehnquist had a string of dissenting opinions. He dissented in *Frontiero*, *Goldfarb*, *Weber*, and *Trimble.* Justice Rehnquist, in his *Goldfarb* dissent, cited administrative convenience and benign discrimination as the reasons for his opposition to the majority decision. Typically, Justice Rehnquist found that there was a rational basis for the discriminatory categories and reiterated that there was no judicial mandate for heightened scrutiny.

113. *Califano*, 430 U.S. at 228–42.

114. *See* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 62 (1971). For a description of the collaboration between Krause and Dorsen, as well as the ACLU's involvement in illegitimacy litigation, see generally Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73 (2003). Davis writes that:

> Within the ACLU, challenges to illegitimacy classifications were reserved for the ACLU's Juvenile Rights Project, which maintained a high level of activity in attacking illegitimacy classifications. As Norman Dorsen recalls, the child-based arguments were so compelling that once they were accepted by the Court in *Levy*, there seemed to be no pressing reason to try a different approach.

*Id*. at 98.

115. KRAUSE, *supra* note 114, at 2–5.

116. Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 831 (1966).

117. KRAUSE, *supra* note 114, at 3.

and a moral outrage.[118] Illegitimate children were barred from holding public office, from appearing in court as a party or witness, and from receiving proper burial.[119] In the common law tradition, illegitimate children were disabled primarily from an economic standpoint. Blackstone described the rights and disabilities of the bastard:

> The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.[120]

The illegitimate child had no surname, no home to claim, no inheritance, and no right to any ancestry. Because of this lack of access to economic resources and support, illegitimate children were often associated with poverty and the social strife endemic to an underclass.[121] This stereotype had strong resonance and persisted well into the twentieth century. "The bastard," one sociologist wrote in 1939, "like the prostitute, thief, and beggar . . . is a living symbol of social irregularity, an undeniable evidence of contramoral forces."[122] Bastardy, as it was named until almost well into the 1960s, was a mark not just of parental sin but also of social disorder brought about by household impropriety and instability. By the late 1960s and 1970s, shifts in norms regarding the family brought about by social and political upheaval led to a reexamination of these types of assumptions about household irregularity.[123] New forms of household arrangement were becoming mainstream, nonmarital households were increasingly common, and the stigma associated with illegitimacy was decreasing accordingly.[124] Advocates for illegitimate children therefore positioned modern-day nonmarital children as a class of individuals deserving of new judicial treatment that reflected these changing family and marital patterns.

In this push for the rights of nonmarital children, the equal protection doctrine was key, just as it was with the gender-based claims of discrimination that Ginsburg and her team were making. Advocates for nonmarital children, such as Norman Dorsen and Harry Krause, carefully invoked the 1943 Supreme Court decision that proclaimed: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded

---

118. *Id.*

119. *Id.*

120. 1 BLACKSTONE, *supra* note 5, at 459.

121. Kingsley Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215, 215–16 (1939).

122. *Id.* at 215.

123. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 347 (2011) ("Societal disapproval of nonmarital childbearing has also decreased as nonmarital births have become more common.").

124. *See* Larry L. Bumpass, *What's Happening to the Family? Interactions Between Demographic and Institutional Change*, 27 DEMOGRAPHY 483, 488–90 (1990).

upon the doctrine of equality."[125] That ancestry did *not* create legal destiny was a foundational claim for the class of nonmarital children. Rewriting roles within the family such that flawed ancestry or inferior household status were not controlling factors was the lodestar of those advocating for the rights of women and nonmarital children. As Ginsburg and her colleagues brought to light, the two classes of individuals were bound together through ties of historic discrimination based on household status and "archaic" stereotypes about the family. *Levy v. Louisiana* was the first step in redeeming the rights of these nonmarital children and overturning another set of statutes that operated on the assumptions of historical heritage rather than earned reward.

### A. *Levy v. Louisiana*: Opening the Door for Nonmarital Children

Writing for the Court in *Levy*, Justice Douglas began with a simple proposition: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[126] With that statement, the Court signaled a significant adjustment to the historical positioning of illegitimate children with respect to inheritance rights by allowing that illegitimate children were, in fact, a class of persons with rights, claims, and protections. *Levy* gave nonmarital children the right to recover for the wrongful death of their mother and marked the beginning of a momentous string of cases that fundamentally modified the rights available to children born outside of the conventional marital household.[127] *Levy* also

---

125. Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Sherrie Anne Bakelar, From "Baggage" to Not "Non-persons": *Levy v. Louisiana* and the Struggle for Equal Rights for "Illegitimate" Children 150–52 (Dec. 1, 2010) (unpublished master thesis, University of Nevada, Las Vegas), *available at* http://digitalcommons.library.unlv.edu/thesesdissertations/746. Writing a dissent in *Labine v. Vincent*, Justice Brennan also cited this line from the *Hirabayashi* decision. 401 U.S. 532, 558 (1971) (Brennan, J., dissenting).

126. Levy v. Louisiana, 391 U.S. 68, 70 (1968).

127. The ACLU and its affiliates had litigated cases that implicated the rights of individuals not embedded in and protected by traditional family relationships earlier in the 1960s as part of a larger civil rights and antipoverty agenda, winning cases such as *King v. Smith*, in which the "man of the house" rule was invalidated and the Court held that aid for dependent children could not be withheld because of a mother's involvement with a "substitute father." 392 U.S. 309, 333 (1968). With *Levy*, however, the focus shifted from combating poverty to creating equal protection for all household members—especially nonmarital children. It was therefore unclear whether or not fundamental rights were at stake. As John Gray and David Rudovsky—two lawyers who helped prepare the *Levy* brief—wrote:

> The Court's characterization of the rights involved is of no small significance. If the right to wrongful death recovery is to be considered "basic" in our constitutional scheme, other economic relationships which similarly can be said to involve "intimate, familial relationships" would also seem to be deserving of special constitutional protections.

John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 U. Pa. L. Rev. 1, 5 (1969). From this

foregrounded the themes that would appear time and time again in the nonmarital children cases—lifting the penalty for illegitimacy from the nonmarital child and recognizing the natural, if informal, relationship that existed between a mother and her nonmarital child.

The Levy family's situation was, as one historian suggests, "a sad one."[128] After feeling unwell for a number of days, Louise Levy was admitted to a local hospital and, due to a series of mistaken diagnoses and negligent care, died there little more than two weeks later.[129] At the time of her death, Levy was mother to and caretaker of five nonmarital children.[130] Bereft of economic support when their mother died, the five children sued for the right to recover under a Louisiana statute.[131] The district court in Louisiana initially dismissed the case, and the court of appeals upheld the district court's decision on the grounds that the state had a legitimate interest in discouraging couples from having children outside of marriage.[132] The Louisiana Supreme Court refused to grant certiorari, and the "Levy children's cause languished until the fall of 1967 when [their lawyer] approached Norman Dorsen about the case and the possibility of arguing it before the U.S. Supreme Court."[133]

Dorsen, a New York University Law School professor and an ACLU colleague of Ginsburg's, agreed to take the case and, by the spring of 1968, it came before the Supreme Court.[134] At issue, according to Dorsen, was not just the historical discrimination that disadvantaged a class of children but also the fact that these nonmarital children had no agency or control over their status as illegitimate.[135] Speaking to the

---

perspective, they continued, "*Levy* may be read to support the emergence of preferred social and economic rights." *Id. Glona v. American Guarantee & Liability Insurance Co.*, decided same year, extended rights to the mother of an illegitimate child, allowing her to recover for her child's wrongful death. 391 U.S. 73, 75–76 (1968).

