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The (Non-)Right to Sex

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What is the relationship between the battle for marriage equality and the expansion of sexual liberty? Some see access to marriage as a quintessentially progressive project—the recognition of the equality and dignity of gay and lesbian couples. For others, promoting marriage or marital-like relationships reinforces bias against individuals making alternative intimate decisions. With powerful policy arguments on either side, there appears to be no clear way to advance the discussion.

By telling the lost story of efforts to expand sexual liberty in the 1960s and 1970s, this Article offers a new way into the debate. The marriage equality struggle figures centrally in a longer narrative about the omission of sex—rather than committed relationships or marriage—from the constitutional canon. By recapturing this narrative, we can identify powerful doctrinal constraints confronting the contemporary marriage equality movement. As importantly, the story of the "non-right to sex" provides a compelling historical parallel to this movement; the mistakes of past decades illuminate the dangers inherent in contemporary marriage equality tactics.

The Article begins the story of the non-right to sex in the 1960s and 1970s, when groups like the ACLU and the NAACP confronted a backlash against a perceived increase in illegitimacy rates. Some attorneys and activists viewed the illegitimacy backlash as evidence of the intersectionality of race discrimination, sex discrimination, and the denial of sexual freedom. Often, however, feminists and civil rights attorneys presented themselves as defenders of conventional sexual morality, arguing that the reform of laws on illegitimacy, contraception, and abortion would strengthen or leave intact traditional sexual norms. These arguments helped progressives achieve incremental progress. At the same time, progressives inadvertently reinforced the State's ability to regulate sexual behavior.

For the marriage equality movement, this history offers a cautionary tale. Efforts to achieve incremental social and legal change have obvious advantages: These strategies appeal to cautious courts and reduce the odds of backlash. At the same time, as the materials con-

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sidered here make plain, incremental strategies can strengthen the status quo. In the 1960s and 1970s, progressives paid lip service to the evils of illicit sex in an effort to chip away gradually at discrimination against minorities, sexual dissenters, and women. This tactic had unexpected consequences, since cause attorneys helped to entrench an existing intimate hierarchy. As this history counsels, incremental litigation strategies adopted by the marriage equality movement may have a profound cost of their own.

I. INTRODUCTION

With the growing influence of the marriage equality movement, scholars have criticized the "domesticated liberty" pursued by activists and ratified by the Court.[1] The privileging of marriage and marital-like relationships has prompted intense debate within the gay rights community.[2] Some see access to marriage as a quintessentially progressive project—the recognition of the equality and dignity of gay and lesbian couples.[3] For others, promoting marriage and marital-like relationships

1. Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004) [hereinafter Franke, *Domesticated Liberty*]; *see also* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); Michael Warner, *Beyond Gay Marriage*, *in* LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002); Amy L. Brandzel, *Queering Citizenship? Same-Sex Marriage and the State*, 11 GLQ: J. LESBIAN & GAY STUD. 171 (2005); Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2689 (2008) [hereinafter Franke, *Longing for* Loving].

2. *See, e.g.*, Brandzel, *supra* note 1, at 172 ("[T]he same-sex-marriage debate is one of the primary sites on which anxieties over America's citizenry and sexual, gender, and racial boundaries play out.").

3. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 66–74 (1996) (discussing "the practical benefits of marriage"); EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 3–18 (2004) (illustrating benefits of marriage across history and cultures); Mary Bonauto, *Ending Marriage Discrimination: A Work in*

reinforces bias against individuals making alternative intimate decisions.[4] With compelling policy arguments on either side, the debate appears to have come to a standstill.

By telling the lost story of efforts to expand sexual liberty in the 1960s and 1970s, this Article offers a new way into the debate. The marriage equality struggle figures centrally in a longer narrative about the omission of sex—rather than committed relationships or marriage—from the constitutional canon. By recapturing this narrative, we can identify powerful doctrinal constraints confronting the contemporary marriage equality movement. As importantly, the story of the "non-right to sex" provides a compelling historical parallel to this movement. The mistakes of past decades illuminate dangers inherent in contemporary marriage equality tactics.

