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From 'baggage' to not 'non-persons': Levy v. Louisiana and the struggle for equal rights for 'illegitimate' children

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FROM 'BAGGAGE' TO NOT 'NON-PERSONS': *LEVY V. LOUISIANA* AND THE STRUGGLE FOR EQUAL RIGHTS FOR 'ILLEGITIMATE' CHILDREN

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ABSTRACT

From 'Baggage' to Not 'Non-Persons': *Levy v. Louisiana* And the Struggle for Equal Rights for 'Illegitimate' Children

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This study focuses on "illegitimate" children, who are more visible than other children within the historical record because of the many laws related to their existence. By examining this group of children, it is possible to improve upon the framework that shapes our understanding of childhood and provide a starting point for future studies that will continue to illuminate children's history. Although illegitimacy laws are as ancient as Western civilization, the key moment for the United States' laws related to nonmarital children came in the spring of 1968 and the pivotal decision of *Levy v. Louisiana*, 391 U.S. 68 (1968). In that case, the U.S. Supreme Court concluded that nonmarital children deserved the same legal rights as marital children. While *Levy* marked the beginning of a series of court cases involving nonmarital children, the case itself drifted into obscurity, its importance reduced to Justice William O. Douglas' majority opinion. In an effort to rescue this significant case from the shadows, an analysis of the complete court record for *Levy*, occupies a prominent position within this work. This close historical

analysis provides a glimpse into American culture during the late 1960s, a time when a fundamental shift was occurring within society, creating a more complete picture of how that shift affected the understanding of childhood and children's rights.

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PREFACE

SEMANTIC KNOTS AND OTHER NOTES

This thesis is, at its heart, a study of children born outside the boundaries of traditional marriage as it is defined in the United States. The terms used to describe these children and differentiate them from those born within the prescribed borders of a traditional, heterosexual, monogamous, marriage have changed over time. Whether scholars refer to them as "bastards," "natural children," "illegitimate," or any other euphemism designed to define them as different, the exact word matters little. Today, the acceptable term for these children is "nonmarital." Regardless of the label used, the fact that society set them apart from other children is more important than the exact term used. Researchers of children, women, and other related subjects often begin discussions of these children and their families by tying themselves into semantic knots. This study avoids this question of language. It is sufficient to acknowledge that "illegitimate," as the word is used in this work, began as a legal term, related to inheritance rights. In the rhetoric that forms the bedrock of this work, that term became burdened with cultural and social weight beyond its limited, legal meaning. In turn, this extra meaning greatly affected these children's lives. Because this work will explore that burden in some respects, and "illegitimate", as it is used in this study, even beyond the quoted rhetoric, is employed to make a

historical point and is not meant to detract from the children who are labeled as such. When possible, however, "nonmarital" will be used.

Beyond semantics, what truly matters is that, more often than not, these children struggled to live within a society that defined them, and their mothers, as somehow lesser beings, not worthy of full legal protection, equal inheritance, or even unconditional love. Through the course of this project, it has proven impossible to separate these children from their mothers. While it should be noted that unmarried fathers also raise children alone, this study will not touch upon them; they deserve their own spotlight. Therefore, although the attempt to illuminate the history of these children has acted as the impetus of this project, and it still lies at the core, in the end, this is a history about an entire family. It is the story of an unmarried mother who chose to raise her children alone despite the disapproval of society. It is a story about the world she and her children inhabited and the changes her death brought to the United States, ultimately improving the standing of all children labeled "illegitimate".

The study's structure is straightforward. The first chapter introduces the legal case, *Levy v. Louisiana* 391 U.S. 68 (1968), and the U.S. Supreme Court's decision. This is followed by an examination of the literature that has been written regarding the Levy case. The second chapter traces ancient legal and religious traditions related to children born outside of a traditional marriage in order to emphasize the weight of

custom that the Levy decision attempted to change. Chapter Three explores French and Louisiana law to present a legal context for the case. Chapter Four then moves beyond the legal context in order to analyze the social and cultural composition of the United States in the mid-twentieth century. It also examines the unspoken racial context of the case. This exploration of the contextual background illustrates the strong traditions that *Levy* challenged. Afterward, Chapter Five presents a detailed analysis of the *Levy* arguments presented before the Supreme Court. As part of this analysis, the thesis touches upon the long-standing discrimination shown toward Asian-Americans and their search for equal treatment within the United States' legal system, as seen specifically in *Korematsu v. United States* 323 U.S. 214 (1944), and *Oyama v. California* 332 U.S. 633 (1948). A number of these cases expanded the Supreme Court's interpretation of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In turn, these cases served as precedents for *Levy*.

After a close reading of the case itself, the final chapter addresses *Levy*'s legacy. Yet, because *Levy* slipped into obscurity, there is little legacy to explore. The chapter includes a brief survey of the legal cases that built upon *Levy*, such as *Weber v. Aetna* 406 U.S. 164 (1972), the more well-known nonmarital children's rights case, before concluding with an examination of how *Levy* led to the creation of the intermediate scrutiny test. Prior to *Levy*, the high court used two tests to decide the

constitutionality of statutes in relation to the Fourteenth Amendment. The first, more lenient of these, was a rational basis, or minimal scrutiny, test. Under this level of examination, state or local statutes that classified people differently were presumed to have a rational basis and passed constitutional muster. The second level, residing at the other end of the spectrum, was strict scrutiny. Under this test, governments had to demonstrate a compelling reason why the classification in their statute was necessary. Otherwise, the court would strike down the law in question as unconstitutional. According to most major law encyclopedias and casebooks, the creation of the intermediate scrutiny category, lying between the two other tests, formally began in 1976, with the gender discrimination case, *Craig v. Boren* 429 U.S. 190 (1976). However, the beginnings of intermediate scrutiny, as Justice William Brennan pointed out, can be found nearly a decade earlier, in *Levy.*[1] Beginning with birth status, the Supreme Court most often used this new test to decide cases involving gender classifications. As *Levy* faded from view, its significant role in the history of the development of intermediate scrutiny was forgotten.

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[1] Kermit Hall, ed., *The Oxford Companion to the Supreme Court of the United States* 2nd ed. (New York: Oxford University Press, 2005), 501-502; Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* 15th ed. (New York: Foundation Press, 2004), 815-816; David S. Tanenhaus, ed., *Encyclopedia of the Supreme Court of the United States*, (Macmillan Reference USA, 2008), 2:484. William J. Brennan, "A Tribute to Norman Dorsen," *Harvard Civil Rights-Civil Liberties Law Review* 27, (1992): 310-311, note 6.

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CHAPTER 1

LOOKING FOR CHILDREN…AND FINDING THEM BEFORE THE SUPREME COURT

In the inaugural issue of the *Journal of the History of Childhood and Youth* (2008), Peter Stearns discusses four concerns that he sees as central to the study of the history of childhood. In addition to a call for more comparative childhood history and greater attention to class, race, and other categories of analysis when studying children, Stearns urges childhood historians to focus on young children, not just adolescents. However, the most pressing concern for the childhood historian, he believes, is discovering sources that hold the voices of children.[1] For a variety of obvious reasons, children have left little behind in the historical record. Because of this, childhood historians must search between the lines of primary sources, looking for children's reflections to create a fuller picture of children's history. By focusing on more visible groups of children, it is possible to improve upon the framework that shapes our understanding of childhood and provide a starting point for future studies that will continue to illuminate one of the more elusive groups within society. Exploring our legal and cultural relationship with nonmarital children, who are more visible within the historical record because of the many laws related to their existence, allows this study to

[1] Peter N. Stearns, "Challenges in the History of Childhood," *Journal of the History of Childhood and Youth* 1, no. 1 (2008): 35.

address questions related to how "family" has been defined and redefined in American culture.

Although illegitimacy laws are as ancient as civilization, one of the key moments for the United States' laws related to nonmarital children came in the spring of 1968 and the pivotal decision of *Levy v. Louisiana,* 391 U.S. 68 (1968). In this case, the Supreme Court concluded that illegitimate children were people too and entitled to the same legal rights as legitimate children. *Levy* marks the beginning of a series of ten court cases stretching from 1968 to 1986, which continued to improve the legal status of nonmarital children, as well as their parents, who were once considered irretrievably degraded.[2] Additionally, exploration of the Levy case provides an opportunity to further our understanding of the legal climate that existed in the late 1960s, a moment in time when a fundamental shift was occurring in American culture. Because the Levy family was African-American, this case initially appears to be another prime example of the legal struggle for equality. The presence of an *amicus curiae* (friend of the court) brief written by the NAACP Legal Defense Fund supports this belief. Further, in the 1960s, the stereotypical illegitimate child was African-American and many people

[2] John Witte Jr., *Sins of the Father: The Law and Theology of Illegitimacy Reconsidered*, (Cambridge: Cambridge University Press, 2009), 158. The ten cases are: *Levy v Louisiana,* 391 U.S. 68 (1968); *Glona v. American Guarantee Company*, 391 U.S. 73 (1968); *Weber v Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Gomez v Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Pickett v Brown*, 462 U.S. 1 (1983); *Reed v Campbell*, 476 U.S. 852 (1986).

considered the problem of illegitimacy to be a "Black problem." However, the American Civil Liberties Union (ACLU) attorney, Norman Dorsen, who argued the case on behalf of the Levy children, did not construct his winning argument around the fact that the Levy children were African-American. Instead, he fought against the ancient traditions of legal discrimination that affected all nonmarital children, regardless of race. He did this by arguing that birth status was equivalent to race in that a child had no say in how they were born. Dorsen's argument made the Levy children's birth status more important than their race. To support this argument, Dorsen cited precedent from several cases argued on behalf of Japanese-Americans. 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.

The history of the Levy children's case is a sad one. After feeling unwell for several days, their mother Louise Levy sought help from the Charity Hospital of New Orleans in the spring of 1964. Doctor W. J. Wing, the resident assigned to her case, listened as she described her symptoms, which included "tiredness, dizziness, weakness, chest pain, and slowness of breath." He then made a cursory examination, which included an x-ray but failed to include a blood pressure check, and sent her home with sodium butisol, a barbiturate used as a sleeping pill, and Alertonic, a vitamin B complex. Seven days later, on March 19, Louise

revisited the hospital and complained to Dr. Wing that the medicine was having no effect. Instead of conducting a more thorough exam, the doctor accused her of not taking her medicine and ordered her to see a psychiatrist in May. Once again, Louise returned home. On March 22, her family brought her to the hospital for the last time, comatose. As her condition deteriorated, the doctors conducted extensive tests, many of them for the first time. Finally, they discovered the cause underlying the discomfort Louise had been feeling for weeks. Her kidneys had failed. On March 29, Louise Levy passed away. She left behind five illegitimate children ranging in age from five to seventeen years old.[3]

Because they were illegitimate, the Levy children had lost their only means of support when their mother died. Luckily, their aunt Thelma took them in and continued to provide for them, though she was legally not required to do so. It was their aunt who also first approached the law firm of Levy, Smith and Pailet, concerned that Louise's death may have been avoidable and that negligence had been shown on the part of the Charity Hospital as well as on the part of Dr. Wing. No blood or urine tests had been performed the first two times Louise sought help, either of which would have shown her failing kidneys while there was still a possibility of prolonging her life. The dismissal of Louise's worsening condition on the nineteenth with an appointment to a psychiatrist also suggested that there was just cause to pursue a claim of

[3] Appendix, *Levy v. Louisiana* 391, U.S. 68, 7-9.

wrongful death. The attorney, Adolph J. Levy, no relation to Louise Levy or her children, concurred and filed a motion in October 1965 with the New Orleans Parish District Court. The children's suit was seeking a total of $60,000 dollars for pain, suffering, and the loss of their mother. The first version of the lawsuit only took issue with Louise Levy's wrongful death. However, the defendants, the Charity Hospital, Dr. Wing and his insurance company, and the State of Louisiana, insisted that illegitimate children could not file for wrongful death benefits. Afterward, Adolph Levy amended the case and countered this argument with two points.[4]

He first established that the mothers of illegitimate children were just as central to a child's life as the mothers of legitimate children. Louise Levy was a good mother to her children regardless of their status. The damages they sought were not just for wrongful death but for loss of support and loss of love and affection as well.[5] Although all five children were born out of wedlock, the brief stated, Louise had certified on their birth certificates that they were hers. The mother's certification was a necessary step, unique to Louisiana law; most other states only required a father to certify his relationship to an illegitimate child. She had treated all five the same as "any good mother would treat her own legitimate children," Adolph Levy insisted. The children had attended

[4] Appendix, *Levy*, 28.
[5] Ibid., 27-28.

Catholic Mass every Sunday and each child was enrolled in a Catholic parochial school even though Louise could have sent them to public school without expense. Adolph Levy stressed that Louise had stayed home to care for the children every night, instead of going out. Most importantly, she had loved them. Although she had worked as a domestic servant, her income had been "sufficient to clothe, feed and educate the children." The Levy children had not been a burden to the State. The argument concluded, "She did everything which a mother of legitimate children would do for her own children, and, indeed, decedent even did more for her children than many legitimate mothers would do for their's[sic]."[6] The second point that the attorney added claimed that barring the illegitimate children from receiving death benefits would be unconstitutional as it, "deprives them of life, liberty or property without the due process of law, and it denies them the equal protection of the laws."[7]

The trial continued through the winter and at the end of January 1966, the Parish Court dismissed all charges against Charity Hospital, Dr. Wing, his insurance company, and the State of Louisiana. It was the judge's opinion that Thelma, acting on behalf of Louise's five children, could not sue for a wrongful death because the children were

[6] Appendix, *Levy*, 38-40.
[7] Ibid., 26.

illegitimate.[8] Unsatisfied with that decision, Adolph Levy appealed. His appeal was denied and the Parish District Court reiterated that the denial of the right to recover wrongful death benefits or sue for damages was "based on morals and general welfare because it discourages bringing children into the world out of wedlock." It was the district court's opinion that "child," as it appeared in Louisiana Civil Code Article 2315, which regulated wrongful death benefits, meant only legitimate children and the court concluded, "That an illegitimate child was dependent upon the deceased parent for support makes no difference." The district court also included an opinion on the question of the unconstitutionality of discrimination against nonmarital children "Since there is no discrimination in the denial of the right of illegitimate children to recover based on race, color, or creed; we can find no basis for the contention of unconstitutionality."[9] Adolph Levy then appealed to the Louisiana Supreme Court, which refused to hear the case and offered no opinion on it. The Levy children's cause languished until the fall of 1967 when Adolph Levy approached Norman Dorsen about the case and the possibility of arguing it before the U.S. Supreme Court.

Dorsen, who had built an impressive legal career through the 1950s and into the 1960s, including time spent as a law clerk for Justice John Harlan II of the U.S. Supreme Court, was a member of the

[8] Appendix, *Levy*, 44.
[9] Ibid., 62-63.

American Civil Liberties Union's (ACLU) Board of Directors. As part of the ACLU, he worked on several constitutional law cases, including *Gideon v. Wainwright*, which held "the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial." He also successfully litigated *In re Gault,* which determined that minors had basic due process rights in juvenile court.[10] His work on these cases and others like them shows his concern for the expansion of civil rights to all people.[11] It was this concern that led him to construct a broad argument against the legal discrimination shown toward nonmarital children, ignoring the fact that the Levy's were African-American. His goal from the beginning was to ask the Supreme Court for a ruling related to all nonmarital children. By ignoring race, his work would apply to all children equally, not just minority children, and it would take issue with centuries of legal discrimination.[12]

The U.S. Supreme Court's decision to hear *Levy* in the spring of 1968 was not a foregone conclusion. The doctrine of abstention allowed federal courts to not hear cases involving a number of issues, including family law and state statutes. In 1968, the three types of abstention in

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[10] *Gideon v. Wainwright* 372 U.S. 335 (1963); *In re Gault* 387 U.S. 1 (1967). Opinions found at *Justia.com Supreme Court Center,* hereafter Justia.com, http://supreme.justia.com/.

[11] Norman Dorsen biographical information from Library of Congress "Bicentennial" http://www.loc.gov/bicentennial/bios/democracy/bios_dorsen.html. [Accessed on 3/28/2010]; Brennan, "Tribute to Norm Dorsen," 309.

[12] Levy Notes; Nov 6, 1967; Norman Dorsen Papers; TAM 251; 32; 11; Tamiment Library/Robert F. Wagner Labor Archives, Elmer Holmes Bobst Library, 70 Washington Square South, New York, NY 10012, New York University Libraries.

use were the Pullman Abstention, which allowed a federal court to abstain when a State's court could clarify a statute, thereby avoiding a federal ruling on constitutionality, the Burford Abstention, which allowed the federal courts to not become involved in complex state procedures, and the Thibodaux Abstention, which deferred to states when a case fell under both federal and state jurisdiction.[13] By abstaining from some cases, federal courts could avoid friction between the different levels of the judiciary system and avoid misinterpreting state law. Also, by abstaining, federal courts could avoid unnecessary trials and rulings.[14] Because of the complexity of family law at the state level, it was possible for the U.S. Supreme Court to abstain from hearing *Levy.*

However, as Erwin Chemerinsky writes in *Federal Jurisdiction*, "Abstention is not necessary if a state law is patently unconstitutional."[15] The jurisdictional statement that Dorsen submitted on behalf of the Levy children centered on the unfair treatment of children born to unwed parents. Dorsen wrote that the question of equal rights for nonmarital children was substantial enough to deserve the U.S. Supreme Court's attention.[16] At issue, as he saw the case, was the discrimination faced by children who had no choice over their birth status, comparing this

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[13] Erwin Chemerinsky, *Federal Jurisdiction,* 5th ed. (New York: Aspen Publishers, 2007), 783-84. Pullman Abstention is named after *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), Burford Abstention after *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and Thibodaux Abstention after *Louisiana Power & Light Co. v. City of Thobodaux*, 360 U.S. 25 (1959).

[14] Ibid., 786-788.

[15] Ibid., 791.

[16] Jurisdictional Statement, *Levy*, 6.

form of discrimination to that faced by people of minority races. As Dorsen presented the argument, it was a question of due process and equal protection under the Fourteenth Amendment. In early November, 1967, the High Court agreed to add *Levy* to their calendar.

Oral arguments were presented before the U.S. Supreme Court on March 27, 1968. On May 20, the court ruled in favor of the Levy children and Justice William O. Douglas issued the court's opinion. Justice Douglas began the opinion by stating 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." [17] As Dorsen had argued and the state had maintained, the fact that the Levy children were African-American was less relevant to the case than was their status as illegitimate children. The Supreme Court also found the classification of illegitimacy unrelated to the ability to sue for wrongful death and survivor benefits. At the end of his opinion, Justice Douglas wrote, "We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."[18]

The Supreme Court's final opinion divorced nonmarital children from the actions of their parents and struck against centuries of long-held traditions that discouraged nonmarital births by imposing

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[17] *Levy v Louisiana*, found at Justia.com, http://supreme.justia.com/us/391/68/case.html, [Accessed on 3/31/2010].

[18] *Levy* at 72.

disadvantages upon children born to unwed parents. *Levy* also 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. One of these later cases was *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164 (1972). *Weber* explored the argument that classifications based on legitimacy and illegitimacy served no real purpose for the state.[19] Despite the fact that *Weber* found precedent in *Levy*, as the years passed, illegitimacy cases tended to look only as far back as *Weber*. Because of this, scholars have often overlooked the early influence of *Levy*.

The historiography surrounding *Levy v. Louisiana* is thin. Shortly after the case was heard, a small number of law review journal articles appeared, including one written by two of Dorsen's researchers, John C. Gray Jr. and David Rudovsky. However, because most of these articles were written so soon after the case was heard, they are more accurately described as primary sources, providing insight into the case but not historical analysis.

Gray and Rudovsky's article, "The Court Acknowledges the Illegitimate*: Levy v. Louisiana* and *Glona v. American Guarantee &*

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[19] Martha T. Zingo and Kevin E. Early, *Nameless Persons: Legal Discrimination Against Non-Marital Children in the United States*, (Westport: Praeger, 1994), 60; *Weber v. Aetna Casualty and Surety Company*, found at Justia.com, http://supreme.justia.com/us/406/164/index.html, [Accessed on 4/25/10].

Liability Insurance Co.," from the November 1969 issue of the *University of Pennsylvania Law Review* was one of the first to appear after the court decision. It provides the most thorough legal analysis of the case, though little time is spent on the history of the case. The authors found the decision of the court in *Levy* and *Glona* to be inadequate. According to Gray and Rudovsky, Justice Douglas' opinion "condemn[ed] generally classifications based on illegitimacy." However, he never clarified the legal grounds for the decision. Despite these shortcomings, the authors felt this decision was the best basis for challenging other aspects of discrimination against illegitimate children.[20]

The problems they noted in Justice Douglas' decision formed the basis for legal analysis of the case over the decades. Douglas' opinion placed the right to wrongful death recovery in the category of basic rights, thus protected by the Constitution. This has wide-ranging consequences, since wrongful death recovery is an economic question, and the court has traditionally been reluctant to interfere in economic issues. If wrongful death benefits are a basic right, equivalent to those rights expressed in the Constitution, then other economic situations must also be considered basic rights. This aspect of the decision allowed the Levy case to play a role in later welfare and other state benefit cases in the early 1970s. The second aspect of Douglas' opinion equated birth

[20] John C. Gray Jr. and David Rudovsky, "The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co," *University of Pennsylvania Law Review* 118, No. 1 (Nov., 1969): 2-3.

status with race or ancestry, making *Oyama v. California* 332 U.S. 633 (1948) important precedent. In that case, the court ruled that discrimination against aliens was constitutional. However, according to the opinion written by Chief Justice Vinson, naturalization status could not be used as a basis for discriminating against a child of an alien, who was a citizen and therefore entitled to equal protection and due process.[21]

There were three possible reasons for Douglas' rejection of the state's argument that legal disadvantages dissuaded people from having children outside of marriage. The first reason was that it was illogical. People would not be dissuaded from creating children before being married because that child would not be able to claim wrongful death benefits. The second reason hinged on the fact that by disallowing nonmarital claims, the law was undermined, since it was created to provide support for children who had lost their parent. If the children of nonmarital parents could not claim benefits, the most financially desperate children would not be served by the law. The third reason related to due process, a law must serve a rational purpose, and status beyond a person's control was suspect.[22]

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[21] Gray and Rudovsky, "The Court Acknowledges the Illegitimate," 4-6; Vinson's opinion for the Court in *Oyama v. California* can be found at Justia.com, http://supreme.justia.com/us/332/633/case.html [Accessed 9/07/10].

[22] Gray and Rudovsky, "The Court Acknowledges the Illegitimate," 8-9.

Finally, according to Gray and Rudovsky, Douglas' decision in *Levy* did not adequately address the particularities of the survivorship claim. The survivorship claim was based on the pain and suffering of the parent at his or her death. It is a finite benefit and therefore the presence of nonmarital children affects the share that legitimate children receive. This differs from wrongful death, where each child has an individual claim. For the Levy case, the "survivorship provisions [were] arguably justified." Because the law traditionally considered nonmarital children unrelated to a parental family, their interests within that family were less important than those of a legitimate child. The basis of this understanding was doubtful, according to the authors, because families often included illegitimate children. Likewise, it was possible that legitimate children might not be intimately involved with their families. Survivorship benefits are usually distributed as if the parent had been able to do the distribution. The law assumed that illegitimate children would be excluded but there was no evidence to support that assumption. In the end, Gray and Rudovsky determined that the court ignored the survivorship aspect of the case and that question remained open.[23]

In addition to the article by Gray and Rudovsky, a second early article, written by Harry Krause, appeared in the winter 1969 issue of the *University of Chicago Law Review*. Krause began his piece with

[23] Gray and Rudovsky, "The Court Acknowledges the Illegitimate," 13-14.

Shakespeare's "Why Bastard, Wherefore Base," describing *Levy* and *Glona* as "sleeper" decisions that would end all legal discrimination between legitimate and illegitimate children with regard to their relationship with their mother. Louisiana law was unique in that it required both the mother and father to acknowledge their illegitimate child.[24] Because of this understanding, Krause's work on the Levy case focused on how the decision could expand the legal rights of unmarried, noncustodial fathers. He wrote,

> But there is more than meets the eye. 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.[25]

His words were almost prophetic; many of the cases that followed Levy and worked to improve nonmarital children's rights and privileges addressed child-father relationships. His article discussed the possible unconstitutionality of several state statutes and federal laws related to the father-child relationship in light of *Levy*.

Krause described Douglas' opinion for the court as careless. And although his article offers analysis of the decision, the history of the case is not mentioned.[26] In addition to exploring Douglas' opinion, Krause looked at the dissent, written by Justice Harlan, who was joined by

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[24] Harry D. Krause, "Legitimate and Illegitimate Offspring of Levy v. Louisiana: First Decisions on Equal Protection and Paternity," *The University of Chicago Law Review* 36, No. 2 (Winter, 1969): 338.

[25] Ibid., 339.

[26] Krause, "Legitimate and Illegitimate, 341-42.

Justices Black and Stewart. Krause explained that Harlan's dissent centered on the argument between legal and biological definitions of relationships. Legal relationships between people were not necessarily equivalent to biological ones and although people might be able to adjust their legal relationships to one another, they could not change their biological ones. Krause argued that Justice Harlan had missed the point of Douglas' decision. "The key to Levy is that the illegitimate child is disadvantaged purely by reason of his birth status *over which he has no control* (original emphasis)." For Krause, illegitimacy was a biological relationship that could not be changed, whereas Harlan's dissent saw illegitimacy as a legal status that held the potential for change. After exploring the decision handed down in *Levy*, Krause turned to the quagmire of paternity laws that varied from state to state and offered his opinion regarding how the Levy decision might affect those laws.[27]

The topic of nonmarital children was an important area of study for Krause and his article, "Legitimate and Illegitimate Offspring of *Levy v. Louisiana*: First Decisions on Equal Protection and Paternity," was one of several on the topic Krause wrote before and after the Levy case. Another article, "Why Bastard, Wherefore Base?," which appeared a few months prior, also focused on the father-child relationship. In this article, Krause created a before and after comparison of illegitimacy laws to show the changes that he believed *Levy* would usher in. As in his

[27] Ibid., 343, 349.

other works, Krause linked poverty, in part, to illegitimate children. The statistics he quoted showed that some urban areas had reached an illegitimacy rate of fifty percent. Krause saw these children, whom he referred to as "fatherless welfare children," as a "symptom of the social malaise," and he felt that progress in the private sector was necessary to improve these children's lives. For Krause, private sector emphasized the family and he saw the father as key to solving the problem of illegitimate children growing up in poverty.[28]

In addition to his work relating illegitimacy to poverty, Krause distinguished between two types of laws related to illegitimate children: definitional laws, and laws that lessened the burden of illegitimacy. Discrimination between types of illegitimate children had been common for ages. For example, some jurisdictions considered children born to parents of different races illegitimate. This "would seem to be prohibited under recent United States Supreme Court decisions," Krause wrote.[29] Although he does not mention these cases by name, it is likely that he is referring to miscegenation cases, such as *Loving v. Virginia* 388 U.S. 1 (1967). Laws had also changed to distinguish between children born into voided marriages and those born into voidable marriages, allowing them to be recognized as legitimate. In other cases, as long as the child was

[28] Harry D. Krause, "Why Bastard, Wherefore Base?" *Annals of the American Academy of Political and Social Science*, Vol. 383, Progress in Family Law (May, 1969): 59. His statistics were quoted from *U.S. News and World Report*, Oct. 2, 1967, 84 and U.S. Dept. of Health, Education, and Welfare, *Trends in Illegitimacy, United States, 1940-1965* (1968).

[29] Ibid., 60.

born into any relationship that resembled a formal marriage, they would be considered legitimate. [30] These early primary source articles appeared in law journals through the late 1960s and early 1970s. Their ultimate goal was to analyze and disseminate information about the Supreme Court's decision and how that decision affected current and future cases related to similar questions about birth status. These articles later gave way to those that provided some historical analysis.

Later articles, such as "Judicial Disapproval of Discrimination against Illegitimate Children: A comparative study of developments in Europe and the United States" by Johan Meeusen and "Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter" by Max Stier, offer some historical analysis.[31] However, these works focus on nonmarital children in general and not on the importance of the Levy case.

Meeusen begins his article with Justice Douglas' *Levy* opinion, using it as the opening volley in the "decade-long attack against the traditional legal discriminations suffered by illegitimate children." His article explores changes in laws regarding nonmarital children in the U.S. and Europe. "For centuries, both the common law and, especially, the civil law tradition subjected children born out of wedlock to

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[30] Harry D. Krause, "Why Bastard, Wherefore Base?", 60.