128. Bakelar, *supra* note 125, at 3.

129. *Id.* at 3–4.

130. *Id.* at 4.

131. The children asked both for damages based on the loss of their mother as well as damages based on the survival of a cause of action that the mother had at the time of her death for pain and suffering. *Levy*, 391 U.S. at 69–70.

132. *Id.* at 70.

133. Bakelar, *supra* note 125, at 7.

134. *Id.* at 7–8.

135. *Id.* at 3, 9–10. While Dorsen could also have chosen to focus on the race of the Levy children, he "did not construct his winning argument around the fact that the Levy children were African-American" and preferred to focus on birth status alone. *Id.* at 3. In this way, "Dorsen's argument became universal, divorcing the status of illegitimate from that of race and rendering immaterial the fact that the Levy children were African-American." *Id.* Despite Dorsen's choice to highlight birth status instead of race, a strong link—demographically and imaginatively—existed between African-American families and illegitimacy. *See* Evelyn M. Kitagawa, *New Life-Styles: Marriage Patterns, Living Arrangements, and Fertility Outside of Marriage*, 453 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 8–10 (1981). Racialized discourse about African-American families—and the breakdown of these families—was abundant. For a famous example, see the Moynihan Report, which noted the problems of race and class in family formation and stability. OFF. OF POL'Y PLANNING & RESEARCH, U.S. DEP'T OF

outdated nature of discrimination against illegitimate children, Justice Douglas stated in his concurrence in *King v. Smith* (decided in the same year as *Levy*): "This penalizing the children for the sins of their mother is reminiscent of the archaic corruption of the blood, a form of bill of attainder."[136] The same sentiment applied to the Levy's children inability to recover for their mother's wrongful death. Justice Douglas, writing for the Court in *Levy*, posited the rhetorical question: "[W]hy, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate?"[137] The discrimination suffered by nonmarital children was both outdated and unfair.[138]

The Levy children were not to blame for the failure of their parents to become legally bound in marriage; they had caused no harm and had violated no laws. The fact of their existence violated a social norm—albeit a changing one—but penalizing the children for their birth allocated blame to the wrong parties, the Court observed. As contributing and upstanding citizens, the Levy children were being unfairly denied rights and remedies. The Levy children, the Court suggested, merited equal citizenship if only because they were "subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act."[139] Reasoning in this way, it was "invidious to discriminate"[140] against the Levy children when "no action, conduct, or demeanor of theirs [was] possibly relevant to the harm that was done the mother."[141] This idea of indexing treatment to behavior was a motif that appeared repeatedly in the cases that followed, as the Court continued to develop the idea of the distribution of family-based rights according to earned penalty or reward.

If earned treatment was one motif, a second motif that Justice Douglas wove through the opinion was that of the natural affection between a mother and her child. This maternal affection was so strong that it did not diminish even in the absence of a formal family structure.[142] As Justice Douglas observed with respect to the Levy children, "[t]he rights asserted here involve the intimate, familial relationship between a

---

LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5 (1965) ("The white family has achieved a high degree of stability and is maintaining that stability. By contrast, the family structure of lower class Negroes is highly unstable, and in many urban centers is approaching complete breakdown.").

136. 392 U.S. 309, 336 n.5 (1968) (Douglas, J., concurring).

137. 391 U.S. at 71.

138. *Id.* Citing *King Lear*, Justice Douglas brought poetry to the cause, proclaiming, "We can say with Shakespeare: 'Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?'" *Id.* at 72 n.6 (quoting WILLIAM SHAKESPEARE, KING LEAR act 2, sc. 2).

139. *Id.* at 71.

140. *Id.* at 72.

141. *Id.*

142. *Id.*

child and his own mother."[143] The relationship, he continued, was a unique and natural one that did not change according to the mother's marital status: "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense."[144]

Responsive to this unique relationship, the Court honed in on the fact that Louise Levy had loved her children and raised them with strong moral values. Louise Levy had "treated them as a parent would treat any other child"[145]and worked steadily as a "domestic servant"[146] in order to be able to provide for the children. In addition, Louise Levy had sent her children to parochial school and gone to church with them on Sundays.[147] Reviewing Louise Levy's behavior toward her children, the Court easily and with no dissent confirmed the position put forward by the Levy children's counsel that "the mothers of illegitimate children were just as central to a child's life as the mothers of legitimate children."[148] In this way, the Court deconstructed the barrier between the marital and nonmarital family—at least as defined by the mother and child—adding further justification to ending the differential treatment of marital and nonmarital children.[149]

With *Levy*, then, the Court took a fundamental first step by bringing the nonmarital children into the family fold and making available to them the same legal remedies available to marital children. Nonmarital children were no longer strictly confined to a lower rung on the hierarchical ladder of the historical household and *Levy* thus "laid the groundwork for a series of cases that continued to expand legal protection for nonmarital children, including access to welfare benefits, and paternal visitation rights and financial support."[150] As the *Levy*

143. *Id.* at 71.

144. *Id.* at 72.

145. *Id.* at 70.

146. *Id.* The Court's portrayal of Louise Levy was also laden with racial stereotypes. The Court, in describing Louise Levy, implicitly evoked the stereotype of a "Mammy" whose "primary role was domestic service, characterized by long hours of work with little or no financial compensation. Subordination, nurturance, and constant self-sacrifice were expected." Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING 458, 459 (1995).

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

148. Bakelar, *supra* note 125, at 5.

149. *See* Ristroph & Murray, *supra* note 27, at 1255. Citing to *Levy*, Ristroph and Murray mention that "[i]n constitutional and state law alike, several efforts have been made to update the legal understanding of the family to reflect the increasing diversity of family life" but argue that legal protection is available only when the informal family *acts as though* it were a formal one. *Id.* at 1256.

150. Bakelar, *supra* note 125, at 11. *See generally* Reed v. Campbell, 476 U.S. 852 (1986); Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982); Trimble v. Gordon, 430 U.S. 762

decision also made clear, future determinations about the rights of nonmarital children would be based on the concepts of earned treatment and the validity of certain informal family arrangements.

## B. Flawed Incentive Structures and the Psychology of the Natural Family

Like *Reed*, *Levy* was important because of the ruling and the precedential support it provided. *Levy* did not provide a roadmap for all questions—the level of scrutiny to be applied by the Court was still unclear and, as Harry Krause pointed out: "Since the common law curse of *filius nullius* still affects the relationship between the illegitimate and his father, the interesting question about the *Levy* case is whether it will be extended to the father-child relationship."[151] The Court continued to waver on the question of scrutiny for two decades after *Levy*, but the question of the father-child relationship was answered by the case that followed *Levy*. The father-child relationship, which was addressed mainly in the context of the nonmarital child's right to recover or to claim support, was relatively simple because the "illegitimate's claim against his father does not rest on an analogy to his claim against his mother. Rather, it rests on comparison with the *legitimate* child's rights against his father."[152] Determinations about the fitness and character of unwed fathers were put aside for hearing in other contexts. To the benefit of nonmarital children, the Court focused on dismantling the structural stigma that subordinated nonmarital children to their marital counterparts.

### *1. "Illogical and Unjust": Transforming the Logic of Illegitimacy*

The next big case—and the case that answered the question about the father-child relationship—was *Weber v. Aetna Casualty and Surety Co*. in 1972.[153] *Weber* determined that Louisiana workmen's compensation laws that disallowed dependent unacknowledged, illegitimate children from recovering on an equal footing with dependent legitimate children violated the Equal Protection Clause.[154] Writing for the plurality in

(1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Glona v. Am. Guar. Co., 391 U.S. 73 (1968).