This Article begins the story of the non-right to sex in the 1960s and 1970s, when progressives confronted a backlash against a perceived increase in illegitimacy rates. Some attorneys and activists viewed the illegitimacy backlash as evidence of the intersectionality of race discrimination, sex discrimination, and the denial of sexual liberty.[5] Often, however, progressive social movements presented themselves as defenders of conventional sexual morality, arguing that the reform of laws on illegitimacy, contraception, and abortion would strengthen traditional sexual norms. These arguments helped progressives achieve incremental progress. At the same time, progressives reinforced the State's ability to regulate sexual behavior. Progressives' strategy contributed to the conspicuous absence of sex from the Supreme Court's foundational equal protection and substantive due process decisions.

This Article makes an important contribution to the theoretical and historical literature on the relationship between equality and liberty jurisprudence under the Fourteenth Amendment. Other scholars have

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Progress, 40 SUFFOLK U. L. REV. 813, 825 (2007) (noting marriage is considered to be part of "living the good life").

4. *See, e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 81–82 (1999) (arguing marriage grants legitimacy to particular relationships, thereby marginalizing other relationships); Franke, *Longing for* Loving, *supra* note 1, at 2689 (noting that marriage's "normative centrality" is the standard by which all other relationships are understood and assigned value); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1535–41 (1993) (surveying scholarly work supporting same-sex marriage and concluding the rhetoric used fails to challenge marriage as a hierarchical, gendered institution).

5. For an account of Kimberlé Crenshaw's theory of intersectionality, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141–60 (1989); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

foregrounded the limits of the constitutional protections set forth in *Lawrence v. Texas*, a decision striking down sodomy bans.[6] This Article adds a new dimension by showing that *Lawrence*'s domesticated liberty came as a logical extension of the Court's past treatment of sexual freedom.[7] As this Article shows, *Lawrence*'s limits reflect a larger gap in American constitutional law.

Moreover, this Article reveals unanticipated costs tied to otherwise promising incremental strategies for legal and social change. Progressives paid lip service to the evils of illicit sex in an effort to gradually chip away at discrimination against minorities, sexual dissenters, and women. This tactic had unexpected consequences, because cause attorneys sometimes helped to entrench a legal and cultural status quo.

For the marriage equality movement, this history builds on existing scholarship exploring the potential disadvantages of marriage equality litigation.[8] Some proponents of marriage equality have battled to separate their cause from any demand for rights for those engaging in other forms of stigmatized conduct, reaffirming the State's power to distinguish licit from illicit sex. In the past, similar strategies have been costly. Incremental tactics may promise realistic social change, appealing to the concerns of cautious judges, allowing democratic debate to unfold outside the courts, and minimizing the chances of backlash. As the history studied here shows, however, incremental tactics may inadvertently entrench the status quo.

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6. 539 U.S. 558 (2003).

7. On the domesticated liberty pursued by activists and ratified by the Court, see generally, for example, Franke, *Domesticated Liberty*, *supra* note 1; Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239–40 (2006); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 810–11, 823–29 (2010); Teemu Ruskola, *Gay Rights Versus Queer Theory: What Is Left of Sodomy After* Lawrence v. Texas*?*, 23 SOC. TEXT 235, 237–45 (2005); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1369–74 (2005).

8. *See, e.g.*, Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012); *see also* Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1187 (2006) (suggesting that the privileging of marriage obscures "the possibility that, for some people, the right to engage in sex outside of marriage might be as significant as the right to enter into a legal marriage"); Urvashi Vaid, *"Now You Get What You Want, Do You Want More?,"* 37 N.Y.U. REV. L. & SOC. CHANGE 101, 102 (2013) ("The same-sex marriage movement has . . . made the [Lesbian, Gay, Bisexual, Transgender ("LGBT") movement] more palatable . . . by deemphasizing sexual freedom."); Franke, *Domesticated Liberty*, *supra* note 1, at 1414 (arguing that the marriage equality movement may "have created a path [of] dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality"). For a discussion of the sex-negative bent of several other areas of American law, see Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 99–150 (2014). On the history of how nonmarital advocacy laid the foundation for marriage equality litigation, see Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87 (2014).