[31] Johan Meeusen, "Judicial Disapproval of Discrimination against Illegitimate Children: A comparative study of developments in Europe and the United States," *The American Journal of Comparative Law* 43, No. 1 (Winter, 1995): 119-145; Max Stier, "Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter," *Stanford Law Review* 44, No. 3 (Feb., 1992): 727-757.

numerous disabilities."[32] With this opening, Meeusen focuses on the shifting patrimonial laws of the U.S. and Europe and analyzes the various decisions of the U.S. Supreme Court. His summation of Justice Douglas' opinion succinctly explains the many problems that legal analysts had with it in the earlier articles. He wrote,

> Applying a vague test (which referred to rationality, scrutiny concerning basic civil rights, invidious classifications and Shakespeare's King Lear), Justice Douglas' opinion for the majority was clear only in its rejection of the Louisiana statutes which discriminated on a basis which was completely irrelevant to its purpose and subject matter.[33]

In 1992, Stanford law student, Max Stier, also explored illegitimacy and other "corruption of blood" sins within the Constitution's legal framework. His article offers the closest example of bringing the child and family's voice into the debate. He accomplished this by referring directly to the children in his introduction. However, Stier felt obligated to change the names of the Levy children to protect their privacy. Although the Supreme Court had struck down a number of decisions that disadvantaged children because of their parents' decisions over the decades, Stier felt that the Court had not offered an adequate explanation for these decisions. This is a common theme when discussing *Levy*.[34]

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[32] Meeusen, "Judicial Disapproval of Discrimination," 119.
[33] Ibid., 122.
[34] Stier, "Corruption of Blood," 727.

Stier's argument is simple, "children should not be made to pay for the sins of their parents."[35] Further, he argues that the Constitution contains provisions against this "corruption of blood" (holding children guilty of parental sin) principle. According to Stier, four reasons that illegitimacy cases deserved to be heard under the heightened scrutiny principle. First, the constitutional principle of corruption of blood "prohibits discrimination against children on the basis of parental conduct." Additionally, in cases related to illegitimacy, the law has discriminated against children. Third, those children who have been discriminated against in this manner have no political voice and cannot protest their treatment. Finally, in these cases, children were being held responsible for their status, not their actions. He writes that if the court recognized the importance of the "Corruption of Blood" aspect of the Constitution more explicitly, it would allow judicial decisions based on corruption of blood to rest on a more solid foundation. This would also allow for the questioning of many state-level classifications.[36]

For Stier, *Levy* "initiated judicial recognition of the constitutional rights of illegitimate children," but it did not explain how states *could* use the classification of "illegitimate." The questionable grounds of the *Levy* decision provided leeway in future decisions. For example, in *Labine v. Vincent* 401 U.S. 532 (1971) the court decided that an illegitimate child

[35] Ibid., 728.
[36] Ibid., 728, 734.

did not deserve an inheritance. While the father had the option of legitimizing the child by marrying the mother, the dissenting justices in this case stated that illegitimacy in *Levy* and *Weber* was equally insurmountable on the part of the child. Throughout the article, Stier illustrates the U.S. Supreme Court's indecision regarding illegitimacy. Is it, or is it not, acceptable to discriminate against illegitimate children? Not until the 1980s did the court finally decide that they would use heightened scrutiny for all illegitimacy cases, regardless of circumstances. This marked the end of the legal battle in the United States for equal treatment of nonmarital children.[37]

One final article lends an international setting to the Levy case, showing that the changes it ushered in were part of global trends. This article, "Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny add up to the Need for Change" by Karen A. Hauser, provides a brief but thorough history of illegitimacy laws that formed the English Common Law. Hauser's early point, that the laws did not always discriminate against children born outside of a traditional marriage, counters the accepted framework of constant discrimination other historians have used. However, other than the enlarged theater and more objective exploration of the legal history surrounding

[37] Stier, "Corruption of Blood," 740-43.

illegitimacy laws, the work does not improve upon the historical analysis of the Levy case.[38]

Beyond journal articles, a small number of unpublished dissertations and theses also mention *Levy v. Louisiana*. Unfortunately, they rely heavily on the court's official opinion and the previously mentioned journal articles. The most useful of these, for this study, is Elizabeth Anne Yukins' *The Agency of Illegitimacy in Twentieth-Century American Literature*, which begins with a brief examination of legal discourse related to illegitimacy before exploring its appearance in several works of American literature.

Yukins based her research on Justice Douglas' opinion, the early journal articles, and quotations taken from the appellant brief, as they appeared in those early articles. Yet, from her reading, she concludes that, "It is possible to say that *Levy v. Louisiana* represents the most significant legal breakthrough for the rights of children born to unmarried parents in the twentieth century."[39]

She begins with the interpretation that Justice Douglas was fighting against the fiction of illegitimate children being nonpersons. It is Yukins' belief that the Levy case "arose out of a series of discriminations levied against the mother of the children." Louise Levy was "a poor,

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[38] Karen A. Hauser, "Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny add up to the Need for Change," *University of Cincinnati Law Review* 65, (1997): 891.

[39] Elizabeth Anne Yukins, *Bastard Claims: The Agency of Illegitimacy in Twentieth-Century American Literature,* (PhD Dissertation, University of Pennsylvania, 1999), 13.

black woman" whose "suspect race and gender status" led to W.J. Wing's misdiagnosis and dismissal of worsening symptoms. Yukins' attack against Wing's actions is predicated by his presumed whiteness. It should be noted that currently, there is no evidence regarding Wing's race. Regardless, her point is valid. Louise's race influenced all aspects of her life and the lives of her children. [40] Because of the importance race played in this case, it is logical to look for information regarding the Levy case in books related to race relations in the United States or the Civil Rights Era. Unfortunately, the majority of them are silent regarding this case.

That silence does not detract from their usefulness to this study. These works provide significant information related to racial injustice and the world that the Levy children and their mother inhabited. Some, such as David Chalmers' *And the Crooked Places Made Straight: The Struggle for Social Change in the 1960s,* do not talk about children or the Levy case, despite the fact that they are looking at social change and the fight for civil rights.[41] Other works, which focus on African-American families, such as Harriette Pipes McAdoo's collections of essays, entitled *Black Families*, and *Black Children: Social, Educational, and Parental Environments,* have proven more useful. Jualynne Elizabeth Dodson's

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[40] Ibid., 2, 15.

[41] David Chalmers, *And the Crooked Places Made Straight: The Struggle for Social Change in the 1960s* 2nd ed. (Baltimore: The John Hopkins University Press, 1991, 1996).

"Conceptualizations and Research of African American Family Life in the United States: Some Thoughts," delves into the various theoretical approaches researchers used while studying African-American families in the twentieth century, including the cultural ethnocentric and the cultural relativist schools of thought.[42]

The cultural ethnocentric school of thought regarding the historical study of African-American families started with E. Franklin Frazier's work, *The Negro Family in the United States*. Frazier believed that patterns he discerned within the African-American family stemmed from enslavement. Through the middle of the twentieth century, a number of investigators followed in Frazier's wake, their work culminating in the Moynihan report.[43] Moynihan's work characterized the African-American community "with such traits as broken families, illegitimacy, matriarchy, economic dependency, failure to pass armed forces entrance tests, delinquency, and crime."[44] In turn, this report became the basis for implementing social policy. The assumptions that Moynihan made were

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[42] Jualynne Elizabeth Dodson, "Conceptualizations and Research of African American Family Life in the United States: Some Thoughts," McAdoo, Harriette Pipes McAdoo ed. *Black Families*, 4th ed. (Thousand Oaks: Sage Publications, 2007). The essays in McAdoo's earlier collection, *Black Children: Social, Educational, and Parental Environments*, 2nd ed. (Thousand Oaks: Sage Publications, 2002) have also provided useful contextual information regarding the Levy family.

[43] E. Franklin Frazier, *The Negro Family in the United States*, Revised and abridged edition, forward by Nathan Glazer, (Chicago: The University of Chicago Press, 1966); Dodson, "Conceptualizations and Research of African American Family Life," 52-54; Lee Rainwater and William L. Yancey. *The Moynihan Report and the Politics of Controversy: A Trans-action Social Science and Public Policy Report Including the full text of The Negro Family: The Case for National Action by Daniel Patrick Moynihan*, (Cambridge: The M.I.T. Press, 1967).

[44] Dodson, "Conceptualizations and Research of African American Family Life," 55.

widely accepted by other scholars. Moynihan's influence could be seen in many works written through the mid-1960s. Jessie Bernard reported in 1966 on the instability of the African-American family and traced the increase of illegitimate children to hedonistic ethics. That same year, Seymour Parker and Robert J. Kleiner wrote "Mental Illness in the Urban Negro Community." In 1967, Elliot Liebow looked at "street corner" African American men who could not fulfill their familial roles because of societal pressure. A year later, Lee Rainwater looked at matrifocal family structures, although he used the term matriarchy.[45] These examples, and others, of ethnocentric studies assumed that the African-American family was dysfunctional and disorganized. They concluded that it was typically fatherless, on welfare, thriftless, and overpopulated with illegitimate children. More often than not, these studies recommended ways to "save" these families. In 1968, Andrew Billingsley took issue with these studies, developing the cultural relativist school, which saw African heritage as central to the cultural behaviors of African-American families.[46] Cultural relativist theories offered an improvement over the ethnocentricity of Frazier's and other early scholars' work and it complemented the growing Civil Rights rhetoric of the late 1960s. By viewing variety within American culture as positive instead of negative,

[45] Ibid., 56.
[46] Dodson, "Conceptualizations and Research of African American Family Life," 57.

Cultural Relativists validated many aspects of the emerging New Social History.

Since *Levy* occurred during the complex decade of the 1960s, other related historical topics range from legal theory to childhood history. However, for the majority of books in these categories that mention *Levy*, authors usually limit their discussion of the case to roughly a paragraph in which generalized background information is given and the outcome that illegitimate children were "not 'nonpersons'" is presented.[47] This cursory treatment has deprived scholars of an opportunity to explore fundamental concepts, such as how labels affect people legally, how we define family, and American culture's changing understanding of childhood and children.

Although *Making all the Difference, Inclusion, Exclusion, and American Law* by Martha Minow offers an excellent legal analysis of family law and labeling, it does not address the Levy case. Minow's work provides foundational information regarding the use of labels and morality, which is vital to understanding why *Levy* remains an important legal decision. She opens with Harold A. Herzog's theory that the labels we use influence our understanding of ethical and unethical behavior. She writes, "Negative labels are especially a problem for members of

[47] This phrase is, perhaps, the most often cited part of Justice Douglas' opinion.

minority groups or groups with less influence in the society."[48] Laws and labels define society and create boundaries and categories in an attempt to regulate the chaos of daily life. As a fundamental aspect of Western society, these boundaries and legal rules distinguish between "competent" and "incompetent," "normal" and "abnormal."[49] A detailed exploration of those living outside the preferred category can be found in Barabara Young Welke's *Law and the Borders of Belonging in the Long Nineteenth Century United States.* For Welke, people who could not be classified as able, white, heterosexual, males, found themselves residing on the legal periphery of society.[50]

Minow reminds her readers that children, who are traditionally seen as legally incompetent, usually fall victim to these arbitrary boundaries.[51] In fact, by comparing other groups *to* children, the law and the state justified the unequal treatment of those labeled as "different." However, Welke specifically avoids adding age to her categories as "children aged out," becoming adults and joining one of the other groups that she has included.[52] Her focus is on women, members of other races, and those defined by law as "disabled in some way." Yet, nonmarital children easily fall into the paradigm she presents.

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[48] Martha Minow, *Making all the Difference, Inclusion, Exclusion, and American Law,* (Ithaca: Cornell University Press, 1990), 4-5.

[49] Ibid., 8.

[50] Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States,* (New York: Cambridge University Press, 2010), 21.

[51] Minow, *Making all the Difference,* 8.

[52] Welke, *Law and the Borders of Belonging,* 10-12.

Depending on the jurisdiction the child lived in, the label of illegitimacy remained a permanent part of the child's identity, following them into adulthood and depriving them of rights that legitimate children would gain after reaching the age of majority. In this way, they remained along the "border of belonging," even if they were "able white males" in all other respects. "Illegitimate" becomes a disability under Welke's thesis.

Minow's work also complements Holly Brewer's *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority.* Ideas regarding the age at which a person became an adult have always been in flux. Brewer's work explored the shifting definition of "adult" and "child" in Britain's pre-Revolutionary American colonies. The changes she discussed delineated those who had authority and could give consent from those who did not.[53] Beginning with hierarchical status, which was assigned at birth during the Middle Ages, society shifted toward individual rights as contracts became more important. "But no one claimed that these new ideas would apply to everyone," Minow writes.[54]

For Americans in the 1700s, consent derived from competence and reason. Americans drew most heavily on John Locke's treatises, which argued that children remained subjected to those in authority because they lacked the ability to reason.[55] This in turn, coupled with the

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[53] Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority*, (Chapel Hill: University of North Carolina Press, 2005), 2-5, 114.
[54] Minow, *Making all the* Difference, 122-124.
[55] Brewer, *By Birth or Consent*, 92-93.

penchant for equating other groups to children, justified the withholding of civil liberties to a variety of people. Also stemming from this, society had traditionally placed those defined as legally "incompetent" under the care of "competent" individuals or under the care of the state. Reasoning, adult males had a right to equality, and freedom, and could legally give consent. For Welke, law reinforced this privilege.

Those who lacked the ability to reason, such as children, women, and the uneducated poor, did not receive individual rights. Minow summarized the legal implications of equating "different" to "legally incompetent" as,

> The competent have responsibilities and rights; the incompetent have disabilities and, perhaps, protections. The competent can advance claims based on principles of autonomy; the incompetent are subject to restraints that enforce relationships of dependence.[56]

For the study of nonmarital children, this leads to an important point. Namely, that in Western tradition, "responsibility follows only from voluntary, knowing, and intelligent choice." This suggests that a child's parents must voluntarily take care of it. Related to legitimate children, the marriage act signifies the voluntary and intelligent choice to create a family. Nonmarital children, because they are born outside the marriage, have a tenuous tie to the family and responsibility for them is questionable.[57]

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[56] Minow, *Making all the Difference,* 126.
[57] Minow, *Making all the Difference,* 126.

As the law creates boundaries around people and groups of people, it often reinforces social prejudice. Minow asks, "Does equality mean treating everyone the same, even if this similar treatment affects people differently?" She replies to her rhetorical question, "Law has failed to resolve the meaning of equality for people defined as different by the society." Her concern is that society used law to accentuate the marginalization of people labeled as different. An example of the inequality created by boundaries can be seen in the way that these borders delineated obligation between people, as seen in the lack of obligation to care for an illegitimate child. As Welke's work shows, Minow's conclusion is justified: "Naming differences may deny the humanity of those who seem different." Thus, labeling certain children as "illegitimate" may have provided society with the necessary justification to deny them equal rights.[58]

Decades of legal struggle have diminished the number of groups that lack full civil rights. However, children, married women and those deemed mentally deficient remained legally defined as incompetent into the twentieth century.[59] *Levy* presents an example of the process Minow describes by which Western legal traditions moved from "fixed and

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[58] Ibid., 9-10.

[59] Minow, *Making all the Difference*, 122-124. Welke's work also explores how members of these marginal groups fought for more equality. Women and racial minorities were most effective at gaining ground; their tactics were sometimes subtle – slaves learning to read – and sometimes overt, such as public marches.

assigned status to notions of individual freedom and rights."[60] It struck a blow against the tradition of labeling children born to unmarried parents as different from children born to married parents.

Yet, as more groups gained legal equality, children remained dependent and "incompetent". Unfortunately, Minow's argument focuses on legitimate children who live within a familial structure. She writes, "Children for the most part still stand in official relationships to their parents under law, rather than assuming the position of autonomous individuals." But how does a nonmarital child fair under this concept? If children born outside of marriage do not belong to a parent, and they are not automatically autonomous, how do they relate to the law? The uncertainty about their status may have justified their disadvantageous label and unequal treatment.[61]

For Minow, the Civil Rights movement represents an attempt to remove societal and legal labels that disadvantaged groups of people. [62] The Levy case occurs within the context of the Civil Rights Era. According to Minow, "The right to due process is special, among other rights, in its specific call for communication and attention to the individual's dignity."[63] When people step forward to claim rights for children, it opens a dialogue within the community. Through this

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[60] Ibid., 121.
[61] Ibid., 131-32, 283.
[62] Ibid., 131-32.
[63] Minow, *Making all the Difference*, 295.

dialogue, attention is given to an individual and a legacy is created. This legal analysis provides a deeper look at the role that labels and difference played in *Levy*'s history. However, it is important not to lose sight of the children and the family at the heart of this thesis.

Beyond legal analyses, works on the history of childhood appear to be the most likely place to find further information on the Levy case. However, these often use only Douglas' official opinion as a source. Typical of this treatment is John Witte, Jr.'s *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered*. This book offers a definitive history of religious law and illegitimacy, which is equally important to understanding the importance of the Levy case. Witte begins with ancient traditions and moves forward through history until he reaches the late-twentieth century. Much of this study's presentation of ancient traditions relies upon Witte's work. However, while Witte provides a good general discussion of the Levy case's basics, he does not go any deeper than Douglas' opinion. Although a more complete background to the case can be found in Steven Mintz' *Huck's Raft, A History of American Childhood*, his overall treatment of *Levy* is less than a paragraph in length.[64] Mintz mentions the Levy case in conjunction with a discussion regarding "erasing the stain of illegitimacy." His

[64] Witte, *The Sins of the Fathers*, 158-159; Steven Mintz, *Huck's Raft, A History of American Childhood*, (Cambridge: Harvard University Press, 2004), 333. The fact that these books provide little detail on *Levy v. Louisiana* should not be misconstrued. Both are excellent scholarly works that contribute greatly to our understanding of childhood and childhood legal history.

information regarding the Levy case comes from the court records of *Weber v. Aetna* 406 U.S. 164 (1972) and *New Jersey Welfare Rights Org. v. Cahill* 411 U.S. 619 (1973), two important cases that built upon *Levy*.[65]

Levy, which was heard in 1968, was one of the cases heard by the Supreme Court while Earl Warren served as Chief Justice. Attempting to find information regarding the Levy case in works devoted to the Warren Court proves equally fruitless. Books that do mention the case, like the journal articles, focus on legal analysis and criticism rather than history. As with the scholarly works on childhood history, the treatment is brief when it does appear. Lucas A. Powe Jr.'s *The Warren Court and American Politics*, is representative of the literature.

Powe's goal is to "[revive] a valuable tradition of discussing the court in the context of American politics," and "replace stereotypes regarding the Warren Court."[66] Despite these goals, for the purpose of this study, Powe's work falls short in that it does not address *Levy v. Louisiana*. However, Powe does include some aspects of children and childhood as they pertained to the Warren court. This can help illuminate some of the cultural underpinnings that helped shape the court's Levy decision.

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[65] Mintz, *Huck's Raft*, 333.

[66] Lucas A. Powe Jr., *The Warren Court and American Politics*, (The Belknap Press of Harvard University Press: Cambridge, Mass, 2000), xi.

Powe opens by quoting Morton J. Horwitz's *The Warren Court and the Pursuit of Justice*, stating that the Warren Court was "increasingly recognized as a unique and revolutionary chapter in American Constitutional history," and that the court "regularly handed down opinions that have transformed American society."[67] After exploring the Warren Court from 1953 to 1968, Powe concludes that the court was indeed revolutionary in that it broke with tradition and "was engaged in a fundamental discarding of older law." When Earl Warren replaced Fred M. Vinson as chief justice, the U.S Supreme Court had overruled eighty-eight cases. When Warren stepped down, another forty-five cases had been overturned. "And the changes were in virtually all constitutional areas," Powe reminds his readers, supporting Horwitz' theory.[68]

Perhaps the best treatment of the Levy case and the Warren Court is found in *The Warren Court in Historical and Political Perspective*, edited by Mark Tushnet. This series of essays explores each justice of the Warren Court and his important decisions. It is in this context that Melvin I. Urofsky mentions *Levy* in his essay "William O. Douglas as Common Law Judge." Although Urofsky's analysis of the Levy case is brief, he uses it and its results to analyze Douglas' rationale for finding in favor of the Levy children. Urofsky finds both a simple rationality test and heightened scrutiny in Douglas' opinion, neither of which is stated

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[67] From Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, (New York: Hill and Wang, 1998), 3.

[68] Powe, *The Warren Court and American Politics*, 485-86.

outwardly. This lack of a bold statement, Urofsky suggests, is the reason why Douglas' opinion has been seen as vague. Urofsky quotes Douglas' opinion at length before comparing the Levy decision to *Labine v. Vincent* 401 U.S. 532 (1971), which found against acknowledged illegitimates in favor of legitimate children regarding intestate property.[69] However, for Urofsky, Douglas was the right kind of justice because he asked the right questions: "Is it right? Is it just? Is the rule fair?"

The one thing all of these authors, regardless of subject, agree upon is that *Levy* was a landmark decision with far-reaching consequences. Yet, a thorough, historical examination of its place in childhood legal history, along with an explanation of why it was a landmark case, does not exist. More importantly, by limiting source material to the official court opinion and a few law review articles, scholars have neglected an intricate history that provides an opportunity to explore American culture at an important moment in time. Thanks to the rhetoric used in arguing the case, *Levy* helps illuminate society's struggle over the definition of "family" and fears related to its perceived disintegration and the apparent decline of American values. Wrapped up in the cultural upheaval of the late 1960s, it also creates another way to access racial stereotypes that fueled the policy debates of the decade. From a legal standpoint, *Levy* marks an important point in the

[69] Melvin I. Urofsky, "William O. Douglas as Common Law Judge," in *The Warren Court in Historical and Political Perspective*, Mark Tushnet ed. (Charlottesville: University Press of Virginia, 1993), 77.

interpretation of the Fourteenth Amendment and it sits at the beginning of a fundamental change in how the court viewed children's rights, pointing the way toward an enhanced belief in the individual equality of children.

CHAPTER 2

'ILLEGITIMATE' CHILDREN THROUGH THE AGES

Living in twenty-first century America, Douglas' opinion and the decision in *Levy v. Louisiana* may seem uneventful. In our current society, illegitimacy is rarely defined as a societal problem. Despite this, children who are born to unmarried parents are still perceived as deviant in some areas of society. As this chapter will show that opinion was long-standing and can be traced through Western Culture, beginning with early religious traditions. Although the laws and traditions related to the legitimacy of children often left nonmarital children at a disadvantage, through the years, various people, ranging from church leaders to legislatures, attempted to lessen the detrimental impact the stigma of illegitimacy had upon the children bearing that label. A survey of these laws and traditions shows that *Levy* was not the first time people attempted to limit the impact these laws had on nonmarital children. Yet, *Levy* does mark the first time that the U.S. Supreme Court explored the nature of the label that had been placed upon nonmarital children and it illustrates how the court grappled with the unspoken realization that labels dehumanized people. More importantly, various past attempts at redefining "illegitimate" children were short lived. For *Levy,* the reinterpretation of nonmarital children's status paved the way for future cases that would continue to expand the rights of children.

Before *Levy* and the string of court cases that came after it, nonmarital children were often punished for the circumstances surrounding their birth. In essence, the law treated them as if they were as guilty as their parents were.[1] The laws that were challenged by the Levy case, which relegated illegitimate children to second-class citizenship, have a long history in Western culture. The laws described here are generalizations by necessity. Every jurisdiction held its own laws and traditions. Additionally, laws may not be a precise indication of cultural practice and the population in any jurisdiction may have ignored official statements regarding the treatment of illegitimate children.[2]

According to John Witte, in the Western tradition, "bastard" children were both *filius nullius* and *filius populi*. They belonged to everyone and no one, living in a "legal limbo."[3] This opinion is supported by Jenny Teichman, who wrote in her philosophical exploration of illegitimacy, *Illegitimacy, An Examination of Bastardy*, that, "Generally speaking, until the twentieth century illegitimate children did not count as kin." Children who were born out of wedlock often could not inherit from fathers who died intestate. In fact, some jurisdictions blocked parents from willing any property to their illegitimate children.[4] However, illegitimate children could claim some charity and support,

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[1] Witte, *Sins of the Father*, 158.

[2] For an enlightening exploration of written law vs. traditions see Hendrick Hartog "Pigs and Positivism," *Wisconsin Law Review* vol. 1985, (1985):899-935.

[3] Witte, *The Sins of the Fathers*, 3.

[4] Jenny Teichman, *Illegitimacy, An Examination of Bastardy*, (Ithaca: Cornell University Press, 1982), 104.

though they could not hold high office, sue, or testify in court. Because of these disadvantages, many in the lower classes suffered from chronic poverty, neglect, and abuse, a fate many in the upper classes managed to avoid. Because of these problems, some parents smothered their illegitimate children or allowed them to die of exposure at birth.[5] The justification for this treatment of children born outside a traditional marriage could be found in Western religious traditions.

Teichman explained that under Roman law, Canon law and English common law, for a child to be legitimate, it had to be conceived in wedlock, born in wedlock, or conceived and born in wedlock.[6] All others were illegitimate. Traditionally, there were four ways a child who was born illegitimate could become legitimate. The first way was by act of King or Parliament. If the child was not nobility, in general, they could not rely upon this method. The subsequent marriage of the parents could also legitimate a child, as could adoption in some jurisdictions; it is important to remember that under English common law, adoption was not permitted. Finally, in some jurisdictions, it was possible for the child to sue for legitimation.[7]

However, ancient Jewish teachings regarding illegitimate children were so harsh that rabbis did all they could to keep children from being classified as bastards. Only children who were born of adultery or incest

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[5] Witte, *The Sins of the Fathers*, 3.
[6] Teichman, *Illegitimacy, An Examination of Bastardy*, 28.
[7] Ibid., 34.

fell under this classification. And adultery, in this instance, referred only to "proven sexual intercourse between a Jewish man and a Jewish woman who was validly betrothed or married to another Jewish man at the time of the sexual union."[8] Therefore, the laws excluded all non-Jews and women who were not validly married or promised to another. Additionally, the child would only be considered a bastard if its parents could *never* legally marry. This further limitation meant that only children born of incest were illegitimate because so long as marriage was *possible*, even if divorce or death had to occur first, then the child would be legitimate. Children who were illegitimate faced only one legal restriction; they could not marry legitimately born Jews and were limited to marrying other bastards, Gentiles, or converted Jews. In this way, the Jewish faith hoped to keep their rabbis free of sin. The Jewish faith contained few of the stigmas that later Christian and Roman law would impose upon illegitimate children. For example, all children, regardless of status, inherited from their fathers.[9]

Early Christian teachings were similar to Jewish ones. In addition, they used the New Testament to counter some of the harsher laws spelled out in Deuteronomy. While the church expanded the laws that regulated sex, marriage, and family, early Christians did not expand

[8] Witte, *Sins of the Fathers*, 17-19, 21.
[9] Ibid., 17- 22.

upon illegitimacy until the medieval period.[10] From the beginning of Christian teaching, only sex that was part of a heterosexual monogamous marriage was considered licit. All other forms were sinful. Procreation was the main goal of the marriage and by the end of the fourth century it was the only reason to have sex. This limited view of sex and marriage led church officials to condemn sex outside of marriage and those who performed it. However, they did not condemn the children of these illicit unions.[11]

In addition to these early religious teachings, ancient civilizations also took an interest in regulating the legitimacy of children. For example, in ancient Rome, where many laws related to legitimacy arose, the question of illegitimacy could be used as a means to control citizenship and property. Legitimate children inherited from their fathers while illegitimate children inherited from their mothers. This later changed in the fourth through sixth centuries, under the Christian emperors. By that time, Christianity had added a moral patina to the status of "illegitimate." Because of this change, nonmarital children were cut off from any maternal inheritance and the position of illegitimates in society worsened. Even before the rule of the Christian Emperors, nonmarital children lived outside the authority and care of a *paterfamilias*, the family unit that grew up around the father's authority.

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[10] Witte,*Sins of the Fathers*, 27.
[11] Ibid., 28, 36-37.

Because they existed outside this family unit, they had no legal recourse if they were abused, did not inherit any of their father's property, and could not be counted for taxation benefits or other rewards.[12]

The moral aspect of the early Christian laws began as an attempt by Christian leaders to expand the laws that regulated sex, marriage, and family. Teichman posits that questions surrounding illegitimacy used birth status to control sexual relationships. By labeling children, "illegitimate," it allowed law to control who had sex. Following her logic, because laws existed to say who should or should not mate, it followed that some children should not exist. [13] However, in most cultures, the child's illegitimate status could be changed, "by the subsequent marriage of his parents provided that the parents had been free to marry each other at the time of his conception." This rule existed under canon law as well and every European country, except England, allowed children to become legitimate through their parents' subsequent marriage.[14]

In addition to these options for securing legitimacy, the tradition of abandoning children to the elements and adopting children who had been exposed in this way provided an opportunity for removing the stigma of illegitimacy from a child. In his classic work *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late*

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[12] Witte, *The Sins of the Fathers*, 49-52; John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance*, (New York: Pantheon Books, 1988), 72, note 60.

[13] Teichman, *Illegitimacy, An Examination of Bastardy*, 5, 7-8.

[14] Ibid., 35.

Antiquity to the Renaissance, John Boswell explores this aspect of illegitimacy. If the parent claimed that they had found the child exposed and adopted it, then the child would be considered legitimate in many circumstances.[15] A great deal has been written regarding abandoned or foundling children, but there are no reliable statistics regarding whether or not these children were originally legitimate or illegitimate. Some estimates place the rate of illegitimate children as high as 60% of those abandoned. Generally, abandoned children were placed in hospices, foundling homes, or simply exposed to the elements and left to die.[16] It is important to remember that nonmarital children were not the only ones abandoned. Children were abandoned for a number of reasons including famine, poverty, and because the mother could not care for another child at that time.