151. Harry D. Krause, *Legitimate and Illegitimate Offspring of* Levy v. Louisiana*—First Decisions on Equal Protection and Paternity*, 36 U. Chi. L. Rev. 338, 339 (1969).

152. *Id.* at 340–41.

153. 406 U.S. at 164.

154. *Id.* at 165. In 1967, when Henry Clyde Stokes died from work-related injuries, he had been living with Willie Mae Weber, the mother of his two illegitimate children. *Id.* Stokes' four legitimate children also lived with Stokes and Weber because Stokes' legal wife had been committed to a mental hospital. *Id.* Stokes' four legitimate children filed a claim for their father's death under Louisiana's workmen's compensation law. *Id.* at 165–66. Subsequently, Stokes' employer impleaded Willie Mae

*Weber*, Justice Powell followed the path cleared by *Levy* and invoked the interrelated logics of penalty and disability in order to reject the historical status of the illegitimate child.[155] Speaking to the historical household position of and discrimination against illegitimate children, Justice Powell evoked democratic and meritocratic values to sustain the force of the Court's holding, penning sentences that were cited freely and frequently in the cases after *Weber*:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing 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.[156]

At a minimum, Justice Powell and his colleagues observed, disability had to be tied to damaging behavior, and punishment as well as reward had to be earned.

This logic of earned outcome and individual responsibility was so strong, the Court observed, that it trumped a state's interest in encouraging marriage and the state's right to determine the optimal form for family operations.[157] Previous to *Weber* coming before the U.S. Supreme Court, the Louisiana Supreme Court had held that the State of Louisiana had an important interest in encouraging the formation of legitimate, formal families.[158] While not denying this state interest in encouraging marriage, Justice Powell and his colleagues doubted that penalizing illegitimate offspring helped attain that end: "Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."[159] The State did have an interest in setting up an incentive structure that promoted marriage, the Court allowed, but not if the incentive structure penalized the wrong party—the illegitimate children.[160]

---

Weber, who appeared and claimed compensation benefits for the two illegitimate children. *Id.* at 166. While this suit was working its way through the system, the four legitimate children received a settlement that exceeded the benefits allowable under workmen's compensation for a tort claim against a third party. *Id.* The illegitimate children did not share in that settlement and when the four legitimate children dismissed the workmen's compensation claim because the settlement had provided them with the maximum allowable amount of compensation, the illegitimate children were left with nothing. *Id.*

155. *Id.* at 171–72.

156. *Id.* at 175.

157. "The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area." Trimble v. Gordon, 430 U.S. 762, 771 (1977).

158. 406 U.S. at 173.

159. *Id.*

160. *Id.* at 175.

The Court deployed identical logic in *Trimble v. Gordon* when it addressed legitimacy-based discrimination embedded in intestacy default rules.[161] In that case, the relevant part of the Illinois Probate Act provided at the time that illegitimate children could inherit by intestate succession only from their mothers, even though under Illinois law legitimate children were able to inherit by intestate succession from both their mothers and their fathers.[162] As the state court had in *Weber*, the Illinois Supreme Court in *Trimble* upheld the constitutionality of the discriminatory provision because it supported "state interests in encouraging family relationships."[163] Taking up this point in the U.S. Supreme Court decision, Justice Powell began by asserting, "No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society."[164] However, he continued, citing to *Weber*, "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."[165] Justice Powell added that "parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status."[166] One year after *Weber*, in *Gomez v. Perez*, the Court articulated the crux of the issue even more clearly, stating that there was "no constitutionally sufficient justification for denying such an essential right to [support] a child simply because its natural father has not married its mother."[167]

Rejecting the idea of visiting punishment for the parents on the children, the Court also rejected the idea that bonds of affection and

---

161. 430 U.S. at 763–64. The Court had addressed intestacy law with respect to illegitimate children in 1971 with *Labine v. Vincent*, with no finding of discrimination. 401 U.S. 532, 533 (1971). Deta Mona Trimble was the illegitimate daughter of Jessie Trimble and Sherman Gordon and had lived with both of her parents until her father's death by homicide in 1974. *Trimble*, 430 U.S. at 763–64. The year before Gordon's death, an Illinois circuit court had entered a paternity order finding Gordon to be Deta Mona's father and had ordered Gordon to pay weekly support. *Id.* at 764. Gordon had also openly acknowledged Deta Mona as his daughter. *Id.* When Gordon died, Deta Mona's mother filed a petition for determination of heirship, from which Deta Mona was excluded by the court. *Id.*

162. *Id.* at 764–65 ("An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate." (quoting 3 ILL. COMP. STAT. § 12 (1973))).

163. *Id.* at 766.

164. *Id.* at 769.

165. *Id.* at 770 (quoting *Weber*, 406 U.S. at 175). This same phrase was also cited by the Court a decade later in *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619, 620 (1973) (per curiam).

166. *Trimble*, 430 U.S. at 770.

167. 409 U.S. 535, 538 (1973) (per curiam). The Court recognized "lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Id.*

affinity (as well as those of economic dependence) did not connect an informal family in the same way they did a formal family. When *Weber* had come before the Louisiana Supreme Court, that court had suggested that illegitimate children were not within the scope of a family's concern in the way legitimate children were.[168] Addressing this argument, Justice Powell observed, "The illegitimate, so this argument runs, may thus be made less eligible for the statutory recoveries and inheritances reserved for those more likely to be within the ambit of familial care and affection."[169] Rejecting assumptions about the place of illegitimate children in the traditional family, Justice Powell stated that "the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children . . . . The legitimate children and the illegitimate children all lived in the home of the deceased and were equally dependent upon him for maintenance and support."[170] In this way, the Court acknowledged that an informal family could operate in substantially the same way as a formal family and effectively erased the boundary line that had kept illegitimate children from benefiting from family membership. What made the informal family look a great deal like the formal one was the economic interdependence of its members and the investment that each family member made toward the unit, whether economic or affective.

### 2. *The Physical and Emotional Toll of Being an Unwed Mother*

Another way in which the Supreme Court enlarged protections available to nonmarital children was by invalidating statute of limitation laws in many states that prematurely foreclosed the nonmarital child or the child's mother from seeking support from an absent father. Invalidating these statutes of limitation served the same purpose of putting nonmarital children on the same economic footing as marital children. In all of these cases, the Court gave additional attention to the status of the unwed mother and her psychology, further validating the natural link between the unwed mother and her nonmarital child. Without passing judgment on the question of parental fitness or making any comparison between mothers and fathers, these cases all assumed a caretaker mother and an absent father, subsequently focusing on the right of the illegitimate child to seek support from the father.

The first of these cases was *Mills v. Habluetzel*.[171] *Mills* came in response to *Gomez*,[172] after which Texas had established a procedure for

168. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 171 (1972).

169. *Id.* at 173.

170. *Id.* at 169–70.

171. 456 U.S. 91 (1982).