This Article proceeds in four parts. Part II positions the marriage equality struggle in a longer narrative about battles to expand sexual liberty. This Section begins the narrative by exploring the illegitimacy backlash of the 1960s and 1970s. In that period, illegitimacy discourse served as a convenient vehicle for discomfort with the changing status of racial minorities and women. Some feminists, welfare-rights activists, civil libertarians, and civil rights leaders saw the illegitimacy backlash as an opportunity to elaborate on the connections between sexual pluralism, race discrimination, and sex discrimination.

As Part III shows, in other instances, activists in organizations like the American Civil Liberties Union ("ACLU"), the National Urban League ("NUL"), and the National Association for the Advancement of Colored People ("NAACP") leveraged discomfort with female sexuality to build support for their chosen reforms. A similar strategy sometimes informed the equal protection litigation pursued by such groups. Attorneys working with the ACLU and NAACP compared discrimination on the basis of race to illegitimacy. This analogy allowed activists to reason about race in novel ways, highlighting the use of proxies for race discrimination and racially disproportionate impacts. Nonetheless, the race analogy presented illegitimate children as the victims of their mothers' immorality. Indeed, attorneys and activists conceded that the State could punish women as long as they did not harm innocent children.

As Part IV explains, the abortion-rights movement borrowed from this strategy in challenging laws on contraception and abortion. Some feminists framed abortion and contraception as part of a larger campaign for sexual liberty for women. However, the mainstream abortion-rights movement mostly avoided any challenge to the status quo, insisting that reform would not increase "sexual promiscuity." Instead, the movement drew on a rich psychiatric discourse describing the harms women suffered as the result of both unintended pregnancy and sexual mistakes.[9]

Parts III and IV document the impact of these strategies on the Court's equal protection and due process jurisprudence of the late 1960s and 1970s. In *Eisenstadt v. Baird*, *Roe v. Wade*, and a line of cases involving illegitimacy, the Court reaffirmed the existence of a broad State authority to deter illicit sex.[10] Expanding reproductive freedom and

9. Jeannie Suk has studied the role played by trauma discourse in feminist advocacy in the late twentieth century. *See generally* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010).

10. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (concluding that the right to reproductive freedom is "not unqualified and must be considered against important state interests in regulation"); Eisenstadt v. Baird, 405 U.S. 438, 452–53 (1972) (refusing to decide whether it is within a state's competence to declare that the use of contraceptives by unmarried persons is immoral). On illegitimacy as a suspect class, see, for example, *Matthews v. Lucas*, 427 U.S. 495,

fair treatment for non-marital families came with little discussion of sexual liberty.

Part V explores the normative implications of this history. This Section evaluates how a more historically grounded understanding of the relationship between sexual freedom and marriage equality could help cause lawyers more productively advance intimate pluralism. Part VI offers a brief conclusion.

II. The Illegitimacy Backlash

As historian George Chauncey has shown, the marriage equality battle "is shaped by half a century of struggle over the place of lesbians and gay men in American society and an even longer history of evolution in the meaning and legal character of marriage itself."[11] While transforming cultural, political, and social understandings of family, the movement has fundamentally legal ambitions: the transformation of existing laws governing access to marriage.[12]

Other scholars have studied the promise and limitations of litigation as a strategy for social change, in the marriage equality context and beyond.[13] This Section explores a different constraint operating in the courts: marriage equality advocates must build on a set of surprisingly limited and limiting precedents. In particular, the equal protection and substantive due process canons protect access to marriage and similar relationships while reaffirming the State's power to punish and regulate illicit sex.

Where did these constraints come from, and what can they teach us about the movement for marriage equality? In approaching these questions, this Section takes up the history of a strikingly similar struggle to expand sexual liberty in the 1960s and 1970s. First, the Section chronicles a powerful social and legal backlash to a perceived rise in illegiti-

503–06 (1976) (refusing to apply strict scrutiny to state actions that discriminate on the basis of illegitimacy).