Whether parents abandoned or kept their nonmarital children, the medieval Christian Church was deeply troubled by the number of illegitimate children in Europe. The great lengths that medieval canonists went to in order to classify these children according to the sin that had produced them suggests this level of concern.[17] The canonical decrees of 906, compiled by Regino of Prüm, were the first of many

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[15] Boswell, *Kindness of Strangers*, 108.

[16] Ibid., 16-17, note 30 and note 34.

[17] Some examples of the laws related to the classification of children, the procedure that a person would take to legitimate a child, and the punishment for having an illegitimate child, can be found in Pope Gregory IX's 1234 decree entitled "Which Children Are Legitimate." This decree included several categories of illegitimacy ranging from "A natural child born to two unmarried individuals" to the offspring of "unbelievers." Quoted in Witte, *Sins of the Fathers*, 84-85.

collections to influence the Christian Church. In addition to imposing penalties on parents for infanticide and negligence, it asked that mothers leave their illegitimate children at the church instead of exposing them. Children left with the church were eligible for adoption. Others resided in institutions for the poor or ill, or managed to survive on their own. Boswell suggests that the majority may have been raised as servants.[18]

In the thirteenth century, laws regarding marriage and clerical celibacy led to the creation of new categories of illegitimate children. A priest's children were considered illegitimate since priests were not allowed to marry. Boswell writes,

> It proved difficult to dissuade the clergy from producing offspring, so the church adopted the expedient of making life difficult for the children themselves, either in the hopes that this would in the end discourage their fathers, or simply as punishment of the parents through the children.[19]

Legally, the children of priests were considered slaves, though it is not likely that they actually lived as such. They could not enter religious orders, marry, or inherit.[20] In reality, these efforts by the church to regulate marriage and produce legitimate children had the opposite effect; more children became illegitimate, though often only through legal technicalities such as changing rules of consanguinity. During the High Middle Ages, "children of awkward parentage" were often given to the church through oblation. "By the fourteenth century the influx of

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[18] Boswell, *Kindness of Strangers*, 222-24.
[19] Ibid., 342-43.
[20] Ibid., 341.

illegitimates, primarily the children of priests, was staggering," Boswell's research showed. In 1346, for example, the Master-General of the Dominicans asked for dispensation from illegitimacy for 200 Dominicans.[21]

Laws in the Middle Ages that addressed illegitimacy remained focused on punishing the sin of the parents. It was hoped that by making the punishments harsh enough, church leaders could curb the sexual interactions of their church members. Secular changes in the law also joined these canonical revisions. As urban populations grew and women could more easily care for themselves and their illegitimate children, the stigma against illegitimacy faded somewhat, though their position in society remained unequal to that of legitimate children.[22]

Legal commentators in medieval Europe reworked Roman law in the fifteenth and sixteenth centuries as well. These laws divided illegitimate children into two main groups, natural and spurious illegitimates. Natural illegitimates were born of concubines or from premarital sex or simple fornication. Spurious illegitimates arose from adulterous or incestuous relationships or from rape and other forms of illicit sex, such as prostitution. The circumstances of their births stained these illegitimate children with the crimes that had been committed by

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[21] Boswell, *Kindness of Strangers*, 302, note 22, 342-43.

[22] Witte, *The Sins of the Fathers*, 89; Boswell writes that the fading stigma surrounding nonmarital children stems from a more lenient opinion of adulterous love, which he sees evinced in erotic poetry and treatises on "Courtly Love." Boswell, *Kindness of Strangers*, 274-75.

their parents. Because of the sins related to their birth, the law placed limits on the amount of property spurious illegitimates could own. It also restricted their rights to inheritance, contracts, and the use of the courts.[23]

Although the changes in illegitimacy law were given special support by Christian theology, Witte's more recent reading of the verses demonstrates that there was no Biblical reason to disadvantage illegitimate children. Because sex out of wedlock was sinful according to the church, the verse, "The sins of the fathers shall be visited upon their children (Ex. 20:5, 34:7; Num. 14:18; Deut. 5:9)," appears to support prejudicial treatment of bastard children. However, Witte shows that there are far more verses within the Bible that support shielding illegitimate children and he further argues that the "sins of the fathers" verses do not relate to illegitimacy or adultery at all. Exodus's two verses relate to the sin of idolatry and do not distinguish between legitimate and illegitimate children. All four verses stipulate that God's vengeance will be enacted upon generations who do not worship Him, regardless of their birth status.[24] Punishing children for the sins of their parents was also limited in Biblical teachings. In fact, ancient Biblical laws specifically do not punish children for the actions of their parents. "The fathers shall not be put to death for the children, nor shall the children be put to

[23] Witte, *The Sins of the Fathers*, 67-68.
[24] Ibid., 4-6.

death for the fathers; every man shall be put to death for his own sin" (Deut. 24:16).[25]

The Protestant Reformation also influenced the lives of nonmarital children. Countries under early modern Protestant rule often remained true to Roman law, dropping much of the medieval reworking that the Catholic Church had done related to marriage, legitimacy, and illegitimacy simply because it was Catholic. Simultaneously, however, Protestants did little to improve the lives of nonmarital children. As Catholic institutions, such as monasteries and orphanages, were dismantled, they were not replaced by Protestant equivalents. The loss of the Catholic institutions in these lands meant that children born out-of-wedlock had fewer possibilities for support.[26]

Finally, English law differed from the Roman law found on the continent in that it began as two separate bodies of law, one canonical and one secular, which eventually merged to form the English common law that later took root in the American colonies. The canonical aspect of this law dealt with the sins that the parents had committed to create an illegitimate child, along with the child's life, while the secular aspect confined itself to laws regarding how an illegitimate child could inherit property. After the Reformation, these two bodies became one law that grappled with not only the parents' sins but also the legal rights of the

[25] Witte, *Sins of the Fathers,* 4-6.
[26] Ibid., 102-103.

illegitimate child. In this way, the child became responsible for the sins that the parents had committed.[27] One of the tenets of English common law was the principle of *filius nullius*, child of no one, which became the root of American law.

Despite the fact that they were *filius nullius*, there is evidence that in 1576, parents were required to support their nonmarital child in some way in order to limit the financial burden imposed upon local state entities. Later, in his *Commentaries on the Laws of England*, William Blackstone wrote,

> And really any other distinction [between a bastard and another man], but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of this parent's crimes, be odious, unjust, and cruel to the last degree. [28]

Therefore, according to Blackstone, the only distinction that should have differentiated legitimate and illegitimate children was a question of inheritance.

Instead, laws that limited a child's access to financial support or inheritance, continued to disadvantage children born outside of church-sanctioned marriages. However, the presence of *filius nullius* was tempered within English common law by the presumed legitimacy

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[27] Witte, *Sins of the Fathers*, 106-07.

[28] Quoted from Blackstone, *Commentaries on the Laws of England*, 485-486 vol. 1 (1757), found in Krause, "Why Bastard, Wherefore Base?" 60. However, it is important to remember that Blackstone may have had his own agenda when he wrote his *Commentaries*, and they may not reflect actual law but rather the direction he wished to take law. Regardless, his treatises greatly influenced the American Colonists. See Brewer, *By Birth or Consent,* 10-11 and Welke, *Borders of Belonging,* 27.

doctrine. Only with undeniable proof that the husband could not be the father, would a child be considered illegitimate if the mother was married.[29] Additionally, there were two legal ways to limit this discrimination against nonmarital children. The first was definitional. By redefining who was legitimate, the law could mitigate the consequences of out-of-wedlock births. The second way was by alleviating specific hardships. Yet, England's law was slow to change. It was not until 1926 that children could be legitimized by the subsequent marriage of their parents.[30]

Although informed by Roman traditions, American law draws most heavily on England's common law traditions, such as the concept of *filius nullius*. In America, the only obligation the parent had toward the child was financial support.[31] However, in his work "Illegitimacy and Bridal Pregnancy in Colonial America," Robert Wells explored colonial laws related to illegitimate children and marriage. He admits that sources are scarce but what is available suggests that illegitimacy rates, though possibly negligible, increased in the colonies through the seventeenth and eighteenth centuries.[32] While colonial churches remained concerned

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[29] Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America*, (Chapel Hill: The University of North Carolina Press, 1985), 201.

[30] Quoted from Blackstone, *Commentaries on the Laws of England*, 485-486 vol. 1 (1857), found in Krause, "Why Bastard, Wherefore Base?" 60; Teichman, *Illegitimacy, An Examination of Bastardy*, 35.

[31] Mintz, *Huck's Raft*, 163.

[32] Robert V. Wells, "Illegitimacy and bridal pregnancy in colonial America," in *Bastardy and its Comparative History*. Peter Laslett, Karla Oosterveen and Richard M. Smith eds. (Cambridge: Harvard University Press, 1980), 354.

with the punishment of sin, civil leaders grew more concerned with the economic aspects of caring for illegitimate children.[33] Over time, according to Wells, governments in the colonies "lost interest in prosecuting sexual sinners so long as the children of sin were financially cared for."[34]

After the American Revolution, states often reworked their laws based on the ideological shift towards the importance of individual rights that had occurred in the new country. As Brewer has argued, this shift related to John Locke's theories of the consent of the governed. Only reasoning adults could give consent to be governed and earn the right to participate in government. As the list of those who were able to give consent increased, the sphere of civil rights expanded to include them. This expansion caused many long-held English laws to change through the 1800s and into the early 1900s. Hints of this shift toward individualism can be seen in the U.S. Constitution, particularly Article Three and its prohibition of bills of attainder and corruption of blood.

For Blackstone, corruption of blood began as a Norman penalty and involved forfeiture of property to the feudal lord. Under Saxon custom, the forfeiture went to the king for a year and a day and then was returned to the heir except in cases of treason when the property was lost for good. Under the common law, corruption of blood began as the

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[33] Grossberg, *Governing the Hearth*, 198-99.
[34] Wells, "Illegitimacy and bridal pregnancy," 356.

penalty of attainder. Attainder allowed for the confiscation of all a person's property and the loss of his ability to inherit or leave anything to any heir. According to Blackstone's definition, attainder exhausted and "dammed up" hereditary blood, stopping rights from flowing from ancestors to descendants, corrupting it. This included property rights. In his article on corruption of the blood, Stier concludes that, "The result of this punishment was to preclude children of an attainted person from inheriting," from their parents.[35]

Corruption of blood is found in Article Three of the United States Constitution, which stated that although Congress could declare the punishment for treason, no attainder would "work corruption of blood, or forfeiture except during the life of the person attainted." In his article, Stier explains that there is no debate surrounding the rationale for including this clause and his research shows that the Framers of the Constitution included this provision because they intended to, "prevent children from suffering the wrongs of their parents." Children who faced corruption of blood rulings faced "denial of rights to inheritance, welfare benefits, education, and other critical resources." After the Constitution's ratification, several state constitutions also contained corruption of blood clauses. Ultimately, this constitutional principle, "prohibit[ed] discrimination against children on the basis of parental

[35] Stier, "Corruption of Blood," 729, note 11.

conduct."[36] Yet, laws that targeted nonmarital children continued. Despite Article Three, American society remained true to the traditions that had been transplanted from Europe. Children born outside of a traditional marriage could not inherit property and the alleviation of corruption of blood only affected legitimate heirs. Centuries later, this Constitutional principle was touched upon within the *Levy* brief, although the possible unconstitutionality of laws related to the treatment of nonmarital children appears less influential than the precedent set forth by earlier court cases.

Beyond the Constitution, reform in the United States continued through the 1800s. The changes in law in the United States during the nineteenth century illustrate a shift in culture from an emphasis on community and family to one of individualism. In his work *Governing the Hearth, Law and the Family in Nineteenth-Century America*, Michael Grossberg explores this shifting debate, focusing on the transformative power of a concern for child welfare, that permeated Western culture.[37] As time passed, the laws related to illegitimate children lost their focus on punishing illicit sex to limiting the financial obligations these children placed upon the state. Because of this focus, the establishment of

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[36] Stier, "Corruption of Blood," 730, 736. Stier cites James Madison from *The Records of the Federal Convention of 1787* Max Farrand ed. (New Haven: Yale University Press, 1911, 1937) and *Federalist* 43. *Federalist 43* can be found at http://thomas.loc.gov/home/histdox/fed_43.html [accessed on 9/30/10].

[37] Grossberg, *Governing the Hearth*, 196.

paternity became all-important and paternity suits "skewed toward conviction."[38]

Laws that separated illegitimate children from their families gave way to concerns that the state should not provide financial support to these children and their parents. These barriers were lessened in many ways through the nineteenth century, first by recognizing common-law marriages as valid. Additionally, legislatures brought in the civil law tenet declaring that children of annulled marriages would remain legitimate. The states also slowly adopted the civil law provision that legitimated children after their parents married. The Spanish Law that granted fathers the right to legitimize their children by notary also appeared in some jurisdictions.[39]

In the United States, mothers became solely responsible for their children seven years and younger, rather than allowing fathers to take control of their upbringing. Grossberg highlights three reasons for this change. The first stemmed from the fact that nonmarital children were attached to their mothers more readily than they were attached to their fathers. Second, "womanhood" became conflated with "motherhood" and led to preferred maternal custody, so long as the mother conformed to the stereotypical "good mother" supported by society. Finally, child welfare doctrine preferred children stay with their mothers. By the

[38] Grossberg, *Governing the Hearth*, 198-99.
[39] Ibid., 200-204.

1830s, these social underpinnings "established direct lines of inheritance between the mother and her illegitimate child," though they varied by jurisdiction. Grossberg explains this occurrence,

> The illegitimate child began to have its own set of guaranteed rights and responsibilities. Legislators and judges carved out that place by using the welfare of the child and the rights of the mother to sever the link between punishment for sexual immorality and rights to family membership. Illegitimacy never ceased to blight children's lives. But bastards with the "good fortune" to be born to women able and willing to care for them were afforded unprecedented opportunities to escape some of the degradation of birth outside wedlock.[40]

As the decades passed and society changed, illegitimacy became less threatening to order, morality, and the family. Most changes in legitimation laws applied to nonmarital children who acquired enough parental financial support to avoid various poor laws. In contrast, impoverished families often lost custodial rights to their nonmarital children. Post-1850, the renewed interest in strengthening the family led to more changes in illegitimacy laws. By century's end, according to Grossberg, law in the United States focused on whether the individual or the family was more important to society. Most changes in law at this time relied on state intervention to improve the lives of poor illegitimate children.[41]

New ideas about improving the lives of children prompted many states to reconsider their laws related to nonmarital children. However,

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[40] Grossberg, *Governing the Hearth*, 209, 212, 214-15.
[41] Ibid., 218, 226, 228.

the rights extended to this group of children were limited. As previous societies had done, states often improved the lives of nonmarital children by redefining who was legitimate. Prior to the Civil War, many states helped children by recognizing common law marriages and by legitimating children born from annulled marriages or to parents who married after the child was born.[42]

After the Civil War, the Fourteenth Amendment to the Constitution also had an impact on the treatment of nonmarital children as its provisions for equal protection combined with the earlier principles forbidding corruption of blood.[43] Eric Foner succinctly addresses the importance of this amendment in his work, *Reconstruction: America's Unfinished Revolution 1863-1877*. The Fourteenth Amendment became arguably the most important addition to the U.S. Constitution as the courts grappled with its meaning. The Fourteenth Amendment fundamentally changed the nation, making "all persons born or naturalized in the United States," citizens of the United States. Because of this, the states could not abridge their rights without due process nor could they deprive people of equal protection. Although ambiguous, at the heart of the amendment lies the principle that all people deserve equal treatment from the law.[44]

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[42] Mintz, *Huck's Raft*, 163.
[43] Stier, "Corruption of Blood," 734.
[44] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877,* (New York: Harper and Row, Publishers, 1988), 257-258.

As has been noted, changes in illegitimacy law in the United States began in colonial times. By the end of the nineteenth century, a great concern for children, both legitimate and illegitimate, had appeared, joined seamlessly with other movements of the Progressive Era. A part of this movement was the creation of children's aid societies and ultimately a child-saving movement. However, because these societies met with resistance from parents when they attempted to change how parents raised their children, they made little real progress. One such agency was the United States Children's Bureau, formed in 1912.[45] It was charged with the task of investigating and reporting on various aspects of childhood, including desertion, juvenile courts, diseases, child employment, and laws that affected them. In this capacity, the Children's Bureau grew to occupy a central position, providing authoritative information on all aspects of childhood. One of the Children's Bureau's main investigative figures was Florence Kelley.[46]

Near the end of the nineteenth century, Kelley had documented many of the changes that had occurred in illegitimacy laws through the 1800s. The improvements she saw included equal treatment with legitimate paupers, access to training in public schools, changes in child labor laws, and "prohibitions on buying liquor and obscene literature."

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[45] Michael Grossberg, "Changing Conceptions of Child Welfare in the United States, 1820-1935," in *A Century of Juvenile Justice,* Margaret K. Rosenheim, et. al, eds. (Chicago: The University of Chicago Press, 2002), 27.

[46] Ibid., 28-29.

Because of these improvements, Kelley noted, the only disadvantage faced by nonmarital children related to inheritance.[47]

As the belief that government had an obligation to care for children grew through the early twentieth century, many states enacted special children's codes. By working to improve the individual nonmarital child's life, reformers like Kelley shifted responsibility away from the family and onto the state.[48] In a 1915 survey, the United States Children's Bureau estimated that 32,400 illegitimate children were born every year, approximately 1.8 percent of all live births. These illegitimate children "face[d] the world with few resources beyond the meager aid provided under poor laws or by charities," the Bureau reported. The previous year, the Children's Bureau reported that only thirteen percent of illegitimacy cases included paternity proceedings and only seven percent of illegitimate children received financial support from putative fathers.[49]

To improve the lives of illegitimate children, reformers relied on foster homes and adoption. Additionally, they attempted to strengthen marriage and the family in order to avoid the creation of illegitimate children. Bradley Hull stated that,

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[47] Grossberg, *Governing the Hearth*, 228-29; Kelley quoted from Florence Kelley, "On Some Changes in the Legal Status of the Child Since Blackstone," *International Review* 13 (1882), 96.

[48] Grossberg, *Governing the Hearth*, 229.

[49] Ibid.

> If you are going to make, as far as the economic basis is concerned, the status of the unmarried mother and her child equal to that of the married woman and her child, you are going to do something to unsettle society.[50]

Grossberg writes that this struggle between supporting the family or supporting the individual combined with the fear of "undermining paternal property rights [and] encouraging blackmail and sexual immorality," in order to tilt law toward support of the family. The constant theme of these debates was, according to Grossberg, "the persistent willingness to sacrifice the interests of the nonmarital child to a majoritarian vision of society's larger needs." In 1926, Emma O. Lundberg illustrated this belief, writing,

> [I]n practically all states, up to the present time, it has been held incompatible with the interest of the legal family to place the child of illegitimate birth upon an equality with the children born in wedlock with respect to his claims upon the father.[51]

The laws enacted in the early twentieth century greatly expanded the right to support and inheritance that illegitimate children could claim. After the 1930s, many states reformed both their criminal and civil laws to give children, both legitimate and illegitimate, greater protection from exploitation and abuse. For nonmarital children, one of the greatest changes in their favor was the return of the Roman practice that allowed them to inherit from their mothers. Despite these changes, the stigma of illegitimacy remained. For example, into the 1950s and

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[50] Grossberg, *Governing the Heart*, 232-33.
[51] Ibid., 233.

1960s, the status of illegitimacy was apparent on the child's birth certificate, which were often stamped or marked "illegitimate" while some recording agencies used a different color paper for printing the birth certificates of nonmarital children.[52] Because many changes were at the state level, improvements in the lives of nonmarital children were not uniform.

Throughout the centuries, Western tradition has held children born outside a marriage separate from those born to parents within one. For many religions, the presence of an illegitimate child signified illicit sexual relationships, both those deemed taboo by the culture, such as incest, and those deemed sinful by the various church doctrines. When it proved difficult or impossible to regulate the promiscuity of adult church members, leaders moved to enforce behavioral codes by imposing disadvantages upon illicit children. It is impossible to say what the success rate may have been for this strategy. However, because these traditions are so timeworn and nonmarital children continued to play a role in society, it is safe to conclude that they did not work as effectively as the religious leaders may have hoped.

As with many other aspects of religion, the Enlightenment also affected the treatment of nonmarital children. This is seen in the changes that occurred in the United States. Moreover, because of federalism, these changes could differ from state to state, especially in

[52] Mintz, *Huck's Raft*, 173, 286; Witte, *Sins of the Fathers*, 152.

Louisiana. Unlike most states whose laws were grounded in the English common law tradition, Louisiana's law developed differently. Its roots lay in the Roman civil law tradition, as developed in France. To complete the historical overview of illegitimacy, it is necessary to examine the roots of Lousiana's law in French history.

CHAPTER 3

THE FRENCH CONNECTION

While common law principles and the rhetoric of individual rights took root in the American colonies, Louisiana's law traveled a different path. These differences, at least in part, formed the basis for Louisiana's struggle against the United States Supreme Court. *Levy v. Louisiana*, for the state of Louisiana, was just another example of federal "meddling." To understand this antagonism, it is necessary to explore some aspects of Louisiana's chaotic legal history. Of greatest importance is the fact that Louisiana's law was not based on English common law but on French and Spanish law, which was originally derived from Roman civil law. The specific law that *Levy* targeted was Article 2315 of the Civil Code. As part of his article, "Legitimate and Illegitimate Offspring of Levy v. Louisiana: First Decisions on Equal Protection and Paternity," Harry D. Krause argued that the standard interpretation of Article 2315, which the lower courts had applied, came about because of an "accident" related to Louisiana's murky legal history.[1] Krause described the law's history as a "tragicomic historical accident." According to Krause, the confusion surrounding the interpretation of Article 2315 was complete because French law allowed illegitimate children to recover for the

[1] Krause, "Legitimate and Illegitimate Offspring," 342.

wrongful death of their mother and even their father.[2] In other words, if Louisiana had remained true to French law, the Levy children may not have been denied wrongful death benefits. Yet, the state did not. Instead, Louisiana's laws grew from French beginnings into a jungle of confusion.

Because French law provided the foundation for Louisiana's law, this chapter begins with a discussion of Pre-Revolutionary France and the problems related to illegitimacy found in that society. Through this discussion, it is possible to gain an understanding of how law formed in the former French colony of Louisiana. From this beginning, the chapter summarizes Louisiana's unique history, showing that the antagonistic relationship the state had with the federal government did not begin with the Civil Rights Era, or even with the Civil War, but with the Louisiana Purchase.

The French connection with nonmarital children begins quite early in France's history. Jenny Teichman offers a philosophical discussion of legitimacy and illegitimacy, based in anthropological understandings of cultural constructs. In this way, her work becomes a gateway into

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[2] Krause, "Legitimate and Illegitimate Offspring," 345, note 31. Krause directs readers to these French cases: *Erhard v. Uttwiller*, [1809-11] S. Jur. II 223 (Cour d'appel, Colmar, March 3, 1810); *Rolland v. Gosse*, [1815-18] S. Jur. I 540 (Cass. civ. Nov. 5, 1818) regarding tort actions and to these sources regarding illegitimate children and death benefits: Min. publ. et cons. *Scherriff v. Sansen*, [1954] D. Jur. 176 (Cour d'appel, Douai, Dec. 10, 1953); *Beinheir Ben M'Bark et Cie v. Dame Bousquet*, [1954] D. Jur. 777 (Cour d'appel, Rabat, Nov. 12, 1954). See 1 Mazeaud and Tunc, Traite Theorique et Pratique de la Responsabilite Civile Delictuelle et Contractuelle 372 et seq. (5th ed. 1957).

understanding why French legal principles play an important role in the Levy story. Because it is anthropological and relies on language's role in the construction of culture, her approach draws attention to the possible etymology of the word "bastard," which comes from the French *bast*, meaning luggage or baggage, and the suffix *ard*. Therefore, the bastard child was literally baggage.[3] The etymology suggests that nonmarital children held an extraneous and unwanted position in society.

Under France's old regime, 1648 to 1788, the status of illegitimate children varied by region. However, for the most part, the king's courts provided for them. Statistics related to nonmarital births in France during the old regime are lacking. In his work on French illegitimacy law, *French Revolutionary Legislation on Illegitimacy, 1789-1804*, Crane Brinton suggests that by extrapolating from the number of Paris foundlings before the French Revolution, it is possible to gain a general impression regarding how many nonmarital children lived in Paris. In 1775, in Paris, there were 6,505 foundlings and 19,550 registered births. However, according to Brinton, these numbers are too high, and he noted that foundlings were brought to Paris from the surrounding countryside.

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[3] Teichman, *Illegitimacy, An Examination of Bastardy*, 1-2. Teichman's definitions are taken from the Oxford English Dictionary. She also includes the possibility that the term refers to a saddle or saddle-pack, implying a temporary bed instead of a marriage bed as the place where these children were conceived. For more on linguistic anthropology and the creation of culture through the use of language see *Linguistic Anthropology: A Reader*, Alessandro Duranti ed. (Malden: Blackwell Publishing, 2001).

Additionally, "foundling" does not necessarily mean "illegitimate."[4] During the old regime, Brinton concluded,

> In the absence of statistics, it is safer to rest on general opinion, and there seems to have been no great notice taken of any change in the proportion of illegitimate births, no crusade to end a growing nuisance, no conspicuous reform movement directed at this particular issue of illegitimacy.[5]

By 1789, French nonmarital children had moved up society's hierarchical ladder, losing the status of serfs or outlaws, which society had attributed to them during the medieval period. Although they still occupied a lower hierarchical position than legitimate children did, they could own property, marry, and transmit property to their legitimate children, even create wills in many regions of France. They could also demand support from both parents. In theory, tradition excluded them from office but, with the prince's consent, they could attain most positions including mayor or judge. Additionally, with the bishop's permission, they could hold minor holy orders and the Pope could open major orders to them. Originally, nonmarital children in France did not belong to either parent's family and could not inherit from their mother or father. However, by the early 1600s, according to Brinton, "bastards could inherit a share of their mother's estate." Additionally, during the old regime, "Filiation could be claimed in legal proceedings against either

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[4] Crane Brinton, *French Revolutionary Legislation on Illegitimacy, 1789-1804,* Harvard Historical Monographs, vol. IX (Cambridge: Harvard University Press, 1936), 11.

[5] Ibid.

mother or father," though the most common course of action involved single mothers suing putative fathers on behalf of the child.[6]

French communities addressed illegitimate children and their status in various ways. The documents from the Old Regime that Brinton used for his study showed the range of treatment that illegitimate children faced. French villagers wrote, "We ask that bastards be given a civil and political status, like that which they enjoy in several neighboring kingdoms." The Third Estate of St. Alban in Brittany lamented the "unfortunate state of bastards, who are not the cause of their birth," and asked that they be allowed to inherit from their mothers. However, other French citizens "wished only to see illegitimate children adequately nourished." Most regional laws regarding nonmarital children in pre-revolutionary France concerned themselves with providing support for nonmarital children, ignoring the possibility of changing their legal status.[7]

Prior to the nineteenth century, if more than one man could potentially be the father of an illegitimate child, each of them could be held responsible for supporting that child. The illegitimate child's mother could sue for paternity and so long as the putative father was unmarried and paternity could be proven, he was forced to maintain the

[6] Brinton, *French Revolutionary Legislation*, 6- 7.
[7] Ibid., 17-18.

child.[8] However, there were exceptions and qualifications to establishing paternity. For example, before the court decided paternity, any possible father could be held liable for lying-in expenses. While an illegitimate child could inherit from his mother, he could only inherit from his father if there were no legitimate children. Finally, if legitimate heirs existed, the illegitimate child could inherit only one-sixth of his father's estate.[9]

The French courts often decided paternity based on the public and private writings of the putative father(s). To be held responsible for a child, there had to be some form of written acknowledgement that the child belonged to him. However, putative fathers also had an opportunity to prove misconduct on the woman's part, calling their responsibility for the child into question. If the sexual relationship was adulterous or incestuous in any way, the court found no actionable claim and the children could never be legitimized and had no claim to either parent's estate. Even after paternity was proven, the man was only responsible for support until the child's majority, "including the teaching of a trade not 'abject'," and for damages to the mother. Children who remained illegitimate had no right to a father's name or inheritance.[10]

During the Old Regime, legitimation was possible in two ways. Either the king could declare the child legitimate -- usually only done for

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[8] Brinton, *French Revolutionary Legislation*, 8; Teichman, *Illegitimacy, An Examination of Bastardy*, 154-56.

[9] Teichman, *Illegitimacy, An Examination of Bastardy,* 154-56.