172. In 1973, the Court expanded the rights of illegitimate children to claim support from biological, but not legal, fathers. Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam). The case of

nonmarital children seeking paternal support.[173] The statutory provision required that the nonmarital child come forward with proof of paternity in order to establish a claim for support before the child's first birthday, and failing that the suit was barred.[174] The result was "a one-year window in its previously 'impenetrable barrier,' through which an illegitimate child may establish paternity and obtain paternal support."[175] The Court found this window inadequate.[176] As Justice O'Connor pointed out in her concurrence to Justice Rehnquist's majority opinion, there were many practical as well as psychological reasons for extending the right beyond one year.[177] A mother who was receiving child support might be unlikely to jeopardize the support by filing a paternity suit in order to protect her child's right.[178] In addition, the mother's reluctance to file a paternity suit could stem, Justice O'Connor suggested, "from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval [and] may continue years after the child is born."[179] As Justice O'Connor observed: "The problem may be exacerbated if, as often happens, the mother herself is a minor."[180] The one-year rule penalized nonmarital children for what could be an unending set of complicated family circumstances and effectively barred the child from receiving support except in the most limited of circumstances.[181]

---

*Gomez* arose in Texas, where the statutory scheme regulating child support required a father to support his legitimate children, both during a marriage and after divorce as well, and considered the failure to do so as subject to criminal sanction. *Id.* at 536. When *Gomez* came before the Texas Court of Civil Appeals, that court had held:

> [N]owhere in this elaborate statutory scheme does the State recognize any enforceable duty on the part of the biological father to support his illegitimate children and that, absent a statutory duty to support, the controlling law is the Texas common-law rule that illegitimate children, unlike legitimate children, have no legal right to support from their fathers.

*Id.* at 536–37.

173. The Texas legislature created chapter 13 of the Texas Code to govern the rights of nonmarital children and to operate "in conjunction with other provisions of the Code to establish the duty of fathers to support their illegitimate children." *Mills*, 456 U.S. at 94.

174. *Id.* at 95.

175. *Id*. Justice Rehnquist, writing for the Court, observed: "Although it granted illegitimate children the opportunity to obtain support by establishing paternity, Texas was less than generous." *Id.* at 94.

176. *Id.* at 101.

177. *Id.* at 105 (O'Connor, J., concurring).

178. *Id.* at 100 (majority opinion).

179. *Id.* at 105 n.4 (O'Connor, J., concurring).

180. *Id.*

181. Although the Court did not determine what would be an appropriate length of time for this type of statute of limitations, the Justices agreed that there were two criteria that needed to be taken into account:

> First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related

One year after *Mills*, the Court addressed the same question in the context of a two-year limitation on certain illegitimate children in Tennessee. In *Pickett v Brown*, Tennessee law held a father responsible for the support of his nonmarital child upon establishment of paternity, and the limit for filing any paternity and support action was two years.[182] The Tennessee Supreme Court, in addressing the issue, had found the two-year timeframe adequate to allow "for most women to have recovered physically and emotionally, and to be able to assess their and their children's situations logically and realistically."[183] The U.S. Supreme Court, however, was not convinced and observed that "[p]roblems stemming from a mother's emotional well-being are of particular concern in assessing the validity of Tennessee's limitations period because [the statute] permits suit to be filed only by the mother or by her personal representative if the child is not likely to become a public charge."[184] The Texas statute in question in *Mills*, the Court mentioned, had allowed anyone connected with the child to bring suit.[185] Leveraging Justice O'Connor's argument from her concurrence in *Mills*, Brennan delivered the unanimous opinion for the *Pickett* Court and observed that most of the problems created by a one-year limitation continued to exist with a two-year limitation.[186]

Neither *Mills* nor *Pickett* suggested what time limitations might be acceptable, leaving the door open for *Clark v. Jeter* in 1988.[187] Relying heavily on the precedent of both *Mills* and *Pickett*, Justice O'Connor, writing for the Court, stated that even a six-year limitation ran afoul of the Equal Protection Clause.[188] Addressing Pennsylvania's six-year rule, Justice O'Connor wrote:

---

to the State's interest in avoiding the litigation of stale or fraudulent claims.

*Id.* at 99–100 (majority opinion). Vectors of race and class were also present in these discussions, given the predominance of illegitimacy in low-income African-American families, and questions of welfare entitlements and alternative social norms both came into play. These questions of race and class emerged in procedural question that came before the Court as well. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), and *Little v. Streater*, 452 U.S. 1 (1981), both raised questions about the ability of low-income parents to pay for legal necessaries, such as representation of required testing. For more information about the intersection between race, class, and illegitimacy, see *supra* note 135.

182. 462 U.S. 1, 1–2. Exceptions existed if the father had already provided support to the child or had acknowledged paternity in writing, or if the child was in danger of becoming a "public charge, in which case the State or any person [could] bring suit at any time prior to the child's 18th birthday." *Id.* at 1.

183. *Id.* at 6 (quoting Pickett v. Brown, 638 S.W.2d 369, 379 (1982)).

184. *Id.* at 13. n.12.

185. *Id.*

186. *Id.* at 13–14.

187. 486 U.S. 456 (1988).

188. *Id.* at 463 ("In light of this authority, we conclude that Pennsylvania's 6-year statute of limitations violates the Equal Protection Clause. Even six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child.").

> Even six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child. . . . Not all of these difficulties are likely to abate in six years. A mother might realize only belatedly "a loss of income attributable to the need to care for the child." Furthermore, financial difficulties are likely to increase as the child matures and incurs expenses for clothing, school, and medical care.[189]

Again, the Court exhibited great sensitivity to the unwed mother's psychological state as she decided when and how to make a claim for child support. Bolstering the protection extended in these cases, the Court also articulated the intermediate scrutiny standard as applied to this class for the first time since extending equal protection to nonmarital children in *Levy*.[190] Discrimination based on historical household status was no longer acceptable in the context of nonmarital children; nonmarital children had a fundamental right to equal as well as earned treatment, and the informal family of mother and child gained important validation.

## III. Equal Parenting and the Case of the Unwed Father

A third case that came before the Court at the same time as *Reed* and just after *Levy* was *Stanley v. Illinois*, another in this grouping of family-centered cases that effectuated new levels of household equalization and role reordering.[191] *Stanley* used equal protection claims, like *Reed* and *Levy*, but this time to bring the rights of unwed fathers into balance with those of other parents.[192] Like illegitimate children, unwed fathers historically were presumed to operate outside the bounds of the conventional household.[193] The principle of *filius nullius* ran both ways—the illegitimate child had no claim to parentage and the putative father had no rights or responsibilities with respect to a child conceived out of wedlock. "Unwed biological fathers had no right to commence paternity actions under the common law. Moreover, the common law established

---

189. *Id.* at 463–64 (citation omitted) (quoting *Pickett*, 462 U.S. at 12).

190. *Id.* at 461. Justice O'Connor wrote:

> Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.
>
> To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because "visiting this condemnation on the head of an infant is illogical and unjust."

*Id.* (citations omitted) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

191. 405 U.S. 645 (1971).

192. *Id.*

193. Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. Rev. 637, 644 (1993).

an irrebuttable presumption that a mother's husband was the father of her children."[194]

If a custody dispute between unwed parents did happen to arise, the presumption favored the unwed mother.[195] Determination of paternity was significantly more difficult than was establishing maternity, and the possibility of fraudulent claims made courts wary of decreeing paternity without ample evidence. The recognition of the unique relationship between mother and child also militated for maternal custody:

> This common law recognition of a mother's exclusive, primary right to the custody of her illegitimate child arose from the presumption that the mother was a better custodian than the putative father. The presumption was based upon . . . the strength of the bonds of love and affection assumed to exist between mother and child.[196]

One scholar named this system of custody of and care for illegitimate children, in which fathers were stripped of parental identity and all control was given to the mother, "male coverture."[197] Male coverture, a mirror image of traditional coverture and a system of regulating the informal household, vested substantive control over and full economic responsibility for the nonmarital child in the mother—making her the "head of the household" in the nonmarital family. "In effect, in non-marital families, men [were] 'covered' by women."[198]

Another family law scholar described the different rights accorded to and assumptions made about unwed mothers and fathers by observing that "since the nineteenth century, claims to maternity have invoked nature; claims to paternity have invoked culture."[199] Stated another way, claims to and discussions of parenting historically invoked nature to explain the affection and connection felt between a parent and child, and these *natural* analyses typically worked to the benefit of the mother and

---

194. *Id.* (footnotes omitted).