11. George Chauncey, Why Marriage?: The History Shaping Today's Debate over Gay Equality 3 (2009).

12. On the movement's focus on litigation, see, for example, Michael J. Klarman, From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage 168–273 (2013); *see also generally* Ellen Ann Andersen, Out of the Closets & into the Courts: Legal Opportunity Structure and Gay Rights Litigation (2009).

13. For a sample of the debate on the value of litigation to the marriage equality movement, see, for example, Andersen, *supra* note 12, at 216–18; Klarman, *supra* note 12, at 168–238; Daniel R. Pinello, America's Struggle for Same-Sex Marriage 192–93 (2006); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 340–80 (2d ed. 2008); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & Soc'y Rev. 151, 167–82 (2009); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 Emory L.J. 663 (2012).

macy rates. Next, the Section turns to the efforts of some reformers first to explain the relationship between race, class, sex, and sexual pluralism in the larger society, and later to explain it in the context of constitutional law.

The battles studied here turned on the meaning of illicit sex—intimate conduct that can be punished, taxed, or supervised by the State. In a fundamental sense, sex becomes illicit when the State denies an individual actor or an act the protection of the law.[14] From sex regulations introduced by Puritans in the Massachusetts Bay Colony to Anthony Comstock's purity crusade in the nineteenth century, the State has made sex illicit in a variety of ways: most often, by criminalizing particular acts but also by attaching specific legal or financial costs to those engaging in or born as a result of those acts.[15] In the period studied here, deeply rooted abortion bans—a potent penalty for illicit sex—faced a determined group of reformers, as did discrimination against non-marital families. By recovering the history of the illegitimacy backlash, we can better understand the omission of sex from the constitutional canon, and we can more clearly appreciate the tactical tradeoffs facing contemporary marriage equality advocates.

A. *The Illegitimacy Backlash*

In 1961, sociologist Clark Vincent challenged the longstanding view of illegitimacy as a disease of poor, non-white, and mentally ill women.[16] While sociologists had long presented the unwed mother as "extremely poor, young, uneducated, or psychologically disturbed," Vincent demonstrated that "the phenomenon also occur[ed] among middle-income normal and well-educated women," many of whom often more easily concealed (or terminated) unintended pregnancies.[17]

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14. On the regulation of sex in the early American Republic, see generally, for example, SHARON BLOCK, RAPE & SEXUAL POWER IN EARLY AMERICA (2006); THOMAS FOSTER, SEX AND THE EIGHTEENTH CENTURY MAN: MASSACHUSETTS AND THE HISTORY OF SEXUALITY IN AMERICA (2006); CORNELIA HUGHES DAYTON, WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639–1789, at 157–230 (1995) (describing the double standard in eighteenth-century Connecticut, where women were found guilty of crimes of fortification while men were generally acquitted of those crimes).

15. On Comstock's moral purity crusade, see, for example, NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA 3–25 (1997); CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 222 (1985) (describing the Comstock Law as "infamous for forbidding the mailing of art, literature, and other materials deemed obscene"). On the contested meaning of illicit sex, see, for example, Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 758–69 (2006).

16. *See generally* CLARK E. VINCENT, UNMARRIED MOTHERS (1961).

17. Leo G. Reeder & Sharon J. Reeder, *Social Isolation and Illegitimacy*, 31 J. MARRIAGE & FAM. 451, 451 (1969) (describing the influence of Vincent's work).

As Vincent suggested, the 1960s represented a turning point in cultural perceptions of female sexuality. Increasing federal, state, and local welfare expenses provided a new target for white supremacists and traditionalists. The sexual immorality of poor, predominately non-white women supposedly represented both a burden on taxpayers and a potent form of psychological harm for children.