[10] Teichman, *Illegitimacy, An Examination of Bastardy,* 154-56; Brinton, *French Revolutionary Legislation*, 8-9.

nobility and in cases where marriage was impossible -- and by the subsequent marriage of the parents. This second form of legitimation stemmed from canon law. In Brinton's opinion, this "was an obvious effort of the mediaeval [sic] church to encourage the institution of marriage."[11] Legal discrimination against nonmarital children was seen by Brinton to buttress monogamous marriage, which had a long tradition in France, beginning with the Roman *Paterfamilias* and the Christian emphasis on monogamy. Despite the legal discrimination, there is no reason to think that the nonmarital children of France lived a harsh life, Brinton concluded. Although they did suffer from the lack of inheritance, it is possible that the parents gave their illegitimate children gifts and voluntary legacies. However, as the middle class encroached on the aristocracy, tension over illegitimate birth may have increased and prejudice against illegitimate children may have spread.[12]

After the Revolution, France busily adopted new laws that addressed the Rights of Men and nonmarital children were part of that reform. Poetically, Brinton wrote, "The syllogism lay ready: All men are created equal; bastards are men; therefore bastards are the equals of other men."[13] Along with sentimental literature, Enlightenment treatises may have spread humanitarian leanings through the population, improving how French society saw nonmarital children. For example,

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[11] Brinton, *French Revolutionary Legislation,* 9-10.
[12] Ibid., 10, 12, 14.
[13] Ibid., 19.

Jean-Jacques Rousseau wrote, "Children are born of love, not of marriage, and Nature knows no illegitimacy."[14] The previous disadvantages placed upon illegitimate children disappeared as the National Assembly expanded individual rights to Rousseaus's "Natural Children."[15] From 1790 to 1793, a debate over whether or not to do away with illegitimacy laws altogether occurred. During the debate, proponents for illegitimate children argued that, "the distinction between legitimate and illegitimate people was founded on aristocratic, irrational, priestly notions."[16] Assembly members suggested that children could be legitimate so long as they could prove that their parents had lived together. Those in favor of this suggested that "the abolition of all distinctions between legitimate and illegitimate children 'is but the consequence of principles of equality established for all citizens'." However, the other side of the debate was anxious over changing inheritance law and proof of paternity.[17] They worried that the illegitimate child's ability to inherit from a putative father would undermine the social foundations. Even at this time, policy-makers feared that illegitimate children, who were proof of infidelity, would cause the downfall of the family and through a weakened familial structure,

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[14] Brinton, *French Revolutionary Legislation*, 16, 19.
[15] Ibid., 22.
[16] Teichman, *Illegitimacy, An Examination of Bastardy*, 154-56.
[17] Ibid.

damage to society as a whole. These same arguments would surface again centuries later in *Levy*.[18]

In France, the Law of 12 Brumaire grew out of these debates, becoming law on November 2, 1793. It declared that illegitimate children had the same rights as legitimate children regarding inheritance, so long as they could prove paternity. Proof was also necessary to claim inheritance from a mother. This proof consisted of written evidence that a parent had maintained the child as his or her own. The law differentiated between illegitimate children of married fathers and those of unmarried fathers. If the father was married, he paid one-third the maintenance paid by unmarried fathers. The Law of 12 Brumaire represented the most favorable law toward illegitimate children of all French revolutionary legislation. However, it had little effect. According to Brinton, "The courts usually ignored that part of it which dealt with inheritance, [...] the Commission of Civil Administration soon cancelled parts of the law by issuing directives." One of those directives, passed in 1795, forbade all paternity suits.[19]

The ineffectiveness of the Law of 12 Brumaire lies within the debate that surrounded its creation. Many French citizens felt that supporting laws *against* illegitimate children meant not supporting the

[18] Brinton, *French Revolutionary Legislation*, 23-24.
[19] Teichman, *Illegitimacy, An Examination of Bastardy*, 154-56.

revolution.[20] Laws differentiating between legitimate and illegitimate children were identified with aristocrats and the clergy, two groups that most French citizens saw as anti-revolutionary. This side of the debate also hoped that by legitimizing all children, people would be less likely to commit infanticide or abandon them. Some members of the National Assembly felt that by removing legal barriers, people would be more likely to police their own behavior, becoming more moral. Finally, they hoped that republican virtue would ensure that parents took responsibility for their children.[21]

Despite enlightened sentiments, support for reform dwindled quickly. The move to improve the lives of nonmarital children only lasted until law makers began to fear that nonmarital children were a threat to the French family structure and the rules regarding inheritance. Regardless of the laws and their complexities, the courts "were not at all inclined to permit illegitimate children to share inheritances on an equal basis with legitimate children." Legitimizing "natural children" was seen as an attack against the family, inheritance, and property rights. More legal changes occurred after Napoleon Bonaparte took control of the country.[22]

In 1803, the Napoleonic Code took effect. It included harsh new laws related to illegitimacy. This body of law formed the basis of French

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[20] Brinton, *French Revolutionary Legislation*, 32-33.
[21] Ibid., 34.
[22] Ibid., 41, 48; Teichman, *Illegitimacy, An Examination of Bastardy*, 154-56.

law, which, in turn, would influence law in French colonies, such as Louisiana.[23] Under the Code, unmarried women were not provided with lying-in expenses and could not sue for paternity except in cases of abduction. Inheritance could only pass to the illegitimate child if the father voluntarily confirmed paternity. Filiation proceedings could be brought against a mother so long as the child was not a product of adultery or incest. However, the legitimation or recognition of children born of adultery or incest was forbidden under all circumstances, even if their father acknowledged them; these children could not inherit anything. Additionally, article 338 of the *Code Napoléon* stated, "the natural child, even though acknowledged by the father, cannot have the rights of a legitimate child."[24] Because of this, "natural children" could not inherit unless there were no legitimate heirs, although an exception existed that allowed them proportional shares of what legitimate relatives received from an estate. Only after the legitimate children were cared for could "natural children" hope for support and training in a trade. Because of these provisions, a single mother and her child had to rely on friends, her family, or the state for support, leading to a precarious existence under the Napoleonic Code.[25]

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[23] Meeusen, "Judicial Disapproval of Discrimination against Illegitimate Children," 120.

[24] The Code Napoléon can be found at http://www.napoleon-series.org/research/government/c_code.html.

[25] Brinton, *French Revolutionary Legislation*, 50-51; Teichman, *Illegitimacy, An Examination of Bastardy*, 154-56.

Rachel Fuchs explores the lives of these women and their children in her book *Abandoned Children: Foundlings and Child Welfare in Nineteenth-Century France*. "Child abandonment was a serious problem in nineteenth century France," Fuchs wrote, "and the problem was most acute in Paris, the nation's largest and fastest growing city." Nearly half of all illegitimate children were abandoned each year at Paris' only foundling home, Hospice des Enfants, according to Fuchs' research.[26] As with Boswell's work, it is important to remember that not all abandoned children were nonmarital. However, according to Fuchs, nearly 95% of the children abandoned at the hospice were illegitimate at the beginning of the century. By 1900, this had dropped to approximately 85%. Fuchs also notes that these high percentages may be due in part to presumed illegitimacy. Women could abandon their babies anonymously during the early years of the century, though many of them did provide some identification. If the mother did not list a father, the baby was presumed illegitimate. Also, if the mother and father had different surnames or if the parentage was unknown, the child was listed as illegitimate.[27]

Perhaps in response to the large numbers of abandoned children, social reformers and state officials publically deplored women who abandoned their children. To the officials, abandonment was an expeditious solution to the problem of an unwanted child that would

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[26] Rachel Fuchs, *Abandoned Children: Foundlings and Child Welfare in Nineteenth-Century France*. (Albany: State University of New York Press, 1984), xi.

[27] Fuchs, *Abandoned Children*, 66.

allow the woman to return to a promiscuous and immoral life. Perhaps driven by this fear, in 1837, the government increased financial aid to unwed mothers, which may have led to a decrease in the abandonment of nonmarital children. This policy continued through the 1800s, the amount increasing in the 1850s. However, this support was not intended to aid the mother and child but to discourage abandonment, which would have cost the state more, financially.[28]

These French laws and traditions migrated across the Atlantic Ocean as French settlers took up residence near the mouth of the Mississippi River on the Gulf of Mexico. Several excellent works have been written on Louisiana's legal tradition. George Dargo's *Jefferson's Louisiana: Politics and the Clash of Legal Traditions*, which explores the clash between Louisiana's civil law and the common law that predominated in much of the rest of the United States, is a foundational text on the subject. Vernon Valentine Palmer, who described Louisiana as a "mixed jurisdiction" because of the intricate weaving of English common law and Roman civil codes, has also written extensively on law in Louisiana. Further appreciation for the legal system that informed the lower courts in the *Levy* decision requires a brief exploration of the creation of Louisiana's mixed jurisdiction and the legal culture that created Article 2315, which was first enacted in the early 1800s, and was influenced, as all Louisiana law was, by the Napoleonic Code.

[28] Fuchs, *Abandoned Children,* 64, 77, 79.

A tense mixture of races, ethnicities, and cultures marks Louisiana's social history. For years the Louisiana territory had been ruled by first the French and then the Spanish. After the United States acquired the territory, the old settlers retained their French and Spanish culture, an aspect of the territory that troubled officials of the United States. In addition to taking territory, Americans brought their common law traditions with them, seeing them as the basis for "American liberty and political independence."[29]

Although French settlers remained in the area, New Orleans attracted many Americans. In 1803 and 1804, a population boom occurred in southern Louisiana and New Orleans. Americans formed the largest group of immigrants; they were drawn to the area for a number of reasons that included agricultural opportunities and navigable waterways. In addition to the immigrants, French-speaking refugees, slaves, and slave traders, converged on the area. Natural increase also augmented the population; families in New Orleans and Louisiana were "notoriously large."[30]

The influx of settlers allowed Louisiana to apply for statehood only a few years after the territory's cession. It was a diverse population, equally divided along racial lines. At the start of 1807, 26,000 European-Americans, 4,000 free African-Americans, and 23,500 African-

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[29] George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions*, (Cambridge: Harvard University Press, 1975), 11.

[30] Dargo, *Jefferson's Louisiana*, 6.

American slaves called lower Louisiana home.[31] The city of New Orleans was more than half African-American at that time. In his work, *Crucible of Reconstruction: War, Radicalism, and Race in Louisiana, 1862-1877*, Ted Tunnell stated that prior to the Civil War, African-Americans occupied several social classes in New Orleans and Louisiana, forming the largest community of freemen, free African-Americans, in the Deep South.[32]

The freemen of New Orleans "held themselves aloof from slaves," especially those who worked on plantations. Urban, Catholic, and comprising the majority of New Orleans' elite class, the French freemen were also less likely to follow the legal regulations of the French *Code Noir*. Combined, these circumstances provided the French freemen with more freedom than their African-American counterparts had. They owned property, both real and personal, including slaves, contracted legal marriages, were allowed to testify against European-Americans in court, learned trades and professions, and participated in music and the arts. All their achievements "rested on a solid economic base," according

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[31] For the purposes of this study, it is necessary to make a distinction between "Americans," people living on the North American continent, and "the United States," that particular country. In this way, "African-Americans," refers to people who were descended from Africans, living in North America, in territory controlled by France, Spain, and then the United States.

[32] Ted Tunnell, *Crucible of Reconstruction: War, Radicalism, and Race in Louisiana, 1862-1877* (Baton Rouge: Louisiana State University Press, 1984), 63. Another important work that addresses the changing lives of African-Americans in Louisiana is Rebecca J. Scott's *Degrees of Freedom: Louisiana and Cuba After Slavery*, (Cambridge: The Belknap Press of Harvard University Press, 2005).

to Tunnell.[33] According to Dargo, when Louisiana became a territory of the United States,

> They had full freedom to enter into business contracts and to own and transfer property, and they had full competence in civil litigation against whites and blacks alike. Even in criminal prosecutions free blacks could give evidence against whites.[34]

Additionally, African-Americans played an important role in the area's military history. While the Spanish had been in control of the territory, they had formed African-American military units. The practice continued under French rule and when the United States took control, the African-American units remained intact, despite the fear of a "black revolt."[35] In 1815, when the British threatened New Orleans, the battalion that the city called up in order to strengthen the defense was mostly *gens de couleur*. Yet, the freedoms enjoyed by this minority group and "their special status in Louisiana law and society," provided them with a reason to "preserv[e] some elements of the established [French] regime" after the territory fell under the United States' jurisdiction.[36] In fact, a majority of the French-speaking community in Lower Louisiana, regardless of race, supported the effort to retain French culture and French institutions when the Americans attempted to change them.

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[33] Tunnell, *Crucible of Reconstruction*, 66-69, 75.
[34] Dargo, *Jefferson's Louisiana*, 7.
[35] Ibid.
[36] Dargo, *Jefferson's Louisiana*, 7.

After 1803, as American encroachment continued, small groups of Spanish and Germans settlers also allied with the French communities.[37]

Despite the fact that there was great ethnic and racial diversity, most tension was two-sided, between the old French settlers and the newly-arrived settlers from the United States. However, ethnic background did not guarantee loyalty and, because there were no political parties, people often took sides based on interest rather than race or ethnicity.[38] These differences were of great importance. Louisiana joined the United States at a time when "American identity" was fragile. Citizens of the young nation saw differences in culture and custom as more important than anything they might have had in common. Because of this, the U.S. government balked at the idea of leaving Louisiana and New Orleans as they had found them and attempted to "improve" their customs and their laws. They did this by introducing common law, thereby creating Palmer's "mixed jurisdiction."[39]

Palmer defines the term "mixed jurisdiction" as an area where the system of law is built upon both common law and civil law. Mixed jurisdictions begin when a civil law nation transfers territory to a common law nation. In the case of Louisiana, France and Spain transferred the land to the United States. In his essay, "The French

[37] Ibid., 8-9.
[38] Ibid., 9-11.
[39] Ibid., 12.

Connection and the Spanish Perception: An evaluation of French influence on Louisiana civil law," Palmer delineates four periods of French law in Louisiana. The first of these lasted from 1699 to 1762 and was marked by the enforcement of the *Coutume de Paris* and the royal *Ordonnances*. During this period, Louisiana law was relatively stable, based solely upon French principles.[40]

Palmer's second period, the Spanish period, began in 1762 and ended in1803. During this period, "France ceded the province to Spain and Madrid officially replaced French law with Castilian law." According to Palmer, this created a "legal dualism" in Louisiana. When the U.S took control, the official Spanish law remained in effect. However, although the Spanish held power in the area for thirty years and legally replaced both French law and the French language, French culture prevailed.[41]

The transfer of Louisiana and New Orleans from France to the United States, and the confusion surrounding the retrocession of territory from Spain to France as part of the secret Third Treaty of San

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[40] Vernon Valentine Palmer, "Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1803-1812," in *Louisiana: Microcosm of a Mixed Jurisdiction*, ed. Vernon Valentine Palmer, (Durham: Carolina Academic Press, 1999), 23; Vernon Valentine Palmer, "The French Connection and the Spanish Perception: An evaluation of French influence on Louisiana civil law," in *The Louisiana Civilian Experience: Critiques of Codification in a Mixed Jurisdiction*,(Durham: Carolina Academic Press, 2005), 51; Vernon Valentine Palmer, "Introduction," in *Louisiana: Microcosm of a Mixed Jurisdiction*, ed. Vernon Valentine Palmer, (Durham: Carolina Academic Press, 1999), 4.

[41] Palmer, "The French Connection and the Spanish Perception," 51-53; Palmer, "Two Worlds in One," 29.

Ildefonso, left the government of the territory in tatters.[42] On November 30, 1803, the French prefect abolished all Spanish courts and did not replace them with French ones. Approximately one month later, December 20, 1803, France transferred the territory to the United States. When William C. C. Claiborne, the provisional governor for the territory, arrived, he declared that all laws in force, "whatever they were," would remain in force while he rebuilt the legal system.[43]

Claiborne had to do this from scratch. He created a court of pleas, with seven judges, to hear civil cases, a Governor's Court, with himself as judge, to hear criminal cases, and he ordered the military commandants to act as judges for outlying districts. The Act of March 26, 1804, marked Congress' attempt to fill the void left by the loss of French control of the area. It allowed the President of the United States to appoint a governor, a council of thirteen "notables" to aid the Governor, and three justices for a Superior Court, which would have original jurisdiction for civil and criminal cases. The act also allowed the governor to appoint inferior court judges and justices of the peace. More importantly, the act provided staple common law guarantees, such as the writ of *habeas*

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[42] The Third Treaty of San Ildefonso, signed October 1, 1800, between France and Spain, was signed in secret and stated, in part, that six months after its provisions had been met that the colony of New Orleans and the territory of Louisiana would be retroceded to France. (Spain had possessed the area since 1763). However, the treaty never described the exact boundaries of the retroceded territory and there was debate over whether or not the conditions were fully met. When the retrocession occurred, it created chaos in New Orleans. Later, when France sold the Louisiana territory to the United States, Spain contested the boundaries. The full text of the treaty can be found at http://avalon.law.yale.edu/19th_century/ildefens.asp.

[43] Dargo, *Jefferson's Louisiana*, 105.

corpus, bail, and the prohibition against cruel and unusual punishments. However, the Act also stipulated that, "the laws in force were continued in force until altered or modified by the legislature." This clause actually left the laws of the territory in confusion.[44] Were the courts to follow customary law, in this case, French, not the English common law the judges knew, or were they to follow the Castilian law that the Spanish had put in place and that the citizens ignored?

While French settlers and their allies out-numbered Americans when the United States first took control, their potential for growth and their attempt to overturn French custom worried the leaders of the French-speaking communities in Lower Louisiana. Their approach differed from the Spanish, who had not tried to change the government or customs of the area when they briefly took possession of the city. Both culturally and legally, the French and Americans were contradictory.[45] For example, cultural and political divisions could be seen in the press; newspapers were French, English, or English and French. Legally, the jurisdiction was also divided with lawyers leaning toward civil or common law as well.[46] Under French and Spanish civil law, property that was brought into a marriage belonged to the community. Although the husband controlled any gains made through this communal property, the marriage was seen as a contract between

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[44] Dargo, *Jefferson's Louisiana,* 105-06.
[45] Ibid., 10.
[46] Palmer, "Two Worlds in One," 31.

equals and both husband and wife retained ownership of the property they brought into the marriage. Upon its dissolution, the property was split evenly between the parties. In contrast, under common law, when a man and woman married, the woman ceased to exist legally; she became *feme covert* and lost a great deal of her right to own property. If she was widowed, she was only entitled to one-third of the inheritable property.[47]

More importantly for the purpose of this study, under English common law, children born out-of-wedlock remained illegitimate regardless of subsequent marriage while civil law reversed this practice and a marriage at any time subsequent to birth would make the child legitimate. Dargo noted, "The classic common law writers maintained that civilian rules governing legitimation were indecent because they struck at the sanctity of matrimony." Those who supported the civil code argued, "The rules permitting legitimation were derived from canon law, and that natural morality dictated that children should not be penalized for the indiscretions of their parent."[48] Under common law, an illegitimate child had no right of inheritance but under civil law, the child could inherit, so long as the mother and father married at some point in time. In addition, illegitimate children under the civil law could inherit from their mother or father, or both, so long as the parents had no

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[47] Dargo, *Jefferson's Louisiana*, 12.

[48] See Blackstone's *Commentaries* as quoted in Dargo, *Jefferson's Louisiana*, 13, note 48; also see Jean Brissaud's *A History of French Private Law* trans. Rapelje Howell, (Boston, Little Brown, 1912; reprint, 1968), p. 213-215, as quoted in Dargo, *Jefferson's Louisiana*, 13, note 49.

legitimate children with a claim to the property, and if the father had no other wife. Finally, if illegitimate children did not inherit, they held a claim to alimony from the legitimate heirs. Civil law included the principle of forced heirship; a parent was limited to one-fifth of their property being disposable how they saw fit. The rest had to be given to their heirs. In contrast, common law allowed a man to dispense with his property however he wished. In this, Dargo stated,

> the common law's individualism and its tendency to locate decision-making power in the mature, reasoning adult stood out in sharp relief from the Civil Law which here, as elsewhere, upheld the family unit and the claims of family members when willful parental action might defeat them.[49]

Compared to the common law that prevailed in much of the United States, Louisiana's civil law appeared quite lenient. In fact, Louisiana's law influenced other states as the nineteenth century continued and many states adopted aspects of it, softening their legal treatment of illegitimate children.[50]

Between 1803 and1828, jurists and legal commentators attempted to codify Louisiana's disparate laws, marking Palmer's third period of Louisiana legal history. During these years, two procedural codes (1805 and 1828), two civil codes (1808 and 1825), and a crimes act (1805) were enacted. According to Palmer, "The Legislature and its appointed

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[49] Dargo, *Jefferson's Louisiana*, 13.

[50] Dargo, *Jefferson's Louisiana*, 13; Robert A. Pascal, "Louisiana Succession and Related Laws and the Illegitimate: Thoughts Prompted by *Labine v. Vincent," Tulane Law Review* 46 (1971): 167-183.

jurisconsults drafted and enacted [these] civil codes borrowing heavily from the *Code Napoléon*" and other French legal treatises.[51]

When control over Louisiana transferred from France to the United States, the private law was left civil while the public law became common. For French settlers in Louisiana, the imposition of common law, which remained tied to the legal concepts born during feudalism, felt like a step backward. Philosophically, Dargo argued, the two bodies of law were also dissimilar. Common law had its roots in the higher courts of justice and "case law maintained its position of primacy." As cultural changes occurred, judges became "creative lawmakers" in order to keep up with rapid changes in business and commerce. [52] Civil law in Louisiana, however, "was rooted in a tradition that looked to agencies other than law courts for definitive statement of the law, new or old." In common law, the jury rather than the judge determined the facts of a case while under civil law the evidence was evaluated by trained jurists. Many Louisianans, not just those in the legal profession, perceived these legal incongruities as a threat.[53]

After taking control of the territory, authorities in Washington D.C. and Louisiana "strongly favored" a change in the legal system to the common law. "But the weight of the French and Spanish culture upon the common citizen," the population discrepancies, and "the energetic

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[51] Palmer, "The French Connection and the Spanish Perception," 52.
[52] Palmer, "Two Worlds in One," 24; Dargo, *Jefferson's Louisiana*, 14-16.
[53] Dargo, *Jefferson's Louisiana,* 15-16, 18-19.

remonstrance" of the French creoles made the task difficult, if not impossible. Officials believed that by introducing the judicial *structure* of the common law first, people would more readily accept common law itself. Yet, in his position as governor, Claiborne worried that changing the judicial structure too quickly would prompt resistance.[54] John B. Prevost, appointee to the Superior Court, agreed with the governor. He wanted to establish common law but realized that doing so too quickly would be even worse than the tangled legal system that was being used in the newly acquired territory. Prevost desired a written reference that detailed the current legal system, feeling that it would simplify the task of changing those laws. Claiborne opposed the committee that Prevost suggested for the task and the project languished.

In 1804, several citizens voiced their disapproval of the territorial judicial system in the Louisiana Remonstrance, which was delivered to Washington D.C. that winter. Among other things, the document showed that local citizens were uncomfortable with English being the official language of the court, did not approve of oral arguments, objected to parts of common law tradition, and were troubled by confused judges who could not navigate the tangle of Spanish, French, civil, and common law. Unsatisfied with the results of the Remonstrance, the citizens of lower Louisiana also sought statehood in an attempt to preserve their culture, though their application was denied. This denial hinged, in part,

[54] Palmer, "Two Worlds in One," 27; Dargo, *Jefferson's Louisiana*, 106, 110.

upon President Thomas Jefferson's distrust of Louisianans. He felt that living under the influence of papists and monarchists had not prepared them for self-government and understanding republicanism.[55]

In 1808, the American James Brown and French jurist Louis Moreau Lislet were finally able to write up a code that "solidified the civil law in the Orleans territory." Their code "represented a crucially new kind of civil law, one purged by the French Revolution of the feudal elements found in previous French and Spanish law," according to Palmer.[56]

Palmer's final period, the modern era, began in 1825 and continues to the present. It is marked by various attempts to reform Louisiana's laws, which peaked in the mid-twentieth century.[57] *Levy v. Louisiana* is only one of many cases that pitted the United States' federal government against the state of Louisiana. A quick scan of any index to the Supreme Court will show an unusual amount of cases that include "*v. Louisiana*" as part of their name. In part, this can be attributed to the North-South dichotomy of the African-American Civil Rights movement and the conservative versus liberal political agenda at the time. However, this survey of Lousiana's history shows that antagonism

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[55] Dargo, *Jefferson's Louisiana*, 116-118. The full text of the Louisiana Remonstrance can be found at http://artsci.wustl.edu/~landc/html/2075.html; Palmer, "Two Worlds in One," 32.

[56] Dargo, *Jefferson's Louisiana*, 113-114; Brown and Lislet's Digest, published in 1808, can be found in full at http://www.law.lsu.edu/index.cfm?geaux=digestof1808.home; Palmer, "Two Worlds in One," 35.

[57] Palmer, "The French Connection and the Spanish Perception," 51-53.

between the two bodies of government has existed since the area fell under United States' control in the early 1800s.

One of the defense's main points during *Levy* was that "child" as it appeared in Article 2315 meant only legitimate children. According to Krause, that interpretation began with the case of *Lynch v. Knoop* 118 La. 611, 43 So. 252 (1907), in which, the mother of an illegitimate child was denied wrongful death benefits for the death of her child. Focusing on inheritance rights, the court ruled that since Article 2315 was a "derogation of the common law," it required strict interpretation. However, the basic provisions of the French law, as seen in the first sentence of Article 2315, allowed a "tort right of action to a dependent," according to Krause. Krause wrote that Louisiana had rejected this French interpretation and adopted the common law view instead, "holding that without a specific statute no action could lie for wrongful death." Although he described this as an accident, because of Louisiana's mixed jurisdiction status and the chaotic birth of its Civil Code, the cause behind the mixed interpretation is understandable and not accidental. Krause's interpretation of Article 2315 and the tangle of illegitimacy laws relevant to the *Levy* case addressed other aspects of Louisiana and French law. This included the provision that required mothers to acknowledge their illegitimate children, as Louise had done. "Elsewhere, the illegitimate child's relation to his mother usually is legally complete upon birth," Krause concluded.

As this summary shows, *Levy* was not the first attempt to improve the lives of nonmarital children from a legal standpoint. The arguments on both sides of the case were neither novel nor innovative. Norman Dorsen's rhetoric echoes the French Revolutionaries' attempts to improve the lives of "natural children." The U.S. Constitution, in both Article Three and the Fourteenth Amendment, provided him with a foundation from which to build the attack against Article 2315. Simultaneously, the defendants' position, that it was necessary to discourage promiscuity and illicit sex by differentiating between children born in a marriage and those born outside a marriage, came from ancient traditions. Preserving the family and society through this distinction was so ingrained in Western culture that few questioned the mistreatment and discrimination of children labeled "illegitimate."

The disadvantages that nonmarital children faced branded them second-class citizens, draping them with a criminality they did not earn by their own actions. As Witte argues, the status offense of "illegitimate" did not meet the requirements to be labeled as a crime. It was not done voluntarily on the part of the child, nor was it done intentionally (*mens rea)*, knowingly, recklessly, or negligently. Despite the ancient fears about illegitimacy being a threat to society, in actuality, being born outside a traditional marriage did not cause or threaten harm to a victim

or to society.[58] Even today, the harm is done to the nonmarital child and their family, who may still suffer from subtle forms of discrimination and poverty; no harm threatens the traditional family built around a traditional marriage.

If *Levy* and its arguments represent just one more attempt to change long-held beliefs, why do scholars label it a landmark case? Why is it important in American legal history and childhood history? When compared to past attempts at lessening the legal burden upon nonmarital children, Justice Douglas' opinion regarding their personhood questioned the very *act* of labeling them. Perhaps it is that question that helped *Levy* create a precedent for the equality of all children. Another aspect of *Levy*'s importance lies in its social context. It came before the U.S. Supreme Court as the African-American civil rights movement crested, drawing on statistics that showed an overwhelming majority of nonmarital children in the United States were African-America.[59]

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[58] Witte, *The Sins of the Fathers*, 6.

[59] The Bureau of Public Assistance, *Illegitimacy and its Impact on the Aid to Dependent Children Program*, (Washington D. C., April, 1960), 4, 9, 12-13.

CHAPTER 4

'WELFARE QUEEN' HYSTERIA INFORMS LEGAL AND POLITICAL POLICY

In addition to the legal confusion found in Louisiana and the long-standing traditions within Western culture that influenced the creation of those laws, the world that the Levy children inhabited grew out of Louisiana's past, stereotypes regarding African-American culture, and the entrenched racism that marked the Civil Rights Era. This chapter delves into the cultural milieu that surrounded the Levy family, highlighting the stereotypical African-American single mother and the near hysteria that informed the political debate regarding how to combat a perceived rising tide of African-American illegitimate children. This concern, perhaps much of it inspired by the migration of African-Americans out of the South and into other areas of the country, in turn informed public policies.