195. *Id.*

196. Comment, *Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 295 (1985) (footnote omitted).

197. Davis, *supra* note 114, at 73. For a chart that details the gendered role reversal that occurred between the formal and informal family within the system of coverture, see Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669, 1683 (2000). For more on the gendered assumptions underlying laws regulating custody and care, see 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, 561–65 (2000).

198. Davis, *supra* note 114, at 81–82. Despite the fact that the unwed mother held all responsibility for her illegitimate child and the unwed father held none, the mother was still unable to legitimate the child on her own. "A non-married woman can never give birth to an illegitimate child in accordance with the legitimation principle, while a non-married man can render that birth legitimate." MARTHA T. ZINGO & KEVIN E. EARLY, NAMELESS PERSONS: LEGAL DISCRIMINATION AGAINST NON-MARITAL CHILDREN IN THE UNITED STATES 33 (1994). In this way, while the broad contours of coverture may be reversed with nonmarital families, "patriarchal and paternalistic values" persist. *Id.*

199. Dolgin, *supra* note 193, at 646.

detriment of the father. Arguments from "nature," as the illegitimacy cases demonstrated, supported the presence of a unique and irreplaceable bond between mother and child; these same arguments implied the lack of natural connection between a father and his child. Paternity invoked culture because it had no purchase in nature. As Ginsburg remarked, discussing *Stanley*, the "stereotypical notion . . . is evident: all women, wed or unwed, want their children and by nature are fit custodians; a man's parental devotion, however, does not extend to the offspring of an out-of-wedlock union."[200] *Stanley* successfully challenged this notion that paternity had no basis in natural feeling or connection; however, the string of cases involving the rights of unwed fathers that came after *Stanley* did not meet with the same success. The decisions in those subsequent cases both cast doubt on the parenting of unwed fathers and reaffirmed the idea that the failure of the unwed father to be attached to a family unit indicated a deeper failure as a parent. The blame that was lifted from the heads of illegitimate children came to rest on the heads of the unwed father, penalty finally finding a safe haven.

### A. *Stanley v. Illinois*: Hearing Rights and Parenting Presumptions

The facts of *Stanley*, no less than those in *Reed* and *Levy*, hinted at the moving story of a family being torn apart by the untimely death of one of its members. Likewise, *Stanley* offered a story about individual family members being forced to bring legal claims in order to vindicate belonging to and participation in the family. In the case of *Stanley*, Joan and Peter Stanley had lived together off and on for eighteen years, during which time they had and raised three children.[201] Peter and Joan had never married, and when Joan died "Peter Stanley lost not only her but also his children" because of an Illinois statute providing that the children of unwed fathers became wards of the State upon the death of the mother.[202] Stanley claimed that he should have at least been allowed a hearing and that, "since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws."[203]

The State of Illinois argued that it was unnecessary to hold these types of individualized hearings because "unwed fathers [were] presumed unfit to raise their children."[204] As the State declared in its brief, "in most

200. Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 11 (1975).

201. Stanley v. Illinois, 405 U.S. 645, 646 (1971).

202. *Id.*

203. *Id.* Illinois did, at the time, accord hearings to any parents but defined parents as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and . . . any adoptive parent." *Id.* at 650 (citing 37 Ill. Rev. Stat. § 701-14 (1973)).

204. *Id.* at 647.

instances, the natural father is a stranger to his children."[205] The argument continued: "While a legitimate child usually is raised by both parents with the attendant familial relationships and a firm concept of home and identity, the illegitimate child normally knows only one parent—the mother."[206] The Supreme Court agreed in thinking that the presumption against unwed fathers had reasonable basis. "It may be," the Court acknowledged, "that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands."[207] The Court, however, was not ready to make a blanket assumption about the parenting capacities of unwed fathers, stating that "all unmarried fathers are not in this category; some are wholly suited to have custody of their children."[208]

Avoiding judgment on whether or not Peter Stanley fell into the category of unsuitable and neglectful parents, the Court determined instead that "integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment" and that the right in question—to preserve and maintain a family—was a fundamental right.[209] Even the absence of legal marriage could not obviate the fundamental nature of the right. Referring to *Levy*, Justice White observed that illegitimate "children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."[210] If the Levy children could not be denied the right to family bonds because of the informal family organization, then neither could Peter Stanley be denied the right to be heard when the very constitution—or as the Court put it, the "dismemberment"[211]—of his family was at stake.[212]

Just as important as the plurality opinion, however, may have been Justice Burger's dissent, which set forth an argument that hewed closely to the State of Illinois's logic and made damaging allegations about unwed fathers. Repeating and reifying received wisdom about unwed fathers, Justice Burger stated:

---

205. *Id.* at 654 n.6.

206. *Id.* at 653 n.5. According to this theory, the best interest of the child dictated that unwed fathers be omitted from consideration in questions of legal parentage and the statute fulfilled "the compelling governmental objective of protecting children." *Id.* at 654 n.5.

207. *Id.* at 654.

208. *Id.*

209. *Id.* at 651.

210. *Id.* at 652.

211. *Id.* at 658.

212. On a practical note, the Court added that if Illinois's contention were true and few unwed fathers would seek custody, then the policy of granting a hearing to these fathers would not overburden courts. "If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings." *Id.* at 654 n.9.

> I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.[213]

Breaching the boundary line set by the plurality opinion, Justice Burger continued his analysis by making a foray into Peter Stanley's claim to be a good father. "Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children. He alleges that he loved, cared for, and supported these children from the time of their birth until the death of their mother."[214] Justice Burger's observations led him to a different conclusion. After the death of his wife, Justice Burger noted, Stanley had turned the children over to "the care of a Mr. and Mrs. Ness" and had taken no action to gain guardianship until the case came to the attention of the State through other channels.[215] Even under threat of State action, Justice Burger suggested, Peter Stanley "seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children."[216] Peter Stanley was not, from the perspective of the dissent, a parent deserving of legal protection; rather than a bereaved husband and father, Stanley was instead a self-interested actor.

This gender typecasting paired with the severe reading of Stanley's parenting attempts provided an influential model of interpretation in the cases that came after *Stanley*. The majority's agnosticism on the matter of Stanley's parenting—coupled with Justice Burger's dismissive analysis of it—preserved significant ground for skepticism about the natural parenting capabilities of the unwed father. Subsequently, even if *Stanley* was "the most important father's rights decision in the United States Supreme Court's jurisprudence,"[217] the case nonetheless left the door open for future stereotyping of unwed fathers and gave grounds for

213. *Id.* at 665–66 (Burger, C.J., dissenting). Exceptions existed, Justice Burger allowed, but they were few and far between enough that the statute still served the purpose of providing for the best interest of the child and fulfilling "the State's obligations as *parens patriae*." *Id.* at 666.

214. *Id.*

215. *Id.* at 667.