For some progressives, the illegitimacy backlash offered an opportunity to unearth previously invisible connections between race discrimination, sex discrimination, and state control of sexuality. Some feminists, civil libertarians, civil-rights activists, and welfare-rights activists developed a theory of equal sexual liberty, demanding individual sexual freedom irrespective of race or sex.[18]

For strategic reasons, this argument lost momentum. In the 1960s and 1970s, decisions on contraception, abortion, and pornography expanded the sexual freedom available to Americans.[19] Nonetheless, the Court's foundational equal protection and due process jurisprudence stopped short of embracing intimate pluralism.[20] Even when feminists emphasized such arguments, the courts tended to ignore them.[21] Just the same, tactical choices made by many progressive activists contributed to the omission of sex from the constitutional canon. Both conservatives and progressives often presented themselves as defenders of the sexual status quo.

Strategic incrementalism seemed to be a realistic option for progressives interested in remaking the State's treatment of sex. Nonetheless, by endorsing the State's ability to regulate illicit sex, progressive social movements helped to entrench the State's power to reach intimate relations and to discriminate between them.

B. *Linking Race, Gender, and Sexual Immorality*

In 1960, the Federal Advisory Council on Child Services called for

18. For a key example of such an argument, see, for example, FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 67–68 (2007) (describing the fight against a welfare department's attempts to investigate the sex lives of welfare recipients).

19. *See, e.g.*, DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS (2012); JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 315–47 (3d ed. 2012); DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 389–473 (1994); LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY (2012).

20. *See, e.g.*, MARC STEIN, SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE 18 (2010) ("The Court helped institutionalize classed, gendered, and racialized principles of heteronormative supremacy.").

21. *See generally, e.g.*, Serena Mayeri, "Stuck with the Result": Feminist Challenges to Illegitimacy Penalties, 1972–1979, in The Status of Marriage: Marital Supremacy Challenged and Remade, 1960–2000 (unpublished manuscript) (on file with author).

a study on the "causes of family disruption."[22] For lawmakers, evidence of family breakdown was not hard to find. In the mid-1960s, the *New York Times* reported dramatic increases in illegitimacy rates for white and African-American women.[23] By 1968, reports indicated that illegitimacy rates had tripled over the past twenty-five years.[24]

Rising illegitimacy rates sparked public outrage about the laws governing federal and state public assistance. Critics complained not so much about the rising welfare costs associated with illegitimacy as about the immorality encouraged by welfare payments.[25] This backlash began in the South, as segregationists pointed to illegitimacy as a reason for maintaining the separation of the races.[26] In 1958, when Congress considered desegregating public schools in Washington, D.C., the *New York Times* noted that "'[t]he prevalence of unwed mothers among black school girls was an immediate rallying cry for Southern segregationists.'"[27] As the *Richmond News Leader* explained in the mid-1950s, integration made no difference to the "'promiscuity'" of African-American girls, and rates of illegitimacy constituted "'one of the more significant reasons for the South's resistance to integration of the schools.'"[28] As part of a legislative strategy designed to "counteract racial integration," Louisiana introduced laws that made it a crime to have more than one illegitimate child.[29]

At first, public outrage about illegitimacy appeared to reflect a belief in white supremacy and hostility to the civil rights movement. As Martin Luther King, Jr., mobilized public sentiment in favor of integration, segregationists had to find a new way of expressing their beliefs.[30]

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22. Bess Furman, *Research Urged to Save Families*, N.Y. TIMES, Jan. 6, 1960, at 17.

23. *See Vanishing Virginity*, N.Y. TIMES, May 14, 1972, at E2; *see also* Harold M. Schmeck, *Study Reports Illegitimate Births Have Tripled*, N.Y. TIMES, Mar. 14, 1968, at 20. Poll data also indicated growing indifference toward these changing sexual mores, particularly among younger Americans. *See, e.g.*, Daniel C. Beggs & Henry A. Copeland, *Special Ethic Accompanies College Sexual Revolution*, CHI. TRIB., May 8, 1971, at 2.

24. *See* Schmeck, *supra* note 23, at 20 ("The national rate was 7.1 in 1940; 21.0 in 1957 and 23.5 in 1965.").