Bitter struggles, both physical and political, accompanied the emancipation of African-Americans after the Civil War.[1] While African-Americans in New Orleans occupied a wide range of socio-economic positions prior to the Civil War, from members of the urban elite to plantation slaves, their lives changed dramatically in the late 1800s and

[1] Tunnell, *Crucible of Reconstruction*, 5.

early 1900s.[2] "The Reconstruction Acts, the Louisiana Constitution of 1868, and the laws of the Radical legislature defined Louisiana as a biracial society," Ted Tunnell wrote, and many European-Americans in the Deep South did not adjust to the new situation. They feared "Negro rule" and race wars, a concern that had permeated the South for decades.[3] Sugar plantations act as the focus for exploring these changes in Rebecca J. Scott's *Degrees of Freedom: Louisiana and Cuba after Slavery.* Slavery was replaced by sharecropping as land owners resisted leasing land to freedmen.[4] Additionally, debates over labor relations became entangled with those over citizenship as people broached the topic of African-American suffrage. For example, in 1867 African-American males were allowed to vote, causing some European-Americans to boycott local elections for the Constitutional Convention. Despite this protest, the convention represented a cross-section of Louisiana.[5] Yet, by the 1880s, Scott writes, "men of color had been muscled out of most public offices," though African-Americans continued to organize and exert power locally through unions, such as the Knights of Labor, and Masonic lodges. Labor strikes by field hands, which were supported by African-Americans who had moved away from the fields, brought

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[2] See Welke, *Borders of Belonging* for the legal justification of these changes. James W. Loewen also wrote on the nadir of racial relations in the early twentieth century in his work, *Sundown Towns: A Hidden Dimension of American Racism*, (New York: The New Press, 2005).

[3] Tunnell, *Crucible of Reconstruction*, 5.

[4] Rebecca Scott, *Degrees of Freedom: Louisiana and Cuba After Slavery*, (Cambridge: Harvard University Press, 2005), 37-39.

[5] Ibid., 40-41.

European-American Democrats and Republicans together.[6] When the strikes did not bring significant change, African-Americans relied on voting, despite the violence they encountered at the polls. When equality remained elusive, African-Americans living in New Orleans filed suit against the Jim Crow laws that had appeared, leading to *Plessy v. Ferguson* and the "separate but equal" ruling.[7]

The struggle over reconstruction and Jim Crow reinforced the antagonism between Louisiana's state government, its people, and the federal government. This enmity continued through the 1900s and can be seen in the aftermath of the Levy case as well. Against this historical antagonism, debates over governmental and legal policy played out, many of them informed by racial stereotypes. Of great concern to policy experts of the early to mid-twentieth century was the growing number of children, a large number of them African-American, who were born outside of a traditional marriage. This concern sparked an increased interest in finding the cause.

Early research, such as that conducted by Percy Kammerer, explored illegitimacy as a criminal act. Kammerer's book, *The Unmarried Mother, A Study of 500 Cases* (1918), was one of the first to explore the lives of single mothers and their children. For Kammerer, the illegitimate child faced a difficult life, brought on, in part, by the "flagrantly

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[6] Scott, *Degrees of Freedom*, 75-77, 85.
[7] Ibid., 86-91.

shortsighted" statutes passed by the State.[8] His work placed the cause of illegitimacy on the women, their choices, and their environment. Because it was 1918, a time when eugenics was popular, Kammerer also blamed "physical abnormality" and "heredity" for women becoming pregnant outside of marriage. However, he concluded, heredity and physical abnormality were only "minor factors." After presenting his research, the statistics he shared showed that the majority of single mothers in the early 1900s were European-American rather than African-American.[9]

Another early author, E. Franklin Frazier, who first wrote about the African-American family in the 1930s, had a greater influence on the study of illegitimacy. John Valery White, in his 2004 article "The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Inequality," discusses the work of Frazier and other mid-twentieth century scholars of the African-American family. According to White, that discussion was influenced by the Immigrant Tale, "a story of 'natural' class ascension of immigrant groups in the 'land of opportunity.'"[10] Because of this influence, many groups theorized that African-Americans had not full assimilated into the dominant American

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[8] Percy Kammerer, *The Unmarried Mother, A Study of 500 Cases,* (Boston, Little Brown and Company, 1918), 3. Available from Google Books at http://books.google.com/books?id=EUxJAAAAIAAJ&ots=v8knoeX3tm&dq=Percy%20Kammerer&pg=PR3#v=onepage&q&f=false. [Accessed 9/19/10].

[9] Teichman, *Illegitimacy, An Examination of Bastardy*, 13-14. Kammerer, *The Unmarried Mother,* 325-26.

[10] John Valery White, "The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Inequality," *Nevada Law Journal,* 5 no. 6 (Fall 2004): 6.

culture, which left them living in poverty. In the early years of the twentieth century, sociologists, along with other scholars, searched for the reasons behind this failure to assimilate. Seeking a cultural explanation for the poverty rates of African-Americans, Frazier's work built upon the Chicago School of sociology, arguing that the loss of "folk culture" in the city was a contributing factor.[11]

As part of his cultural study, Frazier's work attacked the long-held belief that African-American women were more promiscuous than women of other races; this suggested that illegitimacy was the normal state for African-American children.[12] Frazier's thesis, presented in his work *The Negro Family in the United States,* explained that crisis after crisis buffeted the African-American family through the centuries. His research traced large patterns of cultural development in these families. For him, slavery had destroyed the culture that had originated in Africa. After slavery, a family pattern Frazier termed "matriarchy," provided cultural stability during the "crisis of emancipation," which was followed by the urban crisis. Acceptance of illegitimacy accompanied the matriarchy that Frazier described. This, according to Frazier and others, in addition to higher divorce rates, more frequent remarriages, and "more casual discipline," led to the construction of an African-American culture

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[11] White, "Turner Thesis, Black Migration," 7-8.

[12] See Winthrop Jordan, *The White Man's Burden, Historical Origins of Racism in the United States*, (New York: Oxford University Press, 1974) for more on the origins of beliefs concerning African-American women's sexuality.

fundamentally different from the American culture at large. Additionally, in his work Frazier highlighted the pernicious aspects of this culture, including "abandoned mothers, the roving men, [and] the sexually experienced youth."[13]

In the 1930s, when Frazier was conducting his research, studies suggested that a large number of illegitimate children lived in African-American families. Frazier's statistics showed that in 1931, in Macon County, Alabama, 122 women in 114 families had given birth to 191 illegitimate children. For Frazier, these illegitimate children were a consequence of social and economic factors. The stories in Frazier's book suggested that a first husband often died or abandoned his first wife. Once this happened, the woman then either remarried or "couldn't be bothered" with another husband.[14]

Frazier was concerned about the morality of women who bore nonmarital children. However, he blamed this immorality partly on the city and its accompanying, "poverty, ignorance, the absence of family traditions and community controls, and finally the sexual exploitation of the subordinate race by the dominant race."[15] According to Frazier's statistics, illegitimacy in the 1930s was five to ten times higher for African-Americans than for European-Americans. By 1943, this

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[13] Frazier, *The Negro Family in the United States*, viii-xi. Although Frazier used the term "matriarchy," implying that women held all the power, a more accurate term would have been "matrifocal," a family that is constructed around women.

[14] Ibid., 92-94.

[15] Ibid., 94.

"immorality of exploited women" led to an increased rate of illegitimate children, up to 165.2 per 1,000 births. In defense of African-American culture, Frazier took issue with earlier writers, such as Kammerer, who blamed African-American illegitimacy rates on poor morals. For Frazier and the scholars he influenced, illegitimacy was an unfortunate side-effect of the matriarchal African-American culture, which they saw as a defense mechanism against slavery.[16] Although Frazier's work eventually fell out of favor, there are hints of the pattern he described within the Levy family; Louise's oldest son had a different last name than his younger siblings. This suggests that the patterns Frazier described may have been accurate to some degree, even if the causes behind those patterns were not. For Frazier, the matrifocal nature of African-Amercan urban families explained why they had not achieved full assimilation into American culture. The scholarly exploration of African-American families that began in the 1930s continued after World War II.

Before World War II, the preferred explanations behind the "problem of illegitimacy" had been physical, social workers blaming the environment or a person's biological makeup. After World War II, Ricki Solinger states in her work *Wake Up Little Susie, Single Pregnancy Before Roe v. Wade*, psychological causes were sought.[17] At the same time, race became an important analytical tool in the social workers' arsenal.

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[16] Frazier, *The Negro Family*, 257-59.

[17] Rickie Solinger, *Wake Up Little Susie, Single Pregnancy and Race before Roe v. Wade*, second edition, (New York: Routledge, 1992, 2000), 15-16.

According to Peter Novick, after World War II, African-American history emphasized oppression with the intent of promoting a sense of guilt in its European-American audience. In his work *That Noble Dream: The "Objectivity Question," and the American Historical Profession*, Novick discusses two categories of African-American history. The first wave focused on the contributions that African-Americans had made to American society. However, the field was limited, leading to a second, integrationist, wave. This historiography on African-Americans moved from seeing slavery as benign to blaming it for the problems faced by African-Americans in the mid-twentieth century.[18] With this particular focus, drawing on Frazier's work was logical.

One of the scholars' "discoveries" during this period was that significant changes had occurred in African-American families during the mid-twentieth century. According to research by Anne L. Dean, between 1940 and 1965 African American families took one of three paths. The first of these she described as, "Up the ladder of social and economic status." Dean admitted that this path was only open to a "relatively small percentage of better-educated African-American men and women." Her second path for the African-American family was to "maintain the status quo." Economically and socially, these families did not have the advantages of the first group and remained on plantations when they

[18] Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession*, (Cambridge: Cambridge University Press, 1988), 480.

lived in agricultural situations. Finally, those who could not stay on the plantations and had no access to better education went "downhill," forming an African-American underclass.[19]

Studies like Dean's relied on the theory that slavery had permanently changed African-American culture for the worse. Like Frazier and others, Dean's work attempted to explain the poverty faced by African-American families based on failure to assimilate and culture. Dean saw out-of-wedlock birth as a strategy for strengthening cross-generational ties, since it was less likely that African-American men would remain involved with their families. According to Dean, when a young woman became a single mother, she relied on her mother and grandmother for help raising the child, enforcing the matriarchal system that Frazier had first described.[20] Researchers, like Dean and Frazier, uncovered and publicized stories that focused on "outside women" in which African-American men boasted of having multiple women and "an indeterminate number of children" by those women, along with anecdotes featuring women who brought home different men every night.

These ethnocentric cultural beliefs influenced the official reports that informed President Lyndon B. Johnson's War on Poverty, which was announced in January 1964. When Johnson and his advisors set out to fight this war, they saw correcting the social ills facing African-Americans

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[19] Anne L. Dean, *Teenage Pregnancy: The Interaction of Psyche and Culture*, (Hillsdale: The Analytic Press, 1997), 27-28.

[20] Ibid., 30.

as key to winning the battle.[21] One of the central sources of information regarding African-American families was the Moynihan Report. Daniel Patrick Moynihan, assistant secretary of labor, completed the report in March 1965. The report stated, "At the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family."[22] In his article, White explains that for Moynihan and others in the 1960s, the quality of the culture became more important than whether or not it had been assimilated into the dominant American culture. Because of this change in focus, the role of racial segregation and discrimination in African-American poverty was deemphasized.[23] The Moynihan report produced a "storm of protest," according to Novick. Critics included African-Americans as well as European-American liberals and radicals. Despite the protests and the prominent position Lee Rainwater gave the report in his work, *The Moynihan Report and the Politics of Controversy*, at the time, Novick concludes that the Moynihan report failed to "reorient" federal policy, although it did spur on black history.[24]

Moynihan's argument, in brief, consisted of three parts. First, the deterioration of the African-American family was illustrated by three characteristics. Nearly a quarter of urban couples were involved in "dissolved" marriages, the same percentage of births was illegitimate, and

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[21] Frazier, *The Negro Family*, vii.
[22] Rainwater and Yancey, *The Moynihan Report*, 3.
[23] White, "Turner Thesis, Black Migration," 8.
[24] Novick, *That Noble Dream*, 482-83.

women headed a quarter of African-American families. He added that these female-led families were more likely to be "welfare depend[ant]." Moynihan's second aspect looked at the "roots of the problem," which lay in slavery, reconstruction, and "the Negro man['s position], in urbanization, in unemployment[,] and poverty." Reiterating yet another common stereotype of African-Americans, Moynihan also blamed high fertility for their impoverishment. His last point, labeled "the tangle of Pathology," brought together the ethnocentric research from the previous decades. Moynihan echoed Frazier's matriarchy theory, calling attention to the tendency for women to fare better interpersonally and economically than men and thereby to dominate family life. In addition to matriarchy, Moynihan felt that the "tangle of pathology" included the failure of youth, African-American children who did not learn as much in school as European-American children. These children left school earlier and contributed to higher rates of delinquency and crime. Moynihan's report also claimed that African-Americans disproportionately failed the armed forces qualification test, suggesting they were less competitive in the workforce, and that the "alienation" African-American men experienced resulted in their withdrawal from stable, family-oriented, society.[25]

The report attempted to lay out the problems faced by African-Americans and traced them to causes beyond the reach of ordinary

[25] Rainwater and Yancey, *The Moynihan Report*, 5-6.

people. It read heavily of victimization and denied African-American agency. In contrast to the "tangle of pathology" seen in African-American families, Moynihan stated that the "white" family had achieved stability. The Moynihan report, along with the work of the other scholars highlighted here, lends insight into how public officials viewed African-American families, especially urban African-American families, in the late 1950s and early 1960s.

Moynihan's basic findings were made public on June 4, 1965, when President Johnson addressed Howard University.[26] After the speech, the media entered the debate over the supposed pathology found in African-American families. Mary McGrory of *The Washington Star* interpreted the speech to mean that "[African-Americans] [had to] come to grips with their own worst problem, 'the breakdown of Negro family life.'"[27] However, the report actually stated that there was no reason to suppose matriarchal family arrangements were less practical but that American society rewarded patriarchy. Moynihan stated, "A subculture, such as that of the Negro American, in which this [patriarchy] is not the pattern, is placed at a distinct disadvantage." In other words, successful middle-class, African-American families had adopted patriarchy.[28]

Mary Keyserling, head of the Women's Bureau of the Department of Labor, took issue with the Moynihan Report's finding and defended

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[26] Rainwater and Yancey, *The Moynihan Report*, 125.
[27] Ibid., 135.
[28] Rainwater and Yancey, *The Moynihan Report*, 75.

African-American women, as did civil rights advocate, Pauli Murray, whose well-known article "Jane Crow and the Law: Sex Discrimination and Title VII" presented the parallel discriminatory practices faced by women and African-Americans. The August 9, 1965, issue of *Newsweek* summarizing the Moynihan Report prompted Murray to describe the report as,

> a great disservice to the thousands of Negro women in the United States who have struggled to prepare themselves for employment in a limited job market which is not only highly competitive but which, historically, has severely restricted economic opportunities for women as well as Negroes.[29]

Public versions of the report downplayed illegitimacy, "because of the inflammatory nature of the issue with its inevitable overtones of immorality."[30] The statistics regarding illegitimacy used by Moynihan showed a marked increase in the percentage of African-American children born outside a traditional marriage. For example, in New Orleans, in 1950, there were 134.8 illegitimate children born per 1000 nonwhite births. In 1962, that ratio had increased to 183.8.[31] These statistics and those found in similar reports fueled a growing concern, which was then fanned by politicians whose constituents felt that a growing wave of illegitimate children offered proof of America's degradation. What seemed overlooked by these reports was the fact that the United States was experiencing the Baby Boom, a sharp increase in

[29] Ibid., 185.
[30] Ibid., 162.
[31] Ibid., 106.

birth rates for all categories that stretched from the end of the Second World War to the mid 1960s.

Through the late 1950s and early 1960s, the public's increasing concern over illegitimacy was "expressed in the many newspaper and magazine articles, editorials, special reports, and legislative debates across the country," stated a government-ordered report on illegitimacy entitled *Illegitimacy and its Impact* (1960). The Senate Appropriations Committee ordered the Bureau of Public Assistance to create the report to study, "the problems giving rise to the increase in illegitimate births and their impact on [welfare] program[s]."[32] The report cited evidence that suggested that an increasing fear over nonmarital births existed in the United States and that many felt the increase meant an end of American morality. "Traditionally, the American people believe[d] that the family unit [was] the very core of individual and national strength," the report continued.[33] An increase in nonmarital children suggested a decrease in family strength.

This concern over the loss of morality could also be seen in popular magazines, including *Ebony*, whose target audience was African-American. An article in 1952 began with the headline "Illegitimacy increases as teen-age morals decline." It went on to explain that "a recent survey by a large magazine," found that 69% of teenage girls

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[32] The Bureau of Public Assistance, *Illegitimacy and its Impact on the Aid to Dependent Children Program*, (Washington D. C., April, 1960), iii.

[33] Bureau of Public Assistance, "Illegitimacy," 4.

wanted a baby. The article equated this percentage with an estimated 50,000 illegitimate children born annually and warned that, "Because records are often falsified in such cases, and because fourteen states do not even report these births as illegitimate, the real figure is considerably higher." The article then highlighted increased numbers of teen pregnancies in Chicago and New Jersey.[34]

In addition to the feared moral decline and despite the fact that there was some evidence to the contrary, many felt that welfare payments acted as an incentive for women to have children out-of-wedlock and remain unmarried, or for the fathers of these children to shirk their financial responsibility.[35] On August, 9, 1959, the *New York Times* featured a column titled, "Illegitimacy Rise Alarms Agencies." It told the same story as previous research, illegitimacy rates were rising, pointing to a decline in American morality. Additionally, the subheading, "White Rate Drops," illustrated the disparity between African-American and European-American illegitimacy rates. According to the article, the more than 200,000 illegitimate children born annually received an average of $27.29 dollars a month in welfare benefits. Leonard Gross' *Saturday Evening Post* article, "Are We Paying an Illegitimacy Bonus?" from the following January, opened with a pair of vignettes that

[34] "Illegitimacy Increases as Teen-Age Morals Decline," *Ebony* (April 1, 1952), 88.
[35] Bureau of Public Assistance, "Illegitimacy," 1, 3.

encapsulated the popular understanding of African-American single mothers and their relationship with the federal government.

> In Philadelphia, [...] the district attorney had stated that 'a hard-core group of young colored girls' in that city could be found 'down at the corner taproom...buying drinks for the boy friend' with public funds intended to feed their illegitimate children. In several states legislators had charged that promiscuous women were conceiving babies out of wedlock in a deliberate attempt to live off the taxpayers. [...] How I asked the welfare director, had a program so humanely conceived become as much an object of public scorn as the illegitimate children it was increasingly obliged to keep alive?[36]

The last line of this missive, regarding an increasing obligation to keep nonmarital children alive upholds the belief that their numbers were increasing.

Indeed, while some states did not record legitimacy status on a child's birth certificate and could offer no statistics, research showed that the rate of illegitimacy tripled between 1947 and 1950. According to the public rhetoric, most of these children were born to African-American women, although illegitimacy rates for all races increased after the war. As researchers searched for causes behind the increase, they often relied on racial stereotypes to interpret their data. As Rickie Solinger has shown, while the stain of illegitimacy could be taken from "white" women and their children, it became permanent for "black" ones. In both popular

[36] Leonard Gross, "Are We Paying an Illegitimacy Bonus?" *Saturday Evening Post,* (January 30, 1960), 30.

culture and research findings, European-American single mothers were typically described as middle class, producing an adoptable baby. After the baby was born, a European-American woman could still be a wife, so long as she gave up the baby and "changed her ways." Her pregnancy was a temporary, neurotic episode. For example, Solinger explains, if a European-American woman wanted to keep her baby, she was diagnosed as immature and mentally ill.[37]

Leontine R. Young's *Out of Wedlock: A Study of the Problems of the Unmarried Mother and her Child* illustrates this attitude. According to Young, "Girls" who chose to keep their children and return home,

> [came] from severely neurotic homes, and their return with the baby is tantamount to a sentence of future damage and unhappiness for both. In many cases acute rivalry develops between the girl and her mother for possession of the child, who becomes in effect a pawn between the two. [38]

Young saw illegitimate children in this situation having, "no clearly established place ... either in the home or the community."[39] In contrast, pregnant African-American women were defined as "the product of uncontrolled, sexual indulgence," and the absence of psyche. Young stated that African-American unwed mothers had no personality structure. According to Young and others, African-American single

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[37] Solinger, *Wake Up Little Susie*, 24.

[38] Leontine R. Young, *Out of Wedlock: A Study of the Problems of the Unmarried Mother and her Child*, (New York: McGraw-Hill Book Company, inc. 1954), 152.

[39] Young, *Out of Wedlock,* 152.

mothers were chronically poor, and, as Solinger wrote, burdened by a baby that would not be adoptable or adopted. They were both "unrestrained, wanton breeders" and "calculating breeders for profit," depending on who was talking and why. It appears that many experts of the 1950s and 1960s ignored any exceptions to these stereotypes.[40]

Although aspects of the debate over the number of nonmarital children were overtly racially neutral, by the 1960s, illegitimacy was understood to be a "black problem," and single, African-American mothers and their children became a target. Stories like those presented in the above examples reinforced the stereotypes that had marked African-Americans for centuries. [41] For many, both within the academy and the public at large, poverty and illegitimacy had become a "natural" part of African-American culture. As the Civil Rights Era moved forward and these political debates turned to address the poor, the early ethnocentric studies, like Frazier's, informed the conversation. In fact, Frazier's *The Negro Family in the United States* (1939) was reprinted in 1966, giving new life to the matriarchy argument.

Policy officials who were interested in regulating illegitimacy admitted that children born outside of a traditional marriage were "an

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[40] Solinger, *Wake Up Little Susie*, 8-9, 24.

[41] Ibid., 22; Welke also discusses the disparity between how a debate is framed and what the words being used imply. See, Welke, *Borders of Belonging,* 133-137; In addition to Winthrop Jordan's *White Man's Burden*, see Dean, *Teenage Pregnancy*, 31.

age-old problem" that resulted from "a complex of many factors – social, emotional, legal, and economic." Officials saw the family and life circumstances of illegitimate children as, "deprived of parental support," and "frequently in financial need." It was believed that

> many of these families [came] from parts of the community in which living conditions [were] poor and crowded, facilities [were] the most meager, opportunities for education and health [were] minimal, and where opportunities for acquiring the work skills needed in today's economy [were] lacking.[42]

For single women of any race who found themselves pregnant and facing life as described by the Bureau of Public Assistance's report, one possible solution was to give their child up for adoption. According to the Bureau's report, in 1958 between 94,000 and 96,000 children were adopted in the United States. In the states that kept track, more than half of them were illegitimate. However, only 9% were "nonwhite" babies. "In some communities, there were ten suitable applicants for every white infant," the report stated.[43] This simple statement hardly exposes the complex problem facing nonmarital African-American children and a brief exploration of that problem may provide some explanation for why Louise Levy had decided to raise her five children alone.

While European-American single mothers were shamed because of their actions, African-American women were blamed for a population explosion, higher welfare costs, unwanted babies, and poverty's grip

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[42] Bureau of Public Assistance, "Illegitimacy," 2.
[43] Bureau of Public Assistance, "Illegitimacy," 27.

upon the African-American community in general. And, while European-American women were expected to give up their babies, African-American women were expected to *keep* theirs. In fact, African-American women who attempted to give up their babies for adoption in the 1950s were often charged with desertion.[44]

One cause behind the disparate adoption numbers regarding race was the fact that "white-run" agencies held African-American childless couples to standards so high few could meet them. Because of this and the widely-held belief that interracial adoption was detrimental to the child, few African-American couples were able to adopt and African-American babies spent long periods in foster homes or institutions before being adopted, if they were adopted at all. Studies in the 1960s showed that many African-American women did not favor adoption. They believed that once a woman had a child, that child was her responsibility and that a person did not give up a baby to a stranger. Because of this, single African-American women kept their babies, seeing it as the better alternative.[45]

The African-American women who kept their babies held a central position in the Civil Rights Era discourse surrounding welfare and Aid to Dependent Children (ADC) and its later incarnation Aid to Families with Dependent Children (AFDC). High rates of African-American illegitimacy

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[44] Solinger, *Wake Up Little Susie*, 24-25, 27.
[45] Solinger, *Wake Up Little Susie*, 196-01.

played into the debates over continued school segregation, restrictive public housing and other exclusionary policies, in addition to the welfare reform struggle. Several popular views regarding African-American nonmarital children affected the debate surrounding them. First, these babies were believed to be the product of a pathology, either based on race or gender. Additionally, many saw African-American nonmarital children as predisposed to depravity. Because of this, some believed that the "white" majority had a moral obligation and a right to interfere with African-American single mothers and their children. At the same time, many officials believed, because of their slave past, African-American unwed mothers needed less community support, since it was natural for them to have children out of wedlock. Consequently, these officials balked at using taxpayer funds to support "unwanted" illegitimate children.[46]

In her work *The Color of Welfare, How Racism Undermined the War on Poverty*, Jill Quadagno explores the racial inequalities that doomed welfare policies to failure. The mothers pensions tradition stemming from the Progressive era formed the basis for ADC with the adoption of the Social Security Act of 1935. From this beginning, the program incorporated a racial division.[47] Because States retained control over who received the federal grants, white widows were most likely to receive

[46] Ibid., 187-190.
[47] Jill Quadagno, *The Color of Welfare*, (New York: Oxford University Press, 1994), 119.

ADC in the 1930s. Caseworkers supervised the families receiving aid. This supervision, according to *The Moral Construction of Poverty, Welfare Reform in America* by Joel F. Handler and Yeheskel Hasenfeld, included "home management, diet, cleanliness, school attendance, and, of course, moral behavior."[48]

After World War II, the Baby Boom added to the number of children relying on ADC funds for support. In 1940, approximately 1 million children received welfare benefits. In 1950 the number had doubled, and it tripled by 1960. This upward trend continued through the 1960s until, by 1970, nearly 9 million children were receiving AFDC benefits.[49] During these same decades, the recipients changed. Widows were replaced by women who had divorced or never married. An increasing number of minority groups populated the rolls, as well. This increase in recipients was accompanied by an increase in cost, from $550 million in 1950 to $4.8 billion by 1970. The majority of these recipients, 44% by 1975, were African-American.[50]

Although she focuses on welfare before 1935, many of the problems that Linda Gordon illuminates in her work, *Pitied But Not Entitled: Single Mothers and the History of Welfare 1890-1935,* continued to haunt ADC and AFDC into the 1960s. "ADC offered some federal

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[48] Joel F. Handler and Yeheskel Hasenfeld, *The Moral Construction of Poverty, Welfare Reform in America*, (Newbury Park: Sage Publications, 1991), 70.

[49] Handler and Hasenfeld, *The Moral Construction of Poverty*, 113; Quadagno, *Color of Welfare,* 119.

[50] Handler and Hasenfeld, *The Moral Construction of Poverty*, 113. Statistics quoted from the Social Security Bulletin, Annual Statistical Supplement, 1989.

protection to mothers left without male support," Gordon wrote, "providing women a measure of economic insulation against total dependence on men." However, it quickly became one of the most-hated programs of the federal government. Criticism of ADC and AFDC pointed to fundamental flaws within the program's framework. Often, in order to qualify for ADC, a client had to dispose of all their resources, becoming more impoverished before they could qualify for aid. Additionally, if any resources were gained, the ADC benefit was reduced. This policy punished self-improvement. Work was also punished. Stipends were reduced when wages were earned. "[ADC's] proclaimed mission was to keep mothers at home but its workings produc[ed] the opposite effect." ADC was unique among welfare programs, according to Gordon, in that it employed a morality test in order to qualify for the benefit.[51] "The presence of a man in the house, or the birth of an illegitimate child, made the home unsuitable."[52] This morality test was often based on Suitable Home laws, which were passed by the states. These laws, and others, attempted to distinguish the "deserving poor" from those who were "undesirable."[53] As Martha F. Davis explains in her book, *Brutal Need, Lawyers and the Welfare Rights Movement, 1960-1973*, "By 1960

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[51] Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare 1890-1935*, (New York: Free Press, 1994), 287, 297-98.

[52] Ibid., 297-98.

[53] There are many excellent works that explore the distinction between the deserving poor and those who were undesirable. In addition to Handler, *Moral Construction of Poverty*, see Herbert J. Gans, *The War against the Poor: The Underclass and Anti-Poverty Policy*, (New York: Basic Books, 1995).

the distinction between the deserving and undeserving poor within the AFDC program had become stark indeed."[54]

One of the more infamous attacks against nonmarital children on ADC occurred in Louisiana under that state's Suitable Home law. In the summer of 1960, the Louisiana legislature and Governor Jimmie H. Davis passed a law that denied public assistance to over 23,000 nonmarital children, removing them from the rolls. This incident prompted Winifred Bell to write *Aid to Dependent Children* in 1965. Her research into welfare policy showed that the term "illegitimate" had to be redefined by state legislatures as they grappled with laws related to children and ADC benefits. This was necessary as the common usage definition of the word did not always fit with the use that the legislative policies required.[55] Bell also found that after passage of Louisiana's Suitable Home law, a large number of families were coerced into withdrawing from the welfare rolls. Others may have been discouraged from applying.[56] It is possible that Louise Levy fell into one of these two groups. Yet, this coercion did not curtail welfare expenditures and drastic measures were taken.