216. *Id.*

217. Tiffany Salayer, *Rights of Parents:* Stanley v. Illinois, 14 J. CONTEMP. LEGAL ISSUES 249, 249 (2004).

judicial reluctance to fully equalize unwed fathers with other parents. Speaking to the Court's failure to support the full rights of Peter Stanley, Ginsburg noted in an article of hers at the time, the "Court did not hold, as Stanley invited it to, that unwed fathers stand even with mothers and wed fathers when child custody is the issue."[218]

## B. Preference for the "Family Unit" and One-Sided Stories

After *Stanley* was decided, a string of cases in the late 1970s and early 1980s came before the Court with questions pertaining to adoption rules and procedures in the context of unwed fathers, obtaining mixed results. Because the Court in *Stanley* did not provide a blueprint for "how future courts would interpret the significance of the finding that the Stanleys were a 'family,'"[219] cases following *Stanley* were not predetermined by a strong precedent, the way that cases in the wake of *Reed* and *Levy* were. In most cases, diverging from *Stanley*'s agnostic stance toward the parental capability of unwed fathers, the Court denied putative fathers their adoption rights and determined that biology was insufficient grounds for paternal rights. No discussion of historical discrimination or unconstitutional gender typecasting was present in these adoption cases. The Court focused instead on *natural* family connections—connections between parents and children as well as between the mothers and fathers themselves—using a framework that prioritized the nuclear, whether formal or informal. In addition to reasoning based on natural connections, the idea of earned treatment was present in these cases. However, it worked against unwed fathers who generally were construed by the Court to have failed to earn the right to participate in the family as a parent. In this sense, the Court took a page from Justice Burger's dissent rather than the *Stanley* plurality opinion by passing judgment on the quality of the family interaction and not the structural inequities of adoption statutes.

### *1. Putative Fathers and the Importance of Being Married*

The first adoption rights case to come before the Court after *Stanley* was *Quilloin v. Walcott* in 1978.[220] *Quilloin* involved the constitutionality of Georgia's adoption law denying an unwed father "authority to prevent the adoption of his illegitimate child."[221] Five years after *Quilloin*, the

218. Ginsburg, *supra* note 9, at 459.

219. Dolgin, *supra* note 193, at 651 (citing *Stanley*, 405 U.S. at 651).

220. 434 U.S. 246 (1978). Leon Webster Quilloin and Ardell Williams had a child out of wedlock in 1964 and separated not long after. *Id.* at 247. Three years later, Williams married Randall Walcott, and nine years after that, she consented to the adoption of the child by her husband. *Id.* Quilloin attempted to block the adoption and to secure visitation rights, but the court granted Walcott's adoption of the child over Quilloin's objection. *Id.*

221. *Id.*

case of *Lehr v. Robertson* brought up questions surrounding notice of adoption to unwed fathers and the utility of the putative father registry.[222] Both cases involved a putative father whose right to prevent the adoption of his illegitimate child by the mother's new husband was in question. The Court immediately distinguished *Quilloin* (and indirectly *Lehr*) from *Stanley*, observing that "*Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial."[223] In both *Quilloin* and *Lehr*, the countervailing interest was represented by the mother's new husband and the child's would-be father, who represented the promise of a new nuclear family in which the child would presumably thrive. This prospect of a functional family unit outweighed the claim of biology, effectively marginalizing and displacing the unwed father who remained unattached and unaccounted for in any nuclear family. In other words:

> Faced with the prospect of recognizing the rights of an itinerant unmarried father—that is, a father who failed to comport with the paternal norms developed in the context of the marital family—the Court chose to sever paternal rights, allowing the child to be adopted into a marital family.[224]

Beginning the *Lehr* opinion with a poetic nod to the changing circumstances and iterations of family life, Justice Stevens wrote: "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility."[225] He changed course, however, and finished the thought by stating, "In deciding whether this is such a case . . . we must consider the broad framework that has traditionally been used to resolve the legal problems arising from the parent-child relationship."[226] This broad legal framework meant a preference for the formal family—or, at the margin, family arrangements that resembled the formal family. Justice Stevens elaborated: "The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our

222. 463 U.S. 248 (1983). At issue was a question of what types of fathers had the right to notice of adoption. *Id.* at 249–50. The relevant New York statute required that notice be given to unwed fathers whose paternity had been adjudicated, who were identified as the father on the child's birth certificate, who lived openly with the child and the child's mother and thereby held themselves out to be the father, who had been identified as the father by the mother in a sworn written statement, and who were married to the child's mother before the child was six months old. *Id.* at 251. Outside these categories, the State also provided notice to the unwed father if he had registered with the putative father registry. *Id.* at 250–51. Jonathan Lehr did not fit into any of the statutory categories and had failed to enter his name into the putative father registry. *Id.* at 251–52.

223. *Quilloin*, 434 U.S. at 248.

224. Ristroph & Murray, *supra* note 27, at 1254.

225. 463 U.S. at 256.

226. *Id.*

democratic society. In recognition of that role . . . state laws almost universally express an appropriate preference for the formal family."[227]

Operating within this logic in *Quilloin*, the Court was sympathetic to the interests of the new husband and would-be father, because he—not Leon Quilloin—represented the male in the "family unit."[228] Restating and agreeing with the prior holding of the Georgia Supreme Court, Justice Marshall wrote:

> The majority relied generally on the strong state policy of rearing children in a family setting, a policy which in the court's view might be thwarted if unwed fathers were required to consent to adoptions. The court also emphasized . . . that the adoption was sought by the child's step-father, who was part of the family unit in which the child was in fact living, and . . . . unlike the father in *Stanley*, appellant had never been a *de facto* member of the child's family unit.[229]

Supporting this logic, and invoking the best interest of the child, the Court reiterated that denial of adoption rights to Quilloin was not unfair because he had never "sought[] actual or legal custody of his child"[230] and because "the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant."[231] The result desired by the unwed father had little importance because he had exempted himself from the right to protest by being an absent family member who did not participate in the family unit.

*Caban v. Mohammed*—one of the few cases that came out in favor of the unwed father—confirmed this theory of the importance of the formal or nuclear family.[232] A year after *Quilloin*, *Caban* came before the Court with a story about an unwed father who surmounted stereotype not only by living with the mother of his children *as if married* but also by marrying another woman after the mother of his children left him, thereby proving his stability as a partner as well as a parent.[233] Abdiel Caban and Maria Mohammed lived together from 1968 through 1973, and "represented themselves as being husband and wife, although they never legally married."[234] During that time, the couple had two children and Caban was listed on the birth certificates as the father.[235] In 1973, Mohammed left Caban and took the children.[236] She married Kazin

227. *Id.* at 256–57.
228. 434 U.S. at 253.
229. *Id.* at 252–53.
230. *Id.* at 255.
231. *Id.*
232. 441 U.S. 380 (1979).
233. *Id.* at 382–83.
234. *Id.* at 382.
235. *Id.*
236. *Id.*

Mohammed and, not long after, Caban married as well.[237] Several years later, when Mohammed's husband petitioned to adopt the two children, Caban and his new wife submitted a cross-petition.[238]

In deciding Caban's rights with respect to his children, the Court focused heavily on the presence of a "natural family"[239] during the time that the children were growing up. Caban had been a part of the nuclear family and a daily presence in the household. In fact, the Court stated: "There is no reason to believe that the Caban children . . . had a relationship with their mother unrivaled by the affection and concern of their father."[240] Caban had stayed with Mohammed and the children until she left him and subsequently married—another instance in which their story broke with stereotype in that the mother was the one to leave the relationship.[241] Furthermore, Caban married after Mohammed left him, attaching himself to a new nuclear family.[242] Consequently, Caban did not demonstrate the same lack of partnering and parenting skills that the other unwed fathers were perceived to exhibit. "Mediating between a father and his rights to his biological children [was] the institution of marriage."[243] Caban's willingness to partner in marriage and marriage-like relationships was ultimately what made him a good parent, as these qualities contributed to providing the children with "the stability of a normal, two-parent home."[244] In *Quilloin* and *Lehr*, the mediation of marriage condemned the unwed father to exclusion and judgment. In *Caban*, however, this mediation worked in favor of the "unwed" father who happened to be a married man.[245] In each circumstance, the Court

237. *Id.*

238. *Id.* at 383. New York's domestic relations law at the time provided that consent to adoption was required by either parent of a child born in wedlock, but for a child born out of wedlock, only the consent of the mother was necessary. *Id.* at 386–86 (citing N.Y. DOM. REL. LAW § 111 (McKinney 1977)).