25. *See* ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS 66 (2009) (discussing how Governor Hodges of North Carolina "delivered a scathing attack on black illegitimacy rates and related welfare abuses").

26. *See, e.g.*, *id.*; RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE 44–45, 68–69 (2000).

27. SOLINGER, *supra* note 26, at 45 (citation omitted).

28. *Id.* at 47 (citation omitted).

29. *See id.* at 47–48.

30. On segregationists' loss of the moral high ground and efforts to reclaim it, see, for example, RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 491 (2006); JASON MORGAN WARD, DEFENDING WHITE DEMOCRACY: THE MAKING OF

In doing so, as Anders Walker has shown,[31] activists drew on the sociological reasoning set forth in *Brown v. Board of Education*.[32] In striking down segregation in public schools, *Brown* stressed the damage done to "the hearts and minds" of African-American schoolchildren.[33] Proponents of illegitimacy arguments responded in kind, indicating that desegregation would harm whites by exposing them to venereal disease, delinquency, and extramarital sex that segregationists tied to African-American culture.[34] Invoking sexual morality allowed segregationists to defend their views in a more socially acceptable way.

Over time, however, illegitimacy rhetoric took on new meaning. Lawmakers used the issue of illegitimacy to reformulate old beliefs not only about race but also about gender roles and sexual behavior. From this standpoint, women who had sex out of wedlock proved to be both costly to the State and morally defective.

In both the North and South, a racially coded concern about illegitimacy and immorality became a central preoccupation, even outside the context of school segregation. In 1961, Joseph Mitchell, the city manager of Newburgh, New York, announced drastic cuts to public assistance.[35] Discussing the arrival of African-Americans in Newburgh, Mitchell explained: "'There will be more influx into Newburgh from the South, . . . there will be more illegitimacy, more welfare, more crime and violence.'"[36] He suggested that the primary problem was not cost but rather the immorality of the city's new African-American residents. "'We don't believe it's moral,'" Mitchell explained, "'to finance bastardy.'"[37]

Beyond Newburgh, talk about sexual immorality represented an effective new discourse for expressing hostility to African-Americans and liberated women. In Illinois in 1960, Judge Joseph Guttnecht pub-

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31. *See* Anders Walker, *"A Horrible Fascination": Segregation, Obscenity, and the Cultural Contingency of Rights*, 89 WASH. U. L. REV. 1017, 1023 (2012) ("If the region pushed too far in the area of cultural control . . . it would risk appearing backward and philistine, undermining racist arguments that southern whites were culturally superior to blacks.").

32. 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

33. *Id.* at 494.

34. *See* Anders Walker, *Blackboard Jungle: Delinquency, Desegregation, and the Cultural Politics of* Brown, 110 COLUM. L. REV. 1911, 1930 (2010) ("To support the counterthesis that integration would harm whites, segregationists employed elaborate compilations of marriage rates, venereal disease rates, and illegitimacy rates, even manipulating state law to exacerbate seeming disparities in these rates.").

35. *See Newburgh Rules in Effect; New Relief Curbs Ahead*, N.Y. TIMES, July 16, 1961, at 1.

36. *Id.* at 48.

37. *Id.*

licly condemned unwed mothers and chastised states for "subsidizing bastardy."[38] In 1961, James Cleary, a leading member of the Illinois Public Aid Committee, argued that all women on welfare should be sent a letter explaining that it was "a crime under the laws of Illinois for a woman to have marital relationships with any man other than her husband."[39] Similarly, in 1963, a report on welfare reform in New Jersey highlighted the "staggering" costs of illegitimacy and recommended the "[r]emov[al of] children from homes where illegitimate births prevail[ed]."[40]