The 23,459 children who were kicked off the rolls lost their support that summer because either their parent had given birth out-of-wedlock

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[54] Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, (New Haven: Yale University Press, 1993), 9.

[55] Solinger, *Wake Up Little Susie*, 22; Winifred Bell, *Aid to Dependent Children*, (New York: Columbia University Press, 1965), 127.

[56] Bell, *Aid to Dependent Children*, 130-31.

after receiving their first welfare payment or caseworkers felt that the parent's behavior might have led to the birth of another child. The families were left with no support. Sixty-six percent of the children receiving ADC in Louisiana in 1960 were African-American but 95% of the children kicked off the rolls were African-American. "Clearly Louisiana's new definition of "unsuitability" fell disproportionately on Negro children," Bell concluded. Additionally, she continued, "About 30% of the children [who were kicked off the rolls] were legitimate by any definition of the term," suggesting that the loss of benefits was racially motivated. Complaints over these statistics led to a reinstatement of the children's benefits later that year, though each family had to reapply and many who did were denied. Louisiana's law was only one of many state measures aimed at controlling illegitimacy, and all of them relied upon information tainted by beliefs regarding the "wrongness" of African-American culture.[57]

Spurred on by continued budget concerns, several other proposals were made to curb the perceived rising tide of illegitimate children receiving welfare benefits. The Bureau of Public Assistance's report claimed that there were, "persistent efforts in some states to punish parental immorality resulting in an illegitimate birth."[58] In addition to forced sterilization for mothers of illegitimate children, other proposals

[57] Bell, *Aid to Dependent Children*, 137-38, 140-141.
[58] Bureau of Public Assistance, "Illegitimacy," 51.

exposed by the Bureau's report included exclusion of illegitimate children from benefits if they were the second or subsequent child born out of wedlock. However, most of these proposals, if they became law, were deemed unconstitutional or vetoed by the State's governor. One governor wrote, "All good citizens abhor immorality and pity the plight of an illegitimate child--in whose face the door of hope is practically closed at the moment of birth." Of course, lost in the hysteria surrounding ADC benefits and the "growing number" of nonmarital African-American children were the children themselves. As with most debates over them, the adults talked about children as an amorphous concept, losing sight of the actual people who were affected by their decisions.[59]

In an attempt to counter the heated rhetoric of the debate, a number of scholars, such as Clark E. Vincent, joined with the Bureau of Public Assistance's report, attempting to improve society's understanding of African-American nonmarital children. In "Illegitimacy in the Next Decade: Trends and Implications," Vincent provided a brief history of the research related to illegitimacy. For him, the key moment had come during the 1950s and 1960s, when illegitimacy became a symptom of a sick society.[60] He explained how increased political rhetoric, related to increased expenditures, had increased study of the problem. Elizabeth Herzog criticized the tone of this political rhetoric in her work,

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[59] Ibid., 52.

[60] Clark E. Vincent, "Illegitimacy in the Next Decade: trends and Implications," *Child Welfare* 43, no.10 (1964), 516.

"Unmarried Mothers: Some Questions to be Answered and Some Answers to be Questioned." Herzog felt that the past scholarship failed to define the problem. She asked what was everyone so worried about, births, "extramarital conception" or "extramarital coitus?" "Our galloping publicity makes us more familiar with the absolute than with the relative picture," she chided. Herzog suggested that the rise in illegitimate births was not unusual. It was merely keeping pace with the Baby Boom and the increase in all births that was seen after World War II.[61]

The hysteria that Herzog speaks against appears to have grown from the long-held concern over spending tax money, in the form of welfare payments, on illegitimate children. Fortunately, the Bureau's report showed that the concern over tax money supporting immoral "Welfare Queens" was misplaced. "The great majority (over two-thirds) of the children under 18 who were born out of wedlock are living with natural parents or relatives," William L. Mitchell, Commissioner of Social Security, reported. "Only one out of eight is receiving support through the Aid to Dependent Children program."[62]

The report found that children living with a single mother were, "among the neediest in the Nation," but only a small percentage ever received ADC benefits. "The great majority of all children born out of wedlock-- about 87 percent-- are being supported by parents, relatives,

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[61] Elizabeth Herzog, "Unmarried Mothers: Some Questions to be Answered and Some Answers to be Questioned," *Child Welfare*, 41 no. 8 (1962), 340, 341.

[62] Bureau of Public Assistance, "Illegitimacy," iii.

or through sources other than aid to dependent children," the report concluded. Many unmarried parents had come from impoverished families themselves and most ADC mothers worked, even if they had young children. Overall, only 13 percent of nonmarital children living with their natural parents or other relatives received ADC benefits. Of the 87 percent who did not receive ADC payments, just over 55 percent lived with their natural parents or relatives, 30 percent lived in adoptive homes, while just 1 percent lived in an institution or with a foster family.[63]

The racial breakdown of these statistics is illustrative of the social conditions Louise and her children faced in the late 1950s and early 1960s. Of European-American nonmarital children, 70 percent had been adopted and did not receive ADC payments. Nearly 20 percent lived with their parents or other relatives, again without ADC benefits. Only 9.2 percent of European-American nonmarital children lived with their parents and received ADC. For African-American nonmarital children, the percentages paint a different picture. Only 5 percent lived in adoptive homes, while 78.4 percent lived with their parents. Neither of these groups received ADC payments. Only 15.5 percent lived with their parents and received ADC benefits.[64]

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[63] Ibid., 34-36.
[64] Bureau of Public Assistance, "Illegitimacy," 36.

Unfortunately, this report focused on nonmarital children who received state aid and Louise Levy did not, according to the court records. However, because she worked as a domestic, it is safe to assume that her children resided in "a home of meager income." Although the politicians did not have to worry about her children receiving tax money, the fact that she had five children would have marked the family as an example of "degraded morals."[65]

Other aspects of the Bureau's report can be used to glimpse the world that the Levy children lived in as it covers the years 1940 to 1957, roughly the years in which the Levy children were born.[66] Many families who received ADC payments were "partially self-supporting," deriving almost half their income from the mother's wages and contributions made by fathers. According to the report, more than fifteen percent of mothers worked full or part time. While Louise worked to support her family, there is no mention in the court documents of paternal support for any of the children.[67] The report also included the previously mentioned racial stereotypes, which affected their findings. The report found "A variety of aspects – cultural, economic, legal, social, moral, and

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[65] Ibid., iii.

[66] According to court records, the children were to receive $1,000 dollars a year until the age of majority. Working backwards from the monetary figures, the oldest of Louise's children was born around 1947 and her youngest around 1958. There remains the possibility that the age of majority may have been eighteen instead of twenty-one. In which case, the birth years would have to be adjusted slightly, though three years difference does not necessarily change the social milieu surrounding the Levy family.

[67] Bureau of Public Assistance, "Illegitimacy," 3.

psychological," that caused illegitimacy. The first of these was, "[A] lack of integration of families and individuals." By this, the report's authors meant cultural variations that existed between classes and races. The authors saw the variation in culture, specifically the African-American culture first reported in Frazier's work, as one reason that people "[did] not measure up economically, educationally, vocationally, physically, or socially." The report continued,

> The fact that illegitimate births are relatively more numerous among Negroes than among whites can best be understood by viewing it against the cultural background of the Negro family [...] the family culture of many of the lower strata Negroes is that of the old southern rural community.[68]

As a "lower strata Negro," Louise was seen as the natural head of the family, and the lack of a father was construed as normal.

Although outrage over the "fact" that *black* women were having *black* babies at taxpayers' expense grew, the truth was that very few families with nonmarital children actually received ADC benefits. And the benefits they did receive, which ranged from $19.00 to $26.00 dollars per month, did not cover the cost of raising a child.[69] While politicians associated African-American nonmarital children with rising welfare costs, the true cause was more complex. Rising costs were not just from illegitimacy. "Between 1953 and 1959, the number of families headed by women rose 12.8 percent while the number of families rose only 8.3

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[68] Bureau of Public Assistance, "Illegitimacy," 14.
[69] Solinger, *Wake Up Little Susie*, 29.

percent," according to Solinger's research. Overall, the ADC caseload increased because of an increasing number of children and families, as well as an increase in divorce, separation, desertion, *and* illegitimacy.[70] Mitchell was quoted in the report as saying,

> The plight of the children born under this handicap [illegitimate] may well be a matter of concern. They are children whose future is at hazard by reason of their lack of a complete family, and frequently because of lack of sufficient income to assure their normal growth and development.[71]

This sentiment echoes the concern that law and policy makers have often tied to the existence of nonmarital children throughout the centuries. The rhetoric often implied or stated outright that nonmarital children were a threat or left at a disadvantage because they did not reside within a "normal" family. Mitchell also addressed the "humiliation and deprivation" that nonmarital children felt based upon their birth status, though he did not quote any actual examples of these emotions.[72]

Ultimately, the Bureau of Public Assistance's report reached the same conclusions that Herzog had. Although the number of nonmarital births was increasing through the years, the overall percentage was still relatively low, only between 3.8 and 4.7 nonmarital births per 100 live births. Both "whites" and "nonwhites" contributed to this increase and the number of nonmarital children was greater in urban areas than in

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[70] Ibid. 193.
[71] Bureau of Public Assistance, "Illegitimacy," iii.
[72] Bureau of Public Assistance, "Illegitimacy," iii.

rural ones. Yet, the numbers driving the racialized hysteria could be found in the Bureau's report. According to their statistics, in 1957, there were 7,458 nonmarital births in Louisiana, 6,732 of them "nonwhite." For New Orleans, of the 1,406 nonmarital births that year, 1,108 were "nonwhite."[73] For the Levy family, Louise's children were not unusual.

Despite Herzog's and the Bureau's attempt at reason, hysteria over "welfare queens" informed legal policy during the 1960s. Gray and Rudovsky, Norman Dorsen's researchers, suggested in their work that some of the discrimination faced by nonmarital children in Louisiana may have been legally sanctioned as part of a larger plan to discriminate against African-Americans. They based this claim partly on an emergency session of the Louisiana legislature that instituted new measures penalizing nonmarital children and their parents. "Under this new law," the researchers wrote, "conceiving and giving birth to two or more illegitimate children was a crime for both father and mother."[74] The controversial legislative package was later repealed. However, punitive legislation was not limited to Louisiana or the Deep South. Laws related to nonmarital children were uneven, with each state, each jurisdiction, being different. "Even *within* one jurisdiction, the law often does not

[73] Ibid., 4, 9, 12-13.

[74] Gray and Rudovsky, "The Court Acknowledges the Illegitimate," 6. Their information came from *N.Y. Times*, Aug. 28, 1960, pg. 62, col. 4.

stand out with clarity (original emphasis)," Krause wrote in his 1969 article "Why Bastard, Wherefore Base?"[75]

Krause's earlier article, "Equal Protection for the Illegitimate," appeared before *Levy* reached the Supreme Court. In it, Krause equated the psychological problems of bastardy with that of racial discrimination. He quoted Nandor Fodor's "Emotional Trauma Resulting From Illegitimate Birth," in the *Archives of Neurology and Psychiatry*,

> In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal. ... To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe.[76]

However, Krause backed down from calling for complete equality on behalf of illegitimate children, "this writer will not argue that *all* distinctions between the legitimate and the illegitimate are not of proper concern to the state in its exercise of its police power (original emphasis)." For him, the real reason behind the legislative discrimination was prejudice, rooted in medieval church doctrine.[77] Given the long traditions this study has already explored, there appears to be some truth in Krause's conclusion. His article ended with a series of rhetorical questions that laid out past discrimination against nonmarital children and ended with a call for change,

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[75] Krause, "Why Bastard, Wherefore Base?" 59.

[76] Krause, "Equal Protection for the Illegitimate," 487, note 51; Nandor Fodor quoted from "Emotional Trauma Resulting From Illegitimate Birth," Archives of Neurology and Psychiatry 54, 381 (1945).

[77] Krause, "Equal Protection for the Illegitimate," 488-89, 498-99.

> Would our courts today uphold laws that barred illegitimates from public office, such as judgeships, that reduced criminal penalties for the murder of an illegitimate to farcical levels, that prevented illegitimates from appearing or being witnesses in court, that denied them burial and that provided for escheat of their bodies to medical schools upon their deaths? [...] If these disabilities, all of which the illegitimate once bore, offend our modern sense of justice, we should question the part of the burden that remains with all deliberate speed.[78]

Shortly after Krause's article appeared, the Levy case reached the U.S. Supreme Court, headed by Chief Justice Earl Warren. There, Norman Dorsen would take up the comparison equating illegitimacy to race and arguing against the long-held tradition of discouraging promiscuity by punishing children. The argument that Dorsen presented to the Supreme Court represented the first strike against one aspect of, "the part of the burden that remains." In the case of the Levy children, that burden related to inheritance rights and death benefits. Throughout his brief and the oral arguments, Dorsen ignored the swirling prejudice that surrounded African-American nonmarital children at the time. Instead, he argued that all children were equal before the law.

[78] Ibid.," 506, note 97.

CHAPTER 5

BEFORE THE WARREN COURT

In 1968, *Levy v Louisiana* joined the long list of civil rights cases decided by the Warren Court. To place this case into its proper context, the chapter examines the leading role of historical actors, especially Norman Dorsen, who argued for equal rights for illegitimate children. It also delves into the significance of the Fourteenth Amendment and details the dispute over wrongful death suits on behalf of illegitimate children. Although the emphasis is on Dorsen's winning argument in *Levy*, the defense mounted by Louisiana is also significant. While a full analysis of the Warren Court is beyond the scope of this chapter, it does provide an overview the court's membership because who the justices were helps to explain essential features of the Levy decision.

The Supreme Court of the 1960s, headed by Chief Justice Earl Warren, is perhaps best known for its social activism. Decisions passed by the Warren Court changed American law and society, affecting the country into the twenty-first century. And according to many scholars, the Warren Court influenced the legal systems of other nations as well.[1] The journalists Bob Woodward and Scott Armstrong described Warren as being more interested in basic fairness than legal rationale in their 1979

[1] See *Earl Warren and the Warren Court: The Legacy in American and Foreign Law*, Harry N. Scheiber ed. (New York: Lexington Books, 2007) for more on this influence.

work, *The Brethren: Inside the Supreme Court.*[2] This concern for fairness surfaced in the decisions that the Court passed down. In addition to the second argument of *Brown v Board of Education* and a number of cases that pitted the NAACP against various southern states, as Chief Justice, Earl Warren presided over *Bell v. Maryland* (1964), *Cox v. Louisiana* (1965), and *Loving v. Virginia* (1967) through the tumultuous Civil Rights Movement of the sixties.[3]

In these and other decisions, the court often divided along ideological lines. The "liberal bloc" included Chief Justice Warren (1953-1969) and Justices William O. Douglas (1939-1975), William J. Brennan (1956-1990), Abe Fortas (1965-1969), and Thurgood Marshall (1967-1991). On race and civil rights issues, these five were often joined by Hugo Black (1937-1971) and Byron R. White (1962-1993). In addition to racial civil rights issues, the Warren Court wrestled with issues of civil rights for those convicted of crime and the expansion of due process as seen in cases like *Robinson v. California* (1962), *Gideon v. Wainwright* (1963), and *Malloy v. Hogan* (1964). However, these decisions and other similar ones led the public to fear that the Warren Court was "soft on crime."[4] In his 1968 presidential campaign, Richard Nixon took

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[2] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Avon Books, 1979), 3-4.

[3] Horwitz, *The Warren Court and the Pursuit of Justice*, 39-43. The NAACP cases included *NAACP v. Alabama, NAACP v. Button,* and *Brown v. Board of Education II.*

[4] Woodward and Armstrong, *The Brethren*, 13-14; Horwitz, *The Warren Court*, 93; Keith E. Whittington, "The Burger Court (1969-1986)," in *The United States Supreme*

advantage of this growing sentiment. Woodword wrote that Nixon ran against Warren as much as he did against Herbert Humphrey; one of Nixon's campaign promises was to appoint strict constructionists who would "refrain from imposing their 'social and political viewpoints on the American people.'"[5]

Although Warren was confident that Robert Kennedy would win the presidency, when Kennedy was assassinated on June 5, 1968, Warren believed that the chance of the Democrats holding the White House passed with him. Warren described Nixon as "weak, indirect, awkward and double-dealing," and he was concerned about serving on the Supreme Court under Nixon.[6] As the political scientist Keith Whittington has noted, "At the age of 77, Warren knew that his health could not hold out indefinitely, and he explained to [President] Johnson that he wanted a successor who shared Warren's vision of the Court and the Constitution." Therefore, on June 11, 1968, Chief Justice Earl Warren handed over his resignation letter, confident that Abe Fortas would replace him as head of the Court.[7] These were the circumstances that surrounded the late May announcement of the Court's decision in *Levy*, making it one of the last cases associated with Chief Justice

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Court, The Pursuit of Justice. ed. Christopher Tomlins. (Boston: Houghton Mifflin Company, 2005), 301.

[5] Whittington, "Burger Court," 301; Woodward and Armstrong, *The Brethren*, 4.

[6] Woodward and Armstrong, *The Brethren*, 4.

[7] Whittington, "The Burger Court," 300.

Warren while he still believed Robert Kennedy would win the White House and his liberal legacy would be safe for the near future.

In *Levy*, the arguments about nonmarital children remained the same as they had always been. Society should not hold illegitimate children accountable for the actions of their parents, on one side. On the other, the discrimination of illegitimate children encouraged traditional marriages and was necessary to maintain the strength of American families. This time, the children would win, but the Levy children were not the first children to find justice before the Warren Court.

One of these juvenile cases, *In re Gault*, which changed juvenile court proceedings and allowed children the benefits of due process, served as a precursor to *Levy*. In *Gault*, a teenage boy was accused of making an obscene phone call. Because he was a juvenile, his case fell under juvenile court rules that did not allow for confrontation with his accuser, or the provision against self-incrimination. When the judge found Gault delinquent, he sentenced the fifteen-year-old to an industrial school. This meant, in effect, he could potentially spend six years in confinement for a single phone call. The lack of due process in Gault's case brought the ACLU into the fight and the case to the Supreme Court in December 1966.

The ACLU assigned Norman Dorsen to litigate Gault's case. As was mentioned in chapter one, Dorsen's legal career began in the 1950s. During those years, among other things, he worked as Assistant to the

General Counsel of the Army for the Army-McCarthy hearings,[8] and later clerked for Justice John Marshall Harlan II. Dorsen became a law professor at New York University Law School in early 1961. At the same time, he became active in the ACLU and by 1967, he was a member of the board of directors.

On May 15, 1967, Justice Fortas handed down the majority opinion for the court in *Gault*, extending due process to children during adjudicatory hearings in juvenile court. Upon learning of Dorsen's successful argument in *Gault*, Adolph Levy, the Levy children's attorney, contacted him, asking if Dorsen would be interested in taking on the case. After studying the lower opinion, and consulting with the ACLU's legal director, Melvin Wulf, Dorsen agreed to represent Thelma Levy in her attempt to secure wrongful death benefits for Louise's children. Working with three law students from the New York University law school, he prepared the brief.[9]

Dorsen's brief, which was filed with the U.S. Supreme Court in December 1967, challenged the validity of Louisiana's Article 2315 based

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[8] James L. Oakes, "Norman Dorsen: A Tribute," *Harvard Civil Rights-Civil Liberties Law Review* 27 (1992), 316 note 6. The Army-McCarthy hearings of 1954 pitted the Army against Senator Joe McCarthy as he searched for Communist subversives in the military. For more on McCarthy, see Robert Griffith, *The Politics of Fear: Joseph R. McCarthy and the Senate*, 2nd edition, (Amherst: The University of Massachusetts Press, 1987). For the Army-McCarthy hearings see Robert Shogan, *No Sense of Decency: The Army-McCarthy Hearings: A Demagogue Falls and Television Takes Charge of American Politics*, (Chicago : Ivan R. Dee, 2009).

[9] *In re Gault* can be found at Justia.com, http://supreme.justia.com/us/387/1/case.html. [Accessed 10/01/10]. Oral arguments are available from the Oyez Project at http://www.oyez.org/cases/1960-1969/1966/1966_116. [Accessed 10/01/10]. Norman Dorsen, email correspondence with author, 4/20/2010.

on the Equal Protection clause of the Fourteenth Amendment.[10] The court used two standards of scrutiny when exploring issues of constitutionality under this clause. The first of these, minimal scrutiny, presumed that statutes were constitutional if the law in question had a rational reason. Because of this presumption of constitutionality, the court adopted a "hands off" approach, deferring to the states' authority. Under this rational basis test, most state and federal laws were deemed constitutional.

In the mid-twentieth century, the second level, strict scrutiny, developed, in cases that involved racial discrimination. The evolution of this strict reading of the law in relation to civil rights can be seen in two court cases, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) and *Korematsu v. United States* 323 U.S. 214 (1944). In *Carolene*, the court deferred to the experience of the legislature regarding economic matters. However, footnote four stated that cases that involved provisions of the Bill of Rights, such as the First Amendment's protection of free speech, might require closer scrutiny. Justice Harlan Fiske Stone, writing the court's opinion, thus concluded that cases harboring "prejudice against discrete and insular minorities," could require "a correspondingly more searching judicial inquiry" than other cases

[10] The first clause of the Fourteenth Amendment read, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

because of the threat to their civil rights.[11] Nearly a decade later, Justice Black, delivering the opinion in *Korematsu*, expanded upon this footnote.

Korematsu was one of several cases brought before the U.S. Supreme Court relating to the internment of Japanese-American citizens during World War II. Fred Korematsu, a Japanese-American ordered to leave his home along the Pacific Coast after the attack on Pearl Harbor, chose to remain in the area. Justice Black's opinion set forth the principle that, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." He emphasized that these statutes are not necessarily unconstitutional but must be, "subject[ed] [...] to the most rigid scrutiny." However, Black argued that Korematsu's internment was justified by military necessity and overlooked evidence of racial discrimination.[12]

Throughout the 1950s and 1960s, civil rights cases relied upon these two positions, strict scrutiny, and minimal scrutiny. However, to

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[11] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), Page 304 U. S. 155, footnote 4. Found at Justia.com http://supreme.justia.com/us/304/144/case.html [Accessed 9/12/2010].

[12] The four cases were *Hirabayashi v United States* 320 U.S. 81, *Yasui v. United States* 320 U.S. 115, *Korematsu v. United States* 323 U.S. 214, and *Ex Parte Endo* 323 U.S. 283; *Korematsu v. United States* 323 U.S. 214 (1944), pg. 216. Found at Justia.com, http://supreme.justia.com/us/323/214/case.html, [Accessed on 9/12/2010.]; Peter Irons' *Justice at War*, (New York: Oxford University Press, 1983) presents the details regarding *Korematsu*, his initial conviction, and the *coram nobis* challenge filed on his behalf. While researching the legal construction of the four internment cases, Irons came across documentation that showed "a legal scandal without precedent in the history of American law," and a "deliberate campaign to present tainted records to the Supreme Court." When presented with this new information in 1983, the Federal District Court in San Francisco found in favor of Korematsu and overturned his conviction. However, the Supreme Court's initial decision remains "good law."

present a winning argument in *Levy*, Dorsen aimed for middle ground, attempting to expand strict scrutiny to classifications beyond racial categories. Despite the fact that the Levy children were African-American, Dorsen saw the injustices faced by nonmarital children as an issue transcending race.[13]

In his brief, Dorsen stressed that the court had already created two standards related to the Levy case. The first required that the court examine the characteristic or trait, such as race, gender, or creed, which determined the classification that the law relied upon. This fundamental point rested on precedent found within a number of cases related to the unfavorable legal treatment of Japanese-Americans. Dorsen argued that by examining various racial classifications, the court had often found some were "by their nature suspect." As an example of this ruling, he cited *Oyama v. California*, 332, US 633 (1948), insisting that it, "[brought] us even closer to the instant case."[14]

In *Oyama*, the Court had struck down California's Alien Land Law, claiming that it had inflicted harm on a child, simply because his father was of Japanese origin and ineligible for citizenship. The 1913 California Alien Land Law represented just one of many acts of legal discrimination against Asian immigrants living in the United States; perhaps the most infamous of these measures were the Chinese Exclusion Acts.

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[13] Norman Dorsen, email correspondence with author, 4/20/2010.

[14] Levy Notes; Nov 6, 1967; Norman Dorsen Papers; TAM 251; 32; 11; David R Notes; undated; Norman Dorsen Papers; TAM 251; 32; 11; Dorsen's Brief, *Levy*, 21.

California's Alien Land Laws denied Japanese immigrants the right to own any "legal or beneficial interest in agricultural land."

Roger Daniels wrote one of the earliest works on the Alien Land Laws entitled, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* (1962). In 1913, two different Alien Land Laws were proposed to the California legislature by both Democrats and Progressives. One barred all immigrants from land ownership and the other barred only those who were ineligible for citizenship. From these bills, the law that was enacted "limited leases of agricultural land to Japanese to maximum terms of three years and barred further land purchases by Japanese aliens." However, it was easy to avoid the intent of the law. If the land was part of a business, 51 percent of the stock was held by American citizens. If it was simply land owned by a family, the title was placed in the name of an American-born child (*Nissei*).[15]

By 1920, Japanese farmers in California were earning 10 percent of the state profits from agriculture. A new Alien Land Law was passed with the intent of closing loopholes that had been found in the 1913 law.[16] The 1920 version prohibited transferring land to Japanese nationals, barred any lease of land to them. Nor could they acquire the

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[15] Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion*, (Berkeley: University of California Press, 1962,1977), 58, 63.

[16] Daniels, *Politics of Prejudice*, 87.

land by purchasing it through a land corporation as they had done previously. This law also attempted to stop the practice of placing land in a child's name by forbidding Japanese parents from acting as guardians to their Nissei children. This last provision was struck from the law as unconstitutional.[17]

Yet, in 1923, the remaining provisions of the land laws had been approved by the Supreme Court, which determined that "the distinction between aliens eligible for citizenship and those ineligible for citizenship was a reasonable classification because it was borrowed from a rule established by Congress." However, this decision was revisited in the wake of World War II. Before the war, Kajiro Oyama, a first generation Japanese immigrant (*Issei*) purchased two parcels of agricultural land and had them deeded to his American-born son, who was eligible to own property. After Pearl Harbor, when the Japanese were evacuated from California, the state confiscated the land. Several months later, when the Oyamas were released from their internment camp, they sued for the lost land, and their appeal eventually reached the U.S. Supreme Court. This time, the court decided in favor of the American-born son because California's actions denied him the right to own property simply because

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[17] Ibid., 88. The Alien Land Laws also affected Chinese immigrants, see Sucheng Chan, *This Bittersweet Soil: The Chinese in California Agriculture, 1860 to 1910,* (Berkeley: University of California Press, 1986). For more on the legal struggle the Japanese immigrants undertook against these laws see Yuji Ichioka, "Japanese Immigrant Response to the 1920 California Alien Land Law," *Agricultural History* 58, No. 2 (Apr., 1984): 157-178.

his father was from Japan.[18] In the final ruling on *Oyama*, the Court wrote, "distinctions based on ancestry are 'by their very nature odious to a free people.'"[19] It was this argument that Dorsen used to solidify his appeal on behalf of the Levy children.

Dorsen also drew upon *Korematsu*. In addition to the previously mentioned discussion regarding the Fourteenth Amendment, which Dorsen drew to the court's attention, Justice Robert H. Jackson's dissenting opinion stated that Korematsu could not be held responsible for his ancestor's actions. Guilt was not inheritable.[20] Dorsen thus equated holding nonmarital children responsible for the actions of their parents to the shameful treatment that Japanese-American citizens had endured during World War II.

The second standard that Dorsen claimed related to the *Levy* case explored the purpose of the statute and the basis for the classification. By the late 1960s, a well-established constitutional principle existed regarding legal classifications. The categorization of people, in relationship to a law, had to be based upon a feasible similarity between the law and the category that was created. While the Equal Protection Clause does not always require that there be an obvious relationship, in the *Levy* case, there was "a complete lack of reasonable relation between

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[18] "Notes and Recent Decisions," found in *Asian Americans and the Law (vol. 2): Japanese Immigrants and American Law: The Alien Land Laws and Other Issues,* Charles McClain ed., A Garland Series, (New York: Garland Publishing, 1994), 171-172, reprinted from the *California Law Review* 36, (1948).

[19] Appellant Brief, *Levy*, 21-22

[20] *Korematsu v. United States*, as quoted in Stier, "Corruption of Blood," 731.

the two."[21] In other words, there was no logical reason to deny death benefits to illegitimate children while allowing legitimate children, including adopted children, to recover under the same circumstances. Since the purpose of any wrongful death statute was to provide for support of dependents after the death of a parent, if illegitimate children were not covered by the act, it defeated the purpose and the law was meaningless. Wrongful death statutes allowed for the support of children who would otherwise become a burden upon the state.