239. *Id.* at 389.

240. *Id.*

241. *Id.* at 382.

242. *Id.* at 383.

243. Dolgin, *supra* note 193, at 645. Fineman suggests that this focus on the marital relationship happens with mothers as well: "The wider academic and policy communities share with feminists a seeming inability to look at the mother-child relationship (or other versions of the caretaker-dependent relationship) without reflexively refocusing the discussion back to the dynamics of marriage and the interactive responsibility of the marital couple." Fineman, *supra* note 25, at 12.

244. *Caban*, 441 U.S. at 391.

245. Even though the Court found Caban to be a deserving father, the Court did not disallow the possibility that generally "unwed mothers as a class were closer than unwed fathers to their newborn infants." *Id.* at 389. The opinion did mention that "this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." *Id.*

Caroline Rogus has said, referring to *Caban*: "Even when striking down impermissible gender-based generalizations in statutes, the Court reinforced the stereotype that women are natural caretakers and therefore assume the role of mother when they give birth." Caroline Rogus, Comment, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection,*

confirmed the notion that a "man becomes a father by relating to his child *in the context of family*."[246]

### 2. *Child Support and the "Daily Supervision of the Child"*

When unwed fathers were not able to gain parenting rights or even to block the adoption of their children, they were hindered not only by their failure to function as part of a family unit but also by a perceived failure to invest in the family and to thereby earn family rights and belonging. In both *Quilloin* and *Lehr*, the Court chose to focus on what the unwed fathers failed to contribute, rather than what they actually invested in the family. Unlike in the statutes of limitation cases, where the Court demonstrated concern for the unwed mother and tried to understand the possible impact of being an unwed parent on an individual's emotional and psychological state, here the Court displayed no such inclination or sympathy. Certainly in the case of *Lehr*, the majority spun a one-sided story that ignored the unwed father's attempts to contribute to the care of the child. The Court selectively took into account the idea of earned family, and the evaluation of a father's earned treatment was indexed to the related evaluation of a father's participation in a nuclear family. When the father failed as a member of the natural, nuclear family, then he also failed to earn belonging. The natural connections theory, therefore, illustrated the limitations of earned belonging.

---

*and the Implications of the* Nguyen v. INS *Opinion*, 5 U. PA. J. CONST. L. 803, 811 (2003).

This perspective on the existence and development of a unique mother-child affective bond was amplified in a dissent penned by Justice Stevens. *Caban*, 441 U.S. at 401 (Stevens, J., dissenting). Drawing on sociological and anthropological research, Justice Stevens indicated that "by virtue of the symbiotic relationship between mother and child during pregnancy and the initial contact between mother and child directly after birth a physical and psychological bond immediately develops between the two that is not then present between the infant and the father or any other person." *Id.* at 405 n.10. Justice Stevens admitted circumstances in which the father might be given a voice in adoption decisions, but he remained adamant that "as a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process." *Id.* at 406–07.

In a separate dissent, Justice Stewart concurred with Justice Stevens, saying "unwed mothers and unwed fathers are simply not similarly situated" and repeating the truism that "the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested." *Id.* at 398–99 (Stewart, J., dissenting). Rogus states that:

> The Court has invariably conflated the ideal of motherhood with the idea of birth. Such confusion of sociology and biology, while at times appearing to benefit women via better treatment under custody or citizenship statutes, in the end succeeds only in perpetuating "fixed notions" of "the roles and abilities" of women.

Rogus, *supra* at 814 (citing United States v. Virginia, 518 U.S. 515, 541 (1996)).

246. Dolgin, *supra* note 193, at 672; *see* Linda Kelly, *The Alienation of Fathers*, 6 MICH. J. RACE & L. 181, 188 (2000). Kelly discusses the Supreme Court's assumption in these cases that the "unwed biological father could not have a valuable relationship with his child" and that any parental obligations would always be "assumed by the married woman's husband." *Id.*

In *Quilloin*, Leon Quilloin argued that he had rights stemming from the fact that he paid his child support and that his interests were "indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child."[247] The Court, however, quickly determined that the two types of interests were "readily distinguishable."[248]

> Although appellant was subject . . . to essentially the same child-support obligation as a married father would have had, . . . he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.[249]

Making the implicit assertion that all married fathers performed these significant responsibilities tied to caretaking and child rearing, the Court dismissed the possibility of family arrangements that operated outside of the nuclear family. In addition, the Court discounted the notion of earned rights to family based solely on economic support. The Court glossed over the fact that Quilloin had provided economic support for his child—noting that it was provided "only on an irregular basis"[250]—and that Quilloin had visited the child on "many occasions,"[251] bringing "toys and gifts."[252] Rather, the Court relied on the mother's judgment "that these contacts were having a disruptive effect on the child and on appellees' entire family."[253]

Similarly, in *Lehr*, although the father had lived with the mother of the child before the child's birth and had visited her in the hospital when she gave birth, the Court focused on the fact that the couple never lived together after the child's birth.[254] The opinion mentioned that "he [had] never provided them with any financial support, and he [had] never offered to marry appellee."[255] Citing to *Quilloin* and the requirement that a parent shoulder "significant responsibility with respect to the daily supervision, education, protection, or care of the child,"[256] the Court reiterated the idea that there was an equation between the work invested into parenting and the rights available to the parent. Part of that work

247. Quilloin v. Walcott, 434 U.S. 246, 256 (1978).
248. *Id.*
249. *Id.*
250. *Id.* at 251.
251. *Id.*
252. *Id.*
253. *Id.*
254. Lehr v. Robertson, 463 U.S. 248, 251–52 (1983).
255. *Id.* at 252. The suggestion that the father ought to have offered himself in marriage to the mother implicitly reflected the historical idea that a man could remedy a crime of seduction through an offer of marriage. *See* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 1 (2012) ("Seduction statutes routinely prescribed a bar to prosecution for the offense: marriage. The defendant could simply marry the victim and avoid liability for the crime.").
256. *Quilloin*, 434 U.S. at 256.

was being a daily presence in the child's life and being based in the same household. Part of that work was, as the majority suggested, making an offer of marriage to the child's mother.

Rejecting this narrative as biased, Justices White, Marshall, and Blackmun wrote a dissenting opinion, proclaiming that the plurality in *Lehr* chose to overlook that "from the time Lorraine was discharged from the hospital until August 1978, she concealed her whereabouts from him."[257] The dissenting opinion told a different story about the unwed father, painting a picture of a man who "never ceased his efforts to locate Lorraine and Jessica and . . . . when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it."[258] Lehr had "offered to provide financial assistance and to set up a trust fund for Jessica," but the mother had refused this offer.[259] Not only was there an alternate view of family, the dissent suggested, but also an entirely different set of facts available. Ignoring this suggestion, however, the plurality found that Lehr had not sufficiently participated in the family unit and denied his due process claim, just as the Court had dismissed Quilloin's claims five years earlier.[260] The collective lesson was that investment—economic and other—in the family, while necessary, was not sufficient to earn unwed fathers a place at the family table unless paired with the belonging in and subscription to the idea of the nuclear and natural family as constructed by the Court.[261]

---

257. 463 U.S. at 269 (White, J., dissenting).