The new champions of sexual morality used both family law and criminal punishment to censor women who bore children out of wedlock.[41] A number of states attempted to make it a crime for a woman to have more than two children out of wedlock.[42] Civil rights leaders understandably viewed these laws as a vehicle for updating racist views. In 1961, in response to the Newburgh plan, Roy Wilkins of the NAACP explained: "'There is much talk of illegitimacy, . . . all of this is to slander the race [of African Americans] in the public mind without using the designation.'"[43] Fred Graham, a *New York Times* columnist, similarly stated: "'Illegitimacy,' like 'crime in the streets,' is becoming a substitute in many minds for the 'Negro problem.'"[44]

The new illegitimacy backlash, however, fused concerns about white supremacy with anxieties about the changing role of women, particularly when sexuality was involved. Laws stripping women of custody over their children described sexually active, unmarried women as "failing to provide a suitable moral environment."[45] In 1972, when then-Governor Ronald Reagan's Social Welfare Board proposed a law that would automatically remove a third illegitimate child from a mother's custody, champions of the law described "loose" women as "morally depraved."[46]

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38. *Denies Charge State Abets Illegitimacy*, CHI. TRIB., May 7, 1960, at 8.

39. *A Plan to Check ADC Bastardy*, CHI. TRIB., Oct. 15, 1962, at 24.

40. George Cable Wright, *Welfare Reform Urged in Jersey*, N.Y. TIMES, Apr. 4, 1963, at 49.

41. *See, e.g.*, *Neglected Children on ADC*, CHI. TRIB., Oct. 17, 1967, at 16 ("Circuit Judge Perry G. Bowen of Upper Marlboro, Md., has ruled that a woman bearing two or more illegitimate children has violated the state's child neglect law by failing to provide a suitable moral environment. No other proof is needed, he said."); *Denies Charge State Abets Illegitmacy*, *supra* note 38, at 8.

42. *See* SOLINGER, *supra* note 26, at 54, 58.

43. *Wilkins Accuses Newburgh of Bias*, N.Y. TIMES, Aug. 22, 1961, at 16.

44. Fred P. Graham, *Law: It's Tough to Be Illegitimate*, N.Y. TIMES, Mar. 31, 1968, at E10.

45. *8 Children Ruled Neglected Because Birth Illegitimate*, TOLEDO BLADE, Sept. 23, 1967, at 2.

46. Everett R. Hollies, *Outcry Holds Up California Bid to Deal with Illegitimate Births*, N.Y. TIMES, Oct. 30, 1972, at 20.

C. *The Evolution of Equal Sexual Liberty*

In the wake of the illegitimacy backlash, some attorneys and activists recognized that when the State disciplined sexual behavior, the law tended to disproportionately punish minorities, women, and others challenging the status quo. As importantly, regulation of sexuality represented an important tool to strengthen existing hierarchies. Conversely, sex regulations themselves reinforced discrimination on the basis of race and sex.

Illegitimacy-based regulations treated non-marital families as inferior. Such laws punished women who had sex out of wedlock, as did laws regulating contraception and abortion. The legal treatment of unwed mothers came at the intersection of discrimination on the basis of sex, race, and sexual behavior.

Feminists began to bring to light some of these connections between sexual freedom and equal citizenship for women in the mid-1960s. In 1963, Betty Friedan's pathbreaking *The Feminine Mystique* made a call for sexual freedom for women.[47] Friedan exposed a common myth explaining the unhappiness experienced by American housewives.[48] Psychologists had attributed married women's unhappiness to a lack of sexual fulfillment.[49] Friedan identified a different cause. "It is my thesis," Friedan wrote, "that the core of the problem for women today is not sexual but a problem of identity—a stunting or evasion of growth that is perpetuated by the feminine mystique."[50] Friedan called for greater political and economic opportunity for women outside the home.[51] With women's liberation, however, Friedan demanded sexual liberty. She explained: "We need a drastic reshaping of the cultural image of femininity that will permit women to reach maturity, identity, [and] completeness of self, without conflict with sexual fulfillment."[52]

Over the course of the 1960s and 1970s, as Jane Gerhard writes, "white middle-class radical feminists came to see sexuality as the primar[y] source of both women's oppression and their liberation."[53] Lesbian separatists