As part of this argument, Dorsen reiterated Adolph Levy's original point that Louise was a good mother and loved her children no less than she would have if they had been legitimate. For Dorsen, this aspect of the argument was not meant to combat the stereotypical impression of African-American families. As a point of interest, Dorsen did not approach the argument in racial terms, since the record showed no evidence of racial discrimination. Instead, Louise's depiction as a "good mother" related to the important position Louise occupied in the lives of her children. Because they were nonmarital, losing their mother was worse than it would have been for children born into a traditional marriage, since there was no second parent to continue raising them.[22]

Based on these two standards, Dorsen concluded that Article 2315 created two classes of children, one that could not sue for wrongful death

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[21] Appellant Brief, *Levy*, 6, 10.

[22] Norman Dorsen, email correspondence with author, 4/20/2010; Appellant Brief, *Levy*, 12.

benefits and one that could. Further, the ability to sue for wrongful death was unrelated to legitimacy and illegitimacy. Therefore, the state had not justified the classification, according to Dorsen. Dorsen attacked the Louisiana law by claiming that the statute was further suspect because "Louisiana is the only state that deprives illegitimate children of the right to sue for the wrongful death of their mother."[23] The majority of jurisdictions allowed children to sue for the death of their mother and only limited suits regarding the death of a father.

The first point above, that some classifications based on race or ancestry are "constitutionally suspect" led Dorsen to the argument that an illegitimate child's status was "like his race and ancestry and has nothing whatever to do with his own actions or conduct." He expanded upon this argument and returned it to the case at hand by adding,

> There is no room for the State to claim that the discrimination here should be sustained if there is any "rational basis" to support it. Accordingly, there should be no constitutional distinction between discrimination based on illegitimacy and that based on race; discrimination against illegitimates also should be "constitutionally suspect."[24]

Related to this argument regarding constitutionality, Dorsen mentioned that statutes related to illegitimacy "[fell] most heavily on Negroes," and admitted that some of them may have been designed

[23] Appellant Brief, *Levy*, 7.
[24] Appellant Brief, *Levy*, 7, 8-9.

specifically to hurt African-Americans.[25] In the brief, a footnote provided statistics on African-American illegitimacy. Out of more than 9,000 illegitimate children born in 1964, 8,441 were African-American. Dorsen also tied illegitimacy to slavery and miscegenation, a common theme in the 1960s, as the previous chapter showed. However, Dorsen never returned to this aspect of his argument in the brief. In fact, during oral arguments, he denied arguing that Article 2315 was a racist statute. For him, the fact that the Levy children were African-American was secondary to the fact that they were born outside a traditional marriage. As Dorsen said, the case was, "much broader than race."[26]

Dorsen pointed out as he continued the attack against Article 2315, that Louisiana law forced both mothers and fathers to support their illegitimate children. If parents were forced to support their children, "it is bizarre to deny them a cause of action against a wrongdoer who caused the death of their mother," he concluded. Dorsen highlighted one final, illogical, aspect of the case. Article 2315 provided for the recovery of wrongful death benefits for adopted children. Yet, the Louisiana courts had chosen to deny these same benefits to the Levy children.

Finally, Dorsen took issue with the lack of justification in the lower court's verdict and the Louisiana State Supreme Court's decision not to

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[25] Ibid., 8-9.
[26] Norman Dorsen, email correspondence with author, 4/20/2010.

hear the case. The lower court's final justification for denying benefits to the Levy children was that "it discourage[d] bringing children into the world out of wedlock." However, little if any evidence existed to suggest that statutes against illegitimate children actually discourage their parents from creating them. Dorsen elaborated upon this point,

> The attempted justification is offensive to common sense. It would be truly remarkable if persons contemplating or in the process of producing a child out-of-wedlock would be deterred by the possibility that the child would not be able to recover for their wrongful death.[27]

Limiting wrongful death claims did not discourage promiscuity, one of the common reasons for discriminating against nonmarital children, Dorsen's argument concluded. Nor, in this case, did it protect the rights of legitimate children, since Louise did not have any.[28]

Two amicus curiae briefs, one from the NAACP Legal Defense Fund, and another from the executive Council of the Episcopal Church and the American Jewish Congress joined Dorsen's brief. Krause continued to play a role in the fight for illegitimate children's equality, submitting the *Amicus Curiae* brief on behalf of the NAACP Legal Defense Fund and the National Office for the Rights of the Indigent (NORI). Its presence shows that despite Dorsen's attempt to divorce race from birth status, the fact remained that the Levy children were African-American and represented for many one more aspect of legal racial discrimination.

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[27] Appellant Brief, *Levy*, 14.
[28] Ibid., 12, 14-17.

The issues that were addressed in Krause's amicus brief included a concern for the poor and a belief that laws related to illegitimacy acted as covert racial discrimination because they affected African-Americans more often than other races. According to the amicus, this occurred because African-Americans were more likely to be born out of wedlock and less likely to be adopted. As has been shown, scholarship supported both these points.[29]

When the Louisiana Court of Appeal upheld the district court's dismissal, it was because they had used a strict interpretation of the statute and found that "illegitimacy" was not "race, color, or creed." Both Dorsen's and Krause's briefs argued against this finding. Krause's amicus brief stated that Article 2315 was discriminatory because the majority--95.8% was the statistic he quoted--of nonmarital children born in the United States were African-American. [30] Louisiana had argued that discrimination against nonmarital children was undertaken as a way to safeguard the morals and general welfare of society by discouraging the birth of children outside of wedlock. Krause's brief declared this argument "bogus." As stated earlier, laws that discriminated against nonmarital children did not succeed in curbing illicit sex. The rising number of nonmarital children born in the United

[29] NAACP Legal Defense Fund Amicus Curiae Brief, *Levy*, 2-3.
[30] Ibid., 5-6.

States through the middle of the century offered proof of the failure of this policy.

The other fundamental flaw in these laws was that they punished one person in the hopes that it would affect the behavior of another.[31] According to Krause, two additional reasons existed for disavowing the conclusion that laws targeting illegitimate children protected the family and upheld morality. The amicus brief argued that if the statutes were meant to protect families, logically, they could not apply in any case involving a single-parent's death because with that parent's death, there was no longer a family to protect. Although this point is arguably faulty, Krause's reasoning once again returned to the argument that Louise Levy loved her children, whether they were legitimate or not. Finally, the wrongful death benefit allowed survivors to collect money in exchange for loss of parental support, which kept a child from becoming a burden on the state. Krause argued that barring illegitimate children from this benefit would increase the likelihood of them becoming dependent and that it was more logical to allow illegitimate children to collect wrongful death benefits. The brief called attention to the fact that the law did not actually forbid illegitimate children from collecting but that the courts had interpreted the law in that way. Of particular significance, it pointed

[31] NAACP brief, *Levy*, 10-12. The statistics quoted by the NAACP Legal Defense Fund, which came from the U.S. Census Bureau (1965) gave a total of 4,098,000 live births of which 259,400 were illegitimate for the year 1963. This number increased to 291,200 illegitimate children born in the year 1965.

out, was the fact that other laws in Louisiana, such as the Workman's Compensation Act, allowed illegitimate children to collect benefits for the loss of a father if they were dependent on him.[32]

The final aspect of Krause's argument was that Louisiana, as a southern state, had a long history of discriminatory laws. Even if Article 2315 was not intended to be discriminatory, it had become part of a larger pattern of legal inequality against African-Americans. Because of this, Krause urged the Supreme Court to find the law unconstitutional and in violation of the Due Process clause of the Fourteenth Amendment. He cited *Loving v. Virginia*, with its anti-miscegenation ruling, to support the position that if people were allowed to marry whomever they chose, regardless of race, then a child's relationship with his or her mother was an equally vital part of the pursuit of happiness.[33] These arguments from the NAACP Legal Defense Fund's amicus brief added important details to the racial discrimination aspect that Dorsen had only touched on. Equally interesting, given the ancient traditions that had originally led to inequality for illegitimate children, Krause's amicus brief was joined by an amicus from the Executive Council of the Episcopal Church and the American Jewish Congress, written by Leo Pfeffer, Howard M. Squadron and Joseph B. Robison.

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[32] NAACP brief, *Levy*, 13-14.
[33] Ibid., 21.

The submission of the amicus from the Church organizations prompted an announcement in the *New York Times*, dated December 26, 1967, under the headline "Protestants and Jews Back Illegitimates' Right to Sue." Their amicus brief focused on property rights and joined Dorsen in equating illegitimacy to race. However, when these groups discussed the subject of discrimination and inequality regarding illegitimacy, the religious roots of this unequal treatment appeared to have been forgotten, or perhaps, ignored. Both church organizations were interested in preserving democracy by opposing infringements on liberties and protecting civil rights. They joined the suit partly because they were concerned by the "deepening gulf" between the wealthy and the poor in the United States. Their main point was that the socio-economic differences between socio-economic groups could often be found in, "legislation based on outmoded concepts of caste and status."[34]

The church organizations believed that discrimination against illegitimate children was equal to "discrimination based on race and other accidents of birth." They were concerned that laws such as Article 2315 stood in the way of solving the problem of poverty in America. They also felt that the statute, as it had been interpreted by the lower court, deprived the children of their liberty.[35]

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[34] Executive Council of the Episcopal Church and the American Jewish Congress Amicus Curiae Brief, *Levy v. Louisiana*, 3.

[35] Episcopal and Jewish Congress brief, *Levy*, 3-4.

Finally, the organizations felt obliged to add their amicus brief because the decision barring illegitimate children from wrongful death suits was arbitrary and irrational and "perpetuates [and] reinforces invidious distinctions and a badge of inferiority." One of the church organizations' points was that punishing the children for the wrongs of their parents was oppressive. "In primitive times it was not uncommon to punish children for the iniquity of their parents," they wrote.[36] Yet, over the centuries, law and punishment had changed. The justification behind criminal law was not revenge but deterrence. They wrote that the prejudice shown toward illegitimate children was based on,

> complex combinations of historical, psychological and sociological factors. [...] The marital status of one's parents, like race, should be an utterly neutral factor in determining what benefits an individual receives. Discrimination based on the marital status of one's parents, like discrimination based on the color of one's parents, shocks the conscience because of its fundamentally irrational unfairness.[37]

The counsel for the church organization reached the conclusion that, Article 2315 and the lower court's interpretation of it "[reflected] the ancient shame and obloquy suffered by children of unwed mothers."[38] Knowing the centuries of religiously sanctioned discrimination against nonmarital children, this sentiment seems incongruous at first, although

[36] Ibid., 4, 18.
[37] Ibid., 20, 25.
[38] Ibid., 10-11.

it does bring the story of the discrimination of children born outside of a traditional marriage full circle.

In addition to reiterating the points that were already made in the two previous briefs, the churches' brief addressed the question of whether or not the Supreme Court could interfere with Louisiana's statute. The brief first addressed the point that the suit for wrongful death was a property action and the court had a history of not interfering in business transactions. However, *Levy* was not a matter of business or industrial practices but of the loss of property, namely wrongful death benefits, without due process. They saw no reason to exclude illegitimate children from wrongful death benefits as it did not serve any state purpose and was not "in the public interest."[39]

The amicus brief also attacked the state's position that the statute was necessary as "it discourages bringing children into the world out of wedlock." Responding to this argument, the attorneys wrote,

> We believe that, where the constitutional rights of so 'discrete and insular' a minority as illegitimate infants are at stake, this Court is not bound by such a statement and may look into the reality of the situation.[40]

For the church, the exclusion of illegitimate children represented hidden racism equivalent to the "grandfather clause," as seen in *Guinn v. United States*, 238 US 347, 365 (1913), and invalid redistricting as it appeared in *Gomillion v Lightfoot*, 364 US 339 (1960).

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[39] Episcopal and Jewish Congress brief, *Levy*, 5-7, 9-10.
[40] Ibid., 10.

Finally, the churches' brief suggested that normally, the courts could not "pass upon the wisdom of legislation" nor make decisions regarding alternative approaches. The court had to leave these questions to the legislature. However, they argued, in this instant the "Legislature has determined that the "general welfare" calls for the sacrifice of the welfare of defenseless little children," and the Court must interfere on behalf of an oppressed minority.[41] The Court had done this before, as early as 1886, the brief argued, reminding the Court of *Yick Wo v. Hopkins* 118 US 356 (1886), in which it was determined that, "where a particularly disadvantaged group is involved, state action which ordinarily might be neutral and hence lawful may in the particular circumstances be oppressive and hence unconstitutional."[42]

Although the amicus briefs had addressed race and the legal discrimination of African-Americans, in his brief, Dorsen spent little time arguing the case in relationship to the fact that the Levy children were African-American. Dorsen limited his discussion of race to a single sentence and some footnoted statistics, as quoted above. Additionally, his private notes regarding the formation of his brief appear to rule out an exclusively African-American racial argument in favor of a broader reading of the law. Thus, every step of his argument was a pointed attack against the illogical treatment that the Levy children had received

[41] Episcopal and Jewish Congress brief, *Levy*, 16.
[42] Ibid., 18.

from a court system determined to retain power over a group of second-class citizens, illegitimate children instead of African-Americans.

In response to these arguments, the appellee's brief, submitted on behalf of the State of Louisiana, Dr. Wing and his insurance company, and Charity Hospital of New Orleans, maintained that no discrimination had been shown in the interpretation of Article 2315. The lead author of this brief appears to have been William A. Porteous Jr., Dr. Wing's attorney, although oral arguments were presented by William A. Porteous III.[43] In its brief, the state argued four main points. First, the statute was not discriminatory because illegitimate children of all races were denied wrongful death benefits. Their second and third points argued against Dorsen's reading of the law. According to the state, the law did not deprive the children of property without due process, nor was it a penal statute "penalizing persons on account of their status." The state's final point affirmed that Louisiana law protected the rights of illegitimates.[44]

The state's argument pointed out that under common law, there was no wrongful death benefit to be inherited. During oral arguments, Porteous made a point of this, stating that under Article 2315, wrongful death benefits were a privilege, not a right. Legislation had created the

[43] Appellee's Brief, *Levy*, unpaginated title page. The other names on the brief include William A. Porteous III, Dr. Wing's attorney, Jack P.F. Gremillion, Attorney General for Loiusiana, Dorothy D. Wolbrette and L.K. Clement, Jr. Assistant Attorney Generals, and Ingard O. Johannesen, attorney for the Board of Administrators of the hospital.

[44] Ibid., 2-3.

law and, because of that, it had to be subject to a strict scrutiny, which allowed the state courts to interpret Article 2315 as excluding illegitimate children. And, the brief maintained, it was the state court's prerogative to read the law as they chose; the Supreme Court had no business interfering.[45]

In response to Dorsen and Adolph Levy's argument that Louise had loved her children, the state claimed that Louise's love of her children and status as "a good mother" had no bearing on the case. "The law … speaks of its beneficiaries only in terms of status," they wrote. Additionally, the state attempted to turn this argument against the appellants suggesting that to make an exception for the Levy children because their mother loved them as if they were legitimate would actually discriminate against unloved illegitimate children.[46]

According to the State, the status of illegitimate children was more important than their race, an aspect of their argument that echoed Dorsen's. Further, treatises on English law made it plain that the word "child," when used within a statute, held the limited meaning of legitimate child. Under Louisiana law, the state argued, it would have been possible to legitimate the Levy children. If only Louise had married the children's father, "the Levy children would have enjoyed all of the

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[45] *Levy v. Louisiana Oral Arguments,* 267-684 Case #508, Oral Arguments of the Supreme Court, available from the Special Media Archives Services Division (NWCS) National Archives and Records Administration, Room 3360, 8601 Adelphi Road, College Park, MD 20741-6001; Appellee's Brief, *Levy*, 4-5, 22-26 *in passim.*

[46] Appellee's Brief, *Levy,* 6, 12.

rights of legitimate children." Additionally, if she had chosen to remain unwed, she could have legitimated the children by declaring them legitimate in front of two witnesses and a notary public.[47] The problem with these arguments lies in the question of who is capable of acting on these possibilities. Louise Levy would have had to sign the forms or chosen to marry. Her children had no say in the situation. However, as illegitimates, they remained liable for their mother's choices.

In answer to the argument that laws related to nonmarital children were more burdensome on African-Americans than on other groups, the state responded, "The fact that Negroes may be more affected by the requirement of legitimacy does not render the statute void." According to the state, Article 2315's main purpose was to "encourage and preserve legitimate familial relationships." Additionally, the statute and similar laws promoted traditional marriage in order to regulate property inheritance, an aspect of Louisiana law that retained its importance into the 1960s as property ownership continued to equate to social status.[48]

These briefs were supported by oral arguments in late March, 1968. When Dorsen, who was on sabbatical at the time, delivered his oral argument, he faced his well-respected, former boss, Justice Harlan. Although the oral arguments presented condensed versions of the points already detailed in the court briefs, they further illuminated the

[47] Appellee's Brief, *Levy*, 7, 12.
[48] Ibid., 17, 29.

questions raised by *Levy* and showed how Dorsen attempted to increase the reach of strict scrutiny while avoiding race on one side and a rational basis test on the other. If the case could be decided only upon the question of race, then nonmarital children of other races would remain open to discriminatory practices. And if the court found that the law stemmed from a rational basis, no nonmarital child would gain equality.

The state's most important line of defense in the oral arguments was that over forced heirship and the state's right to define who belonged to a family. Forced heirship, a quirk of Louisiana law discussed previously, played a significant role in the creation of laws distinguishing between the rights of legitimate and illegitimate children, Porteous argued. According to Porteous, this "unique policy" demanded that title examiners be able to find every legitimate heir. He stated, "Hence you can begin to appreciate why the question of status in family is so important to Louisiana." He suggested that laws discriminating against illegitimate children were a necessary aid in this grueling task. Porteous also justified the discrimination against illegitimate children by drawing on "strong family traditions" found in the *Code Napoléon*.[49] His argument, as presented, showed that legally belonging to a family was very important under Louisiana law. The principle of inheritance being dictated by status within a family could be traced all the way back to the Roman *Paterfamilias*. There too, the illegitimate child had been denied

[49] *Levy v. Louisiana Oral Arguments.*

inheritance rights. Article 2315 simply continued this ancient tradition. However, the Court was concerned. The principle of forced heirship had not been mentioned by the lower court and there was no precedent to draw upon. In the end, it was Porteous' own opinion that Article 2315 related to forced heirship.[50]

Related to this, the second point of interest in the oral arguments discussed whether or not there was a rational basis for the classification of children as legitimate or illegitimate. If such a basis existed, the Court had no reason to find Article 2315 unconstitutional. Justice Thurgood Marshal broached the subject first, asking Porteous, "What basis is there for this classification [of illegitimate]?" When Porteous asked for clarification, did the Justice mean a rational basis, Marshall replied, "No, I'm talking about *any* basis."[51]

Thurgood Marshall, who had successfully argued *Brown v Board of Education* in 1955, joined the Supreme Court in 1967 as the first African-American Justice, despite the fact that his appointment was challenged by Southern Democrats. For two years, he formed a part of the liberal wing of the Warren Court, with Warren, Douglas, Brennan and Fortas. After the formation of the Burger Court under Nixon, he joined with Brennan and later Harry Blackmun. In the forward to Randall W. Bland's *Justice Thurgood Marshall, Crusader for Liberalism*,

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[50] Ibid.
[51] Ibid.

his Judicial Biography, Henry J. Abraham described Marshall as one of the "most reliable, most predictable liberal activists on the high bench, voting together [with Brennan] in almost all cases involving claims of denial of civil rights and liberties."[52] During the *Levy* oral arguments, in response to Marshall's questioning, the defense insisted that the classification of individuals was fundamental to legislation. However, Porteous could offer no definitive rational basis for the law and concluded that the court should presume it existed, since Article 2315 was part of long-held public policy in Louisiana.[53]

Finally, the *Levy* discussion turned to race. As Dorsen stated, he couched his argument in the fact that the children were illegitimate, not in the fact that they were African-American. As part of his opening remarks, Dorsen reiterated his point that illegitimate children were a "discrete and insular minority" with characteristics "similar to the racial classification" that the court had dealt with for years. Dorsen highlighted the prejudice faced by illegitimate children and equated their treatment with racial prejudice.[54]

Porteous' opening statement, "How far are we going to go with the Fourteenth Amendment?" led to a reminder that the court had traditionally used two criteria, one a strict set of standards that applied

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[52] Randall W. Bland, *Justice Thurgood Marshall, Crusader for Liberalism, His Judicial Biography*, (Bethesda: Academica Press, LLC, 2001), vii.

[53] *Levy v. Louisiana Oral Arguments.*

[54] *Levy v. Louisiana Oral Arguments.*

to racist or racial statutes, making them automatically suspect. The court interrupted his argument to reply that they thought Louise's race immaterial. Porteous agreed. And although Dorsen denied it, Porteous accused the appellee's brief of attempting to paint Article 2315 as a racist statute. "And I submit," Porteous continued,

> that the appellants are therefore trying to bring this statute within the purview of those cases, *Loving v Virginia*, *Korematsu*, *Hirabayashi*, *et cetera*, where the statute is automatically suspect. And only the most overriding public policies may justify it.[55]

This exchange shows the fine line Dorsen's argument tread. Despite the fact that the majority of reported nonmarital children born were African-American and working against the popular perception that illegitimacy was a "black problem," Dorsen remained steadfast in his analysis of the situation. Illegitimacy was similar to race, but not identical. And the discrimination suffered by illegitimate children was unjustified. However, while it was not a racial issue, the argument returned to racial precedent. Nonmarital children were denied rights based on the label they were given, not the actions they had taken. This label followed them throughout their lives, and no action on their part would change it. In this way, they formed a "discrete and insular minority." As children, they had no lobby and no way to petition for change. They were disenfranchised just as earlier racial groups had

[55] Ibid.

been. For these reasons, illegitimate birth status deserved to be treated *similarly* to racial status.

When *Levy* came up in conference, March 29, 1968, Warren indicated that he believed the case was simple. "I can't see any interest 'that the state can have to exclude illegitimate children for the loss of their mother by a tortious act.'" For Black, the argument swung the other way, "This has been an acceptable classification for generations. It's bad state policy, but I can't say that it's not a rational one." According to Bernard Schwartz' work, Douglas' opinion reversed what Warren had said in conference. His draft, which was omitted from the final *Levy* decision, stated, "Here we are not concerned with alleged 'wrongdoers' but with people born out of wedlock who were not responsible for their conception or for their birth."[56]

On May 20, 1968, the court ruled in favor of the Levy children and Justice William O. Douglas issued the court's opinion. Justice Douglas began with the assertion 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." [57] As Dorsen had argued and the state had maintained, the fact that the Levy children were African-American was less relevant

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[56] Bernard Schwartz, *Super Chief, Earl Warren and His Supreme Court -- A Judicial Biography*, (New York: New York University Press, 1983), 715-716.

[57] Opinions from http://supreme.justia.com/us/391/68/case.html, [Accessed on 3/31/2010].

to the case than was their status as illegitimate children. The Supreme Court also found the classification of illegitimacy unrelated to the ability to sue for wrongful death and survivor benefits. At the end of his opinion, Justice Douglas wrote, "We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.[58]

Justices Harlan, Black, and Potter Stewart dissented, disagreeing on two of the majority's points. First, they felt that discrimination against illegitimate children was necessary to strengthen the position of formal marriage within society.[59] Harlan wrote, "These decisions [in *Levy* and *Glona*] can only be classed as constitutional curiosities." He concluded that the majority opinion was best described as "brute force."[60] In addition to questioning the validity of the argument that love played a role in deciding who had a claim to wrongful death benefits, the dissenters concluded that the state's had the right to choose who could claim these benefits and how a family was legitimately formed. The arbitrary nature of the categories created by the states was not the court's concern, but the legislature's. Harlan stated that he was "at a loss" to understand the swing that the court had made in deciding familial relationships based on biology instead of legal ties, which it had

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[58] Ibid.

[59] Gray and Rudovsky, "The Court Acknowledges the Illegitimate," 17-18.

[60] Harlan's Dissent, *Glona v. American Guar. & Liab. Ins. Co.* 391 U.S. 76. Found at http://supreme.justia.com/us/391/73/case.html [Accessed on 9/01/2010]. Because *Levy* and *Glona* were heard in tandem, Harlan's dissent applied to both cases.

upheld previously. According to a number of sources, the word "child" when used in wrongful death statutes meant only a legitimate child, and illegitimate children had been traditionally excluded in America and Canada.[61] His citations do not mention French sources, suggesting that Louisiana's Civil Code tradition was not an issue for the Supreme Court.

Additionally, Harlan did not see the classification of illegitimate children as a minority group as inherently suspect. Therefore, the question was not open to strict scrutiny. For Harlan, the strictest scrutiny pertained only to cases of racial discrimination. His reasoning can be found in his dissent in *Oregon v. Mitchell* 400 U.S. 112 (1970), in which he explains his understanding of the history of the Fourteenth Amendment. In that dissent, he wrote, "I am of the opinion that the Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit." Instead, for Harlan, its purpose was to ensure racial equality for only a short time after the Civil War and it only applied to the former Confederate States.[62]

With the Supreme Court's ruling, the case was returned to the lower courts. Porteous, on behalf of the defendant parties, appealed the decision. It is within that appeal that *Levy*'s true legacy is most plainly voiced, "The Court has fundamentally altered the interpretative guidelines of the equal protection of the laws clause by making the test of

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[61] Harlan's Dissent, *Glona*, 76-79, footnote 2/2.

[62] Harlan's Dissent, *Oregon v. Mitchell* 400 U.S. at 154 and 170. Found at http://supreme.justia.com/us/400/112/case.html [Accessed on 9/17/2010].

constitutionality rationally in the mind of the court."[63] This fundamental alteration was the beginning of intermediate, or heightened, scrutiny, a level of consideration residing between the strict scrutiny of statutes based solely on race, and the deference to state legislatures and presupposition of constitutionality. Because heightened scrutiny came into existence with relation to non-racial categories, it divorced the equal protection clause from previous interpretations that limited it to race, creed, or color. From *Levy* forward, equal protection could be granted to any labeled category of person. The appeal was denied, but Louisiana's Supreme Court wished to have the final say.

Usually, when the Supreme Court overturned a case, it returned to the lower court for action. However, upon *Levy*'s return, the Louisiana Supreme Court and District Court reinterpreted the higher court's decision.[64] The Louisiana Supreme Court informed Adolph J. Levy that they would hear his oral arguments in November 1968 and they asked him to submit a brief that,

> cover[ed] the effect of the United States Supreme Court's opinion upon Article 2315. [...] whether it knock[ed] out that portion pertaining to legitimate children, or if it tend[ed] to amend the statute, and, if so, by what authority [could] the Supreme Court of the United States amend a state statute, etc.[65]

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[63] Appellee Brief for Rehearing, *Levy*, 2.
[64] Gray and Rudovsky, "The Court Acknowledges the Illegitimate," 9.
[65] Dorsen's papers, Letter to AJ Levy from Supreme Court of LA dated 6/27/1968. Box 32 folder 16.

Melvin Wulf, legal director of the ACLU, replied that he thought it would not be, "too difficult to get up a little brief to explain to them exactly what the Constitution and United States Supreme Court [were] all about." The lower court then interpreted the Supreme Court's decision to mean that *nobody* could inherit wrongful death benefits from their mother! As Dorsen stated, "the state maintained that this eliminated discrimination against the illegitimate children (we would now call them nonmarital children) because they were being treated like everyone else." Together with Dorsen, Levy wrote a brief for the court.[66]

In December 1968, Justice Mack E. Barham delivered the Louisiana Supreme Court's opinion, tracing the history of Article 2315 back to the Napoleonic Code. Afterward, he wrote that the U.S. Supreme Court's actions had declared at least a portion of Article 2315 unconstitutional, since judicial review could not change state legislation. He concludes,

> The members of this court may totally disagree with the reasoning and the result of the United States Supreme Court majority opinion and may agree with the dissent of Justice Harlan wherein it was said that the majority resolved the issue in this case "by a process that can only be described as brute force."[67]

Although, on the surface, these words may appear to be aimed at furthering discrimination against nonmarital children, the fact that

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[66] Dorsen's papers, Letter from Melvin Wulf to AJ Levy dated 8/1/1968. Box 32, Folder 16; Norman Dorsen, email correspondence with author, 4/20/2010.

[67] *Levy v State*, 253 La. 79; 216 So. 2d 818, 1968.

Justice Barham began his opinion by tracing Article 2315's history back to the Napoleonic Code suggests that the court's actions remained rooted in their long-standing antagonistic relationship with the federal government. Louisiana was proud of their French heritage and they saw the Supreme Court's actions as an attempt at forced conformity.

The Court's decision itself made few headlines. Dorsen described the case as being "rather outside the usual run of litigation."[68] The day after the Court's opinion was announced, *The Times-Picayune*, one of New Orleans' newspapers, ran a short column on page fifteen, section one, under the headline, "La. Illegitimate Children have Right to Lawsuits." The column highlighted Douglas' argument regarding the personhood of nonmarital children as well as the dissenter's opinion that the decision was an example of brute force. *The New York Times*' article of the same day suggested that Douglas' opinion "erected a barrier against anti-illegitimacy laws in general," while *The Washington Post*'s article regarding the *Levy* decision hinted at the likelihood that Alabama's welfare regulations, which were based on "social policy," would also be struck down by the Supreme Court.