258. *Id.*

259. *Id.*

260. *Id.* at 267–68 (majority opinion).

261. The Court continued to reiterate the ideas that unwed fathers were lesser parents, that mothers had a biological advantage in parenting, and that sex-based categories in the context of unwed fathers were acceptable. *See* Miller v. Albright, 523 U.S. 420 (1998); Nguyen v. INS, 533 U.S. 53 (2001); Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (per curiam). Justice Ginsburg dissented in both *Miller* and *Nguyen*, and *Flores-Villar* was a 4–4 per curiam decision with Justice Kagan not participating. Dissenting in *Miller*, Justice Ginsburg used the historic household theory to argue her point. 523 U.S. at 460 (Ginsburg, J., dissenting). She observed that the legislature was "shaping government policy to fit and reinforce the stereotype or historic pattern." *Id.* She proceeded to document the historical legal treatment of children born abroad to U.S. citizen parents, beginning in 1790, showcasing the way in which assumptions concerning unwed mothers and fathers were not inevitable conclusions but rather cultural constructs indexed to particular historical moments. *See id.* at 460–68.

Justice Stevens, using the natural connections theory in writing the opinion, stated that the gender categories did not represent outdated forms of stereotyping but rather the "undisputed assumption that fathers are less likely than mothers to have the *opportunity* to develop relationships." *Id.* at 444 (plurality opinion). This differential was tied to the process and act of childbirth: "[D]ue to the normal interval of nine months between conception and birth, the unmarried father may not even know that his child exists, and the child may not know the father's identity." *Id.* at 438. For a discussion of Ginsburg's focus on history and use of the historical argument, see Collins, *supra* note 197, at 1669. "Justice Ginsburg used the history of American citizenship law as evidence that gender stereotypes have functioned in citizenship transmission since the Founding, and to intimate that § 1409 is a modern, father-disadvantaging incarnation of ongoing discriminatory practices." *Id.* at 1680; *see* M. Isabel Medina, *Real Differences and Stereotypes—Two Visions of Gender, Citizenship and*

## CONCLUSION

Three lines of logic—history, nature, and earning—provided distinct modes of analysis with which to build advocacy arguments and ground judicial reasoning. Historical argument, as developed by Ginsburg, succeeded best when showcasing points of disjuncture between the historical and the modern, signaling the outdated nature of the regulation in question. The historical household theory was bolstered by a broad and widely accepted meta-narrative about the evolution of the family from patriarchal hierarchy—in which the "obligations and rights accorded people within families stemmed from the inexorable nature of the ties that linked the members of a family together"[262]—to equalized unit.[263] Arguments from history flagged this evolution in household practice for the Supreme Court and called for the law to be responsive to social change, lest regulation be predicated on faulty or inapt assumptions.

The theory of natural connections, on the other hand, offered a very different way of considering the family and its composition. The natural connections argument was based on the idea that the nuclear family possessed an inherently optimal structure and that the work of legislatures and courts was to support this form whenever possible. Replacing the nuclear family was not an option; the nuclear family was, if anything, "merely in need of adjustment or minor modification."[264] According to this logic, biology was indeed destiny and the ability to parent was not created by social conditions but rather by innate talent indexed to gender. Consequently, when the Court relied upon anthropological ideas about the nature of the family to provide an understanding of how the spouses and parents fit into the family unit, arguments about historical stereotyping and marginalization held little sway.

---

*International Law*, 7 N.Y. CITY L. REV. 315, 317 (2004).

262. Dolgin, *supra* note 193, at 638. In the historical view of the family, expressed in the doctrine of domestic relations and the master-servant relationship, "obligations and rights accorded people within families stemmed from the inexorable nature of the ties that linked the members of a family together." *Id.* Conventional histories hold that these structures were softened or displaced by the end of the nineteenth century. "But as one begins to scrutinize particular bodies of nineteenth-century law, it becomes clear that such changes did not eradicate foundational status structures: In gender, race, and class relationships, the legal system continued to allocate privileges and entitlements in a manner that perpetuated former systems of express hierarchy." Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1116 (1997).

263. Martha Minow, "*Forming Underneath Everything That Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 833. Depicted as a story of progress, the traditional outline of family law treated the disabilities legally imposed on wives (and children) as outmoded restrictions giving way over time, allowing for increased affirmative rights for women both within the family and in relation to the commercial and public worlds. *See* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 972–75 (1993) ("The movement toward individual rights in the family during this century may be seen as part of a more general liberal progression . . . .").

264. Fineman, *supra* note 23, at 404.

The third way, earned belonging, represented a step forward in time and outlook and embodied a particularly American desire to reward merit rather than birth. Earned belonging was democratic and embodied the idiom of "just deserts." Creating blinders where gender and other markers of difference were concerned, earned belonging allowed courts to evaluate performance rather than status and made it easier for historically disadvantaged classes to gain access to rights and resources. For this reason, the concept of earned belonging complemented historical analysis by providing a new logic to replace that of historical hierarchy. The cases concerning wives and illegitimate children illustrated the virtues as well as the success of the earnings logic. When Ginsburg and her colleagues pushed the Court to reject the historical household, they offered the earnings idea as a less hierarchical and more democratic mode—and, in the majority of cases, the Court supported the proposed substitution.

The Court's application of the natural connections theory, however, demonstrated the limits of the earned belonging theory. In the adoption cases following *Stanley*, biology and not individual contribution predetermined the capacity of the unwed father to parent. In these cases, the Court brushed aside extenuating circumstances—as well as facts supporting the parenting efforts and ability of the unwed father—and invoked "human experience" and "sociological and anthropological research" to support the constitutionality of letting particular sex-based differences stand. Instead of rewarding unwed fathers for providing financial support or visiting their children, the Court penalized them for being irresponsible and failing to marry the mothers of their illegitimate children.[265] The Court, unwilling to question the supposed biology of parenting, was unable to assign value to contributions that came in unconventional forms and from "'deviant' family units."[266] In this way, the plight of unwed fathers brought into sharp focus the failing of earned belonging theory by demonstrating how a court's calculation of earnings could be biased and how certain contributions could easily be discounted when the natural connections theory cast its long shadow.

Nonetheless, the theory of earned belonging cleared a broad expanse of space for gender-neutral arguments and judgments about family inclusion to flourish by creating a "neutral, functional description"[267]

---

265. As one New Jersey court summarized: "Filiation statutes are generally considered to represent an exercise of the police power for the primary purposes of denouncing the misconduct involved, punishing the offender or shifting the burden of support from society to the child's natural parent." State v. M., 233 A.2d 65, 67 (N.J. Super. Ct. App. Div. 1967); *see* Katherine Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 7 (2004).

266. ZINGO & EARLY, *supra* note 198, at 93 (internal quotation marks omitted).

267. *Id.*

for families. When making determinations about individual rights according to the earned belonging theory, courts could no longer rely on stereotypes to determine a wife's proper entitlements, the rights of an illegitimate child to claim family benefits, or—in theory—the fitness of an unwed father as a parent. Earned belonging offered a democratic vision of the family, pairing equal rights with equal contribution, and pointed a way past the lattice of barriers that both history and nature had built.

***