While the struggle to provide equal treatment to nonmarital children continued after *Levy,* for the Levy children, their moment in the spotlight of history ended. Despite the attempted appeal and the delay at the state level, they received $60,000 dollars for their mother's wrongful

[68] Norman Dorsen, email correspondence with author, 4/20/2010.

death. Given their young age and the fact that they never took part in the trial, it is unlikely the Levy children realized the important role their family's tragedy played in legal and childhood history.

CHAPTER 6

LIFE AFTER *LEVY*

In his tribute to Norman Dorsen, written upon Dorsen's retirement from the ACLU presidency, Stephen Gillers began by quoting his subject, "Well, there it is. What does it all mean?"[1] While Gillers' piece goes on to discuss Dorsen's philosophical and practical sides, Dorsen's question fits rather nicely at this point in the study of *Levy v Louisiana*. From *paterfamilias* to *filius nullius*, the history of nonmarital children shows them consistently occupying a disadvantaged place in Western society. Although this project has focused on the United States and Revolutionary France, the Enlightenment contributed to a shift in perceptions regarding illegitimacy throughout Western Culture and this shift slowly improved the lives of these children and their parents. *Levy*'s history was woven from a variety of strands and each one continued beyond 1968.

Through the 1970s and 1980s, as American culture continued to shift away from finding fault in nonmarital children, the problem of their birth became redefined as a problem of unwed mothers. In addition to official government reports, the National Council on Illegitimacy worked through the decades to improve policy makers' understanding of illegitimacy, with the intention of improving laws related to nonmarital

[1] Stephen Gillers, "Truth, Justice, and White Paper," *Harvard Civil Rights-Civil Liberties Law Review* 27 (1992), 319.

children. In 1969, they released a series of reports entitled *The Double Jeopardy, the Triple Crisis – Illegitimacy Today.* As part of this collection, Gertrude Leyendecker presented "Children in Double Jeopardy," which highlighted the continued belief that "illegitimate" children were a threat to family cohesion. According to her, children of poor, single women lived in double jeopardy; the family was not intact and the family was poor. Leyendecker felt that women stressed by economic issues would take that stress out on their children, her assumption being that children of unwed mothers were burdensome and only grudgingly cared for by family members. Leyendecker concluded her research by summarizing the legal inequalities faced by illegitimate children, highlighting common practices that continued even after *Levy.* In addition to those explored in earlier chapters, mothers of nonmarital children were compelled to begin paternity proceedings if the father did not voluntarily support the child and she needed public assistance. In these cases, the court decided the amount of financial support without considering the father's, mother's, or child's needs. Additionally, the fathers of these children had no custodial rights or visitation privileges.[2]

Karl D. Zukerman also presented a summary of illegitimacy law, drawing primarily on Krause's work, as part of this report. Zukerman wrote that there were two "true-but-not-true" statements related to

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[2] Gertrude Leyendecker, "Children in Double Jeopardy," in *The Double Jeopardy, the Triple Crisis -- Illegitimacy Today.* (National Council on Illegitimacy, National Council of Social Welfare, 1969), 35-36, 42.

illegitimate children. The first was that, "An illegitimate child is illegitimate because the law denotes him as such," and "An illegitimate child bears various burdens and suffers various disabilities as an illegitimate because the law says he should." He called them "true-but-not-true" because while the statements were technically true, the legal definition and legal burdens placed upon nonmarital children were not the only things that set them apart from marital children. According to Zukerman, there were differences beyond the law that related to strengthening the traditional family.[3]

Zukerman saw a common thread running through laws related to illegitimacy, namely, protection of the family unit. Yet, he noted, "Clearly the laws affecting illegitimacy have neither deterred illegitimacy nor guaranteed the family as a social institution." He also questioned whether the family unit *deserved* protection. If it did, he asked, was it appropriate to punish one group of people in order to make another group feel guilty about their behavior?[4] As the decades passed, a greater variety of family forms emerged in the United States, some of them, such as surrogate parenthood, contributing to the softening opinion toward illegitimacy.[5]

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[3] Karl D. Zukerman, "Social Attitudes and the Law," in *The Double Jeopardy, the Triple Crisis -- Illegitimacy Today.* (National Council on Illegitimacy, National Council of Social Welfare, 1969), 69.

[4] Ibid., 76.

[5] For more on surrogate parenting and its legal complications see Marsha Garrison, "Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage," *Harvard Law Review* 113, no. 4 (Feb. 2000): 835-923.

In 1981, Francis Allen's *The Decline of the Rehabilitative Ideal, Penal Policy and Social Purpose,* touched upon the changing modern family of the United States. "The reality of the modern American family is that its authority in the area of child rearing has been significantly displaced by the state, the schools, "experts," peer groups, and the market," Allen wrote. Public policy increasingly allowed the state to interfere with the family. Juvenile courts, public schools and child welfare agencies all participated in this interference with parental authority. Additionally, the "post-Hiroshima, post-Vietnam, post-Watergate" United States had become more cynical and pessimistic regarding many aspects of society. This skepticism then combined with the "diminution of family authority." Other changes in family authority could be traced to the rise of a youth culture along with market pressures and the advent of television. Allen concluded that perceptions of the family were also changing from a "hierarchical structure characterized by mandatory mutual obligations to an arrangement of convenience designed to advance the personal satisfactions and self-fulfillment of its individual members."[6]

Steven Mintz, in *Huck's Raft,* also delved into this changing family structure. He wrote, "It became part of the conventional wisdom that the student radicalism of the 1960s was largely a by-product of the military

[6] Francis Allen, *The Decline of the Rehabilitative Ideal, Penal Policy and Social Purpose*, (New Haven: Yale University Press, 1981), 18-22.

draft and that when the draft was replaced by a lottery and later a volunteer army, student militancy quickly dissipated." But, as Mintz points out, many of the changing values associated with the radical 1960s actually occurred in the 1970s. These changes included increased drug use and younger children becoming sexually active, which led to controversial issues of access to contraceptives and abortions. The 1970s also saw an exponential growth in divorce rates, single parents, both married previously and unmarried, and fulltime working mothers. During these years, public panics erupted over teen pregnancy, stranger abductions, child abuse, illicit drugs, and juvenile crime. Economically, wages of noncollege graduates fell, "leading many young people to postpone marriage."[7]

Economics played an important role in the changing family pattern. During the "stagflation" of the 1970s, two incomes were required to maintain a middle-class lifestyle. This limited the number of children born. Self-supporting women also chose to become mothers without marrying or chose to leave an unhappy marriage. Men without a college education made poor wages, which translated into them being seen as undesirable marriage partners.[8]

These changes and others led to, "A grossly inflated and misplaced sense of crisis," over children and their well-being. Panics erupted

[7] Mintz, *Huck's Raft*, 334.
[8] Mintz, *Huck's Raft*, 342.

through the last quarter of the twentieth century. Many of them followed a similar pattern; the media reported an "epidemic" or a "growing number" of children facing a crisis. As the story spread, the numbers became inflated. For example, in the late 1970s and early 1980s, reports claimed that half a million children were kidnapped each year, with as many as 50,000 of them murdered by strangers. Later research showed that the actual numbers were between 500 and 600 annual kidnappings by strangers, with approximately fifty of those ending in murder.[9]

At this same time, a rising number of single-parent homes, many of them stemming from the increasing divorce rate, appeared to provide evidence of the decline. However, more recent statistics highlight the positive aspects of the changes that occurred in the 1970s. Families grew smaller, for example, allowing parents to devote more time to the children they did have. Many of these children attended preschool, gaining important preparation for later education, while their mothers worked full time. Studies showed that women who worked outside the home suffered from less depression than those who stayed home fulltime.[10] However, these changing family patterns were not easily accepted by society.

Questions related to who belonged in a family were not easy to answer and the legal history surrounding *Levy* suggests that the courts

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[9] Ibid., 336-337.
[10] Mintz, *Huck's Raft*, 341.

have not provided any definitive answers. Illustrative of the difficulty surrounding changing family law and shifting definitions of "family," in Louisiana, after the state Supreme Court's attempted reinterpretation of *Levy*, laws related to nonmarital children remained basically unchanged. According to Robert A. Pascal, as of 1970, Louisiana allowed all legitimated persons equal protection from the day they were legitimated. Although the law still barred children of incest from gaining legitimacy, the process for legitimizing other children remained nearly the same. If their parents married and if they acknowledged the child as their child, either formally or informally, the child became legitimate. Also, if either parent acknowledged the child before a notary, the child would be legitimate. However, these procedures still relied upon the action of the parents.[11]

Yet, the Supreme Court's final opinion in *Levy* divorced nonmarital children from the actions of their parents and struck against centuries of long-held traditions that discouraged births outside of a traditional marriage by imposing disadvantages upon the children. Even though its local impact was miniscule, *Levy* 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.

[11] Pascal, "Louisiana Succession and Related Laws and the Illegitimate," 167.

The first case influenced by *Levy* was *Glona v. American Guarantee Company,* 391 U.S. 73 (1968). It was heard the same day as *Levy* because it argued against the constitutionality of the same Louisiana law, although *Glona*'s argument approached the law from the other side. In *Glona*, Minnie Brade Glona, a resident of Texas, sued an insurance company for wrongful death benefits when her illegitimate son was killed in a car accident while in Louisiana. In Texas, she would have been able to collect benefits. However, because her son died in Louisiana, Louisiana's Article 2315 allowed the insurance company to deny her claim.[12]

A few short years after the court handed down their decision in *Levy*, they heard a similar case, *Labine v. Vincent* 401 U.S. 532 (1971). However, in the intervening years, the make-up of the court had changed; Chief Justice Warren had retired to be replaced by Chief Justice Warren Burger. Warren had tried to ensure his successor would be a liberal by resigning while Lyndon B. Johnson was still president. But scandal forced Johnson to withdraw his nomination of, Abe Fortas, who was later forced him to resign. This gave Nixon the opportunity to name the next Chief Justice as well as an Associate Justice.[13]

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[12] Zingo and Early, *Nameless Persons*, 42; *Glona v. American Guarantee Company (391 U.S. 73 (1968)*, found at *Justia.com,* http://supreme.justia.com/us/391/68/case.html, [Accessed on 4/25/10].

[13] Woodward and Armstrong, *The Brethren*, 4, 13-14.

Nixon wanted to appoint a strict constructionist, someone who would interpret the Constitution close to its literal intent, to join Justices Stewart and Harlan in an attempt to break Warren's liberal majority. Nixon saw Burger as a "voice of reason, of enlightened conservatism-firm, direct and fair."[14] Burger, as a member of the United States Court of Appeals for the District of Columbia, was described in *The Brethren* as, a "vocal dissenter whose law-and-order opinions made the headlines. He was no bleeding heart or social activist, but a professional judge, a man of solid achievement."[15] But, upon the announcement of Burger's appointment, an "unnamed judge who had worked with Burger on the Court of Appeals said, "[Burger] is a very emotional guy, who somehow tends to make you take the opposition position on issues. To suggest that he can bring the [Supreme] Court together--as hopefully a Chief Justice should--is simply a dream."[16]

Burger's legal skills were not well regarded. He was among the least productive justices and, to quote Keith E. Whittington's "The Burger Court(1969-1986)," "[Burger] often frustrated his colleagues with his relatively weak understanding of the cases, and his opinions rarely won praise for either their reasoning or their style."[17] After Nixon's appointments, many observers "expected that the Burger Court would

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[14] Ibid., 7, 13-14.
[15] Ibid., 6.
[16] Ibid., 19.
[17] Whittington, "The Burger Court," 302.

mount a counterrevolution against the Warren legacy. Those expectations generally went unfulfilled." Instead, Burger created a path for the Renquist court of the 1980s to follow. Under Burger, criminal aspects of law were more often changed than the civil rights principles.

At the same time, the Burger court attempted to protect state and local governments from the federal government. Whittington writes, "Since the New Deal, the Supreme Court had given the federal government a largely free hand to take action without concern for the constitutional boundaries between state and federal powers."[18] Additionally, the Burger Court set new records for the number of dissenting opinions it produced, twice as many plurality opinions than had been produced in the entire history of the Court. Decisions were usually made by one-vote majorities.[19]

"Although appointed by Republican presidents, the members of the Burger Court were ideologically diverse, reflecting the political goals and contexts of the presidents who nominated them," Whittington wrote. Because of this diversity, swing votes held the power during the Burger Court and key opinions were written by centrists while Renquist and Brennan "did verbal battle from the wings."[20]

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[18] Ibid., 306, 319.
[19] Ibid., 320.
[20] Whittington, "The Burger Court," 320. For more on the transition between the Warren Court and the Burger Court see Stephen L. Wasby, *Continuity and Change: From the Warren Court to the Burger Court,* (Pacific Palisades: Goodyear Publishing Company, 1976).

Despite the fact that the Court's line-up had changed, the laws in question in *Labine* came out of Louisiana and the state's mixed jurisdiction. But this time, the Court upheld Louisiana's viewpoint and *Labine*'s decision contradicted *Levy*.[21] Because Justice Douglas' reasoning in the *Levy* opinion was vague, and because *Levy* related to the mother-child relationship, there was room for a different interpretation when the father-child relationship lay at the heart of the case, as it did in *Labine*. In *Labine*, an illegitimate child attempted to gain a share of her natural father's intestate property. Rather than granting the child any inheritance, the Court decided that the estate would pass to the father's other relatives. According to Justice Black's opinion for the court, it was within the state's power to create succession laws that strengthened the family. Additionally, the *Labine* decision drew upon the provision of the Napoleonic Code that stated, in part, that illegitimate children could not claim the same rights as legitimate children.[22]

For the Burger Court, the lack of a will passing part of the father's estate to his nonmarital child was not an "insurmountable barrier," like that presented in *Levy*. Black wrote that because tort damages were involved in *Levy*, the Court had ruled it discriminatory to differentiate

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[21] Meeusen, "Judicial Disapproval of Discrimination against Illegitimate Children," 123.

[22] *Labine v. Vincent* 401 U.S. 532 (1971). Available from Justia.com http://supreme.justia.com/us/401/532/case.html [Accessed on 9/25/10]; *Labine* at 534. Compare to "A natural child acknowledged cannot claim the rights of a legitimate child." Title III, section II, *Napoleonic Code*.

between legitimate and illegitimate children. He continued, "*Levy* did not say, and cannot fairly be read to say, that a State can never treat an illegitimate child differently from legitimate offspring."[23] Brennan, joined by Stewart, Marshall, and White, replied with a cutting dissent. In it, Brennan chastised the court for ignoring Louisiana's discriminatory treatment of illegitimate children. In his opinion, Louisiana's laws treated illegitimate children differently and that distinction was unconstitutional. He went further, complaining about the court's dismissal of the Fourteenth Amendment simply to, "[...] uphold the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimates' parents, but also the hapless and innocent children." Brennan concluded, "Based upon such a premise, today's decision cannot even pretend to be a principled decision."[24] What *Labine* and *Levy* show, however, is the fluid nature of legal interpretation. Regardless of the theory that the fundamental principles of law are immutable, the fact remains that those principles will always be open to interpretation and as the interpreters change, the implementation of the law will also change. However, despite the challenge from *Labine* and the changing make-up of the court, *Levy* continued to influence later cases.

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[23] *Labine v. Vincent* at 536.
[24] Brennan's Dissent, *Labine v Vincent* at 541.

The next case to draw on *Levy* was *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164 (1972). In *Weber*, a father of four legitimate children and two unacknowledged illegitimate children died on the job. His workman's compensation insurance paid the maximum amount of survivor benefits to each of his legitimate children, leaving the two nonmarital children with nothing. Although the state insisted that *Levy* did not relate to the case, the Supreme Court found that relegating the two illegitimate children to a distinct class had no bearing on how workman's compensation benefits should be shared out to survivors, echoing the opinion espoused in *Levy*.[25]

In 1973, both *Levy* and *Weber* served as precedent for voiding a New Jersey law that only provided welfare benefits to traditional families. In *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), nonmarital children sought support equal to that given to legitimate children. This case revisited the argument that punishing children for the choices made by their parents was ineffectual. [26] However, many of the cases that followed *Weber* did not return to *Levy*, perhaps finding a more concrete decision in the later case. Additionally, by not returning to *Levy*, these later cases avoided *Labine*'s contradictory ruling. Finally, cases such as *Mills v. Habluetzel*, 456 U.S. 91 (1982) and *Pickett v.*

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[25] Zingo and Early, *Nameless Persons*, 60; *Weber v. Aetna Casualty and Surety Company*, found at *Justia.com Supreme Court Center*, http://supreme.justia.com/us/406/164/index.html, [Accessed on 4/25/10].

[26] Zingo and Early, *Nameless Persons*, 61; *New Jersey Welfare Rights Organization v. Cahill* (411 U.S. 619 (1973), found at *Justia.com Supreme Court Center*, http://supreme.justia.com/us/411/619/case.html, [Accessed on 4/25/2010].

Brown, 462 U.S. 1 (1983), explored various aspects of paternity and the rights of nonmarital children to collect child support from their fathers, which did not need to address the mother-child relationship that was central to *Levy*.[27] Because of these combined factors, *Levy* slipped into obscurity and scholars have overlooked its influence.

For Dorsen, who believed the case would be decided in his favor even before oral arguments were presented, *Levy* was almost a foregone conclusion. Although he would have been unsure of the outcome a decade earlier, by 1968 the ACLU and its allies "had chalked up" several victories and the Supreme Court had often decided civil rights cases favorably. Additionally, Dorsen felt that, "the facts of the case were so outrageous that they would appeal to a majority of the Court as an injustice that should be rectified." Years later, he would describe *Levy* as a favorite among the cases that he argued, "because it involved a new issue [illegitimacy] for the Court and because the result would help so many people."[28]

Dorsen's work on *Levy* provided much more than improved legal standing for illegitimate children, it touched off the creation of intermediate scrutiny, allowing the court to address discrimination of

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[27] *Pickett v Brown*, 462 U.S. 1 (1983), found at *Justia.com Supreme Court Center,* http://supreme.justia.com/us/462/1/case.html; *Mills v. Habluetzel*, 456 U.S. 91 (1982), found at *Justia.com Supreme Court Center,* http://supreme.justia.com/us/456/91/case.html, [Accessed on 4/25/2010].

[28] Norman Dorsen, email correspondence with author, 4/20/2010. Dorsen notes that there had been an earlier case involving "illegitimate children" but it had not been at the Constitutional level.

"distinct and insular minorities" other than racial minorities. The beginnings of intermediate scrutiny were only possible by rendering immaterial the fact that the Levy children were African-American. By ignoring the argument for racial equality, Dorsen expanded civil and constitutional rights in new directions. In his dissenting opinion for *Oregon v Mitchell* 400 U.S. 112 (1970), which pertained to eighteen-year-old voting rights, Justice Douglas supplied an appendix enumerating many cases related to improved civil rights.[29] His appendix showed that the equal protection clause had been used to strike down statutes unrelated to race for years. In addition to categories such as statutes for and against businesses and those related to taxes, Douglas' list included statutes related to the treatment of criminals, the poor, immigrants, and illegitimate children, under which he listed *Levy v. Louisiana*.

Even though the argument in *Levy* avoided race, as seen in chapter four, racial stereotypes created an important backdrop for the case and informed the lives of Louise Levy and her five children. After *Levy*, despite the fact that stereotypes remained in place regarding poor, unwed, African-American mothers and the families they formed, legally, their children could not be held accountable for the choices their parents made. The changing legal climate eased the taboo nature of illegitimacy and through the 1970s there was a sharp increase in both out-of-

[29] *Oregon v Mitchell* 400 U.S. 112 (1970). Douglas' dissent can be found at http://supreme.justia.com/us/400/112/case.html#135. [Accessed on 10/04/2010].

wedlock births and divorce. This led to an increase in female-headed households for both African-Americans and European-Americans. Although the rate of female-headed households increased for both African-American and European-American women, African-Americans were more likely to live in a single-parent household. These single parent households were also more likely to suffer from poverty, making it more difficult to raise children in this family form.[30]

Scholars began weeding racial stereotypes regarding African-American families from their work in the 1970s and 1980s. Harriette Pipes McAdoo theorized that a growing percentage of single-parent homes were caused by economic stress and both wrote and edited several works on the topic. One of these, *Black Children: Social, Educational, and Parental Environments*, presented statistics from 1984 that showed women headed 47% of African-American families. That percentage remained stable through 1996. In that year, 70.4% of African-American children were born to unwed mothers.[31] In her work, McAdoo acknowledged that family patterns were changing in all U.S. families but single-parent households made up a larger percentage among African-American families. McAdoo felt that this was because of a gender imbalance. "There were simply not enough men available who

[30] Suzanne M. Bianchi, *Household Composition and Racial Inequality*, (New Brunswick: Rutgers University Press, 1981), 3, 5, 30-31.

[31] Anderson J. Franklin, Nancy Boyd-Franklin, Charlene V. Draper, "A Psychological and Educational Perspective on Black Parenting," in *Black Children: Social, Educational, and Parental Environments*, 2nd ed. Harriette Pipes McAdoo ed. (Thousand Oaks: Sage Publications, 2002), 124.

would make good husbands."[32] This imbalance caused marriages to break, if they formed at all, she concluded.

Economic stress was especially hard on single parents, regardless of race. As support networks dwindled through the 1980s, single parents struggled to provide for the basic needs of their children. "Many a single parent feels overwhelmed by the demands of everyday living," Nancy Boyd-Franklin wrote in an essay appearing in *Black Children* (2002). This stress was magnified for African-American single parents because half of them lived below the poverty level, compared to 30% of European-American single parents.[33] Bette J. Dickerson, writing in 1995, took issue with African-American stereotypes that stemmed from the 1960s. The Moynihan Report had labeled African-American single mothers dysfunctional. In Dickerson's opinion, this came from a "culture of poverty perspective," the poor were resigned to their fate and little could be done for them. This in turn was based on "the bias that considers two-parent families to be superior to single-mother-headed families."[34] Statistics from 1989 showed that women who had never married headed one-third of all female-headed families. Additionally, almost one million babies were born out of wedlock each year, a one in

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[32] Harriette Pipes McAdoo, "Diverse Children of Color: Research and Policy Implications," in *Black Children: Social, Educational, and Parental Environments*, 2nd ed. Harriette Pipes McAdoo ed. (Thousand Oaks: Sage Publications, 2002), 19.

[33] Franklin, Boyd-Franklin, Draper, "A Psychological and Educational Perspective on Black Parenting," *Black Children*, 125.

[34] Bette J. Dickerson, "Introduction," in *African American Single Mothers: Understanding Their Lives and Families.* Sage Series on Race and Ethnic Relations vol. 10, Bette J. Dickerson ed. (Thousand Oaks: Sage Publications, 1995), xii.

four ratio. According to Dickerson, divorce was the leading factor, not sex before marriage. "Contrary to popular opinion," she wrote, "African Americans and teenagers do not account for the majority of out-of-wedlock births. European-American women actually have the majority of such births and are the fastest growing category of unwed mothers.[35]

At the same time, K. Sue Jewell's *Survival of the African-American Family: The Institutional Impact of U.S. Social Policy* showed a steady rise in births to unmarried women of both races throughout the latter half of the twentieth century. Jewell attributed differences in illegitimacy rates between racial groups to varying teen marriage rates. If a teenage girl marries, her child is legitimate.[36] This concern for single, teenage mothers can also be seen in Charles Murray's *Losing Ground: American Social Policy, 1950-1980* (1984). Perhaps symptomatic of the crises that erupted during these decades, Murray's work highlighted the overall increase in illegitimate children and then further emphasized the disparate numbers between "Black and other" versus "White" illegitimate births.[37] His work implied the return of the stereotype that African-American women were more promiscuous than other races. He wrote, "The fertility rate among black teenagers that was so high relative to the rest of the developed world in 1980 had *gone down* by 28 percent since

[35] Dickerson, "Introduction," *African American Single Mothers*, xiv.

[36] K. Sue Jewell, *Survival of the African American Family: The Institutional Impact of U.S. Social Policy,* (Westport: Praeger, 2003), 92-93.

[37] Charles Murray, *Losing Ground: American Social Policy 1950-1980,* 10th anniversary ed. (New York: Basic Books, 1984, 1994), 126. Figure 9.1 graphs the number of illegitimate births per 1,000 according to "white" and "black and other."

1971. [...] If the [Westoff] study had been limited to illegitimate births, the fertility rate of U.S. black teenagers would have been much further out of proportion to the international range than it already was. (original emphasis)"[38] Murray's work was "neither systematic empirical analysis by the author nor a balanced synthesis of research by others," Victor R. Fuchs wrote in his 1985 review. He continued, "It is, rather, a polemic that uses data and quotations selectively in support of its arguments, while ignoring those data and research findings that point in the opposite direction."[39] However, Murray's three conclusions made an impact on social policy during the Reagan administration.[40] Those conclusions were, in part, that the social policies of the 1960s and 1970s had failed, that the failure was inevitable because "social programs in a democratic society tend to produce net harm," and that the programs had been morally wrong.[41]

As the numbers of children both born to and living with single parents has increased, the legal problems faced by nonmarital children have faded. Most Western countries have removed many of the laws that discriminated against nonmarital children, including those related to

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[38] Murray, *Losing Ground,* 127.

[39] Victor R. Fuchs, "Review of *Losing Ground*," *Population and Development Review* 11, No. 4 (Dec., 1985): 769.

[40] A *New York Times* article dated February 3, 1985, titled "Losing More Ground" opines that the Reagan "budget-cutters" took Murray's work as their Bible, citing its philosophy as the basis for proposals to cut education, child nutrition, and housing assistance programs.

[41] Victor R. Fuchs, "*Review of Losing Ground*," 769; Murray, *Losing Ground,* 218-219.

property rights and financial support. They are no longer *filius nullius.* However, with the loss of legal focus, these children have also faded from view, becoming as obscure as those in *Levy*. Although laws had never completely stopped people from creating children out-of-wedlock, with no laws to dissuade them, the rate of nonmarital births has continued to grow. According to Witte, now 38% of all American children, up from 11% in 1970, and more than 69% of all African-American children, are born out-of-wedlock. Most of these children continue to suffer poverty, poor education, deprivation and child abuse, juvenile delinquency and criminal conduct, he asserts.[42]

For Witte, understanding how we treat children who were once nobody's helps us understand the fundamental importance of equality under the legal system of the United States. Understanding how the argument was made in favor of nonmarital children helps us see further inconsistencies within the law as it now stands.[43] One of the most persistent inconsistencies in the United States relates to the children of illegal immigrants, many of them born in the United States and therefore entitled to citizenship. Also, many children of illegal immigrants who are not born in the United States grow up considering themselves citizens. An example of this similarity can be found in *Plyler v. Doe* 457 U.S. 202 (1982), in which the court compared the treatment of the children of

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[42] Witte, *The Sins of the Fathers*, 7-8; Garrison, "Law Making for Baby Making," 839, note 9.

[43] Witte, *Sins of the Fathers*, 157-158.

illegal immigrants to those born illegitimate. In ruling that children of illegal immigrants had a right to a public education, the court found little justification for denying an education to undocumented children and maintained that without a public education, the Texas statute in question "imposed the lifetime stigma of illiteracy" on the children.[44] Continuing the struggle over how to interpret the Constitution, Burger dissented in *Plyler*, citing his belief that by ruling in favor of the undocumented children, the Court was making policy, rather than judging it.[45]

And what of Peter Stearn's call for increasing the presence of children in history by focusing on them as subjects of study, rather than objects discussed by others? Children, as a rule, did not testify before the Supreme Court, so is it possible to read their voices into these documents? Although they did not testify as children, many do share their experiences after becoming adults. Additionally, by exploring the shifting definition of which children are worth protecting under the law, we increase our understanding of where children fit in what Christopher Tomlins refers to as "the facts of life," or the "institutional and imaginative contexts that give meaning to human action. After the American Revolution, law became the main source for organizing how

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[44] Susan E. Babb, "Analysis of an Analogy: Undocumented Children and Illegitimate Children," *University of Illinois Law Review* (1983): 701. *Plyler v Doe* 457 U.S. 223. Found at http://supreme.justia.com/us/457/202/case.html [Accessed 9/25/10].

[45] Burger's Dissent, *Plyler v Doe* at 242.

people viewed the world and human activity within it. [46] Because of this position, law was used to categorize society. Children born outside a traditional marriage have always been a part of society. The classification that they are different from those born inside a marriage speaks to the perceived foundational structures of Western society. Although the accepted truth is that marriage is preferred and children should be born to parents who are wed to each other, the existence of children born outside marriage suggests other possibilities. However, as these laws show, the preferred ordering of society rejects those alternatives. Finally, children who have traditionally been objects of legal discussion have increasingly become the subjects, especially as the definition of children's rights has expanded. In this way, legal analysis does help illuminate the lives of children. Moreover, by focusing on large categories of children, such as those born outside a traditional marriage, it is possible to gather enough minute sounds together to give them a voice in history.

[46] Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic,* (New York: Cambridge University Press, 1993), 20-21.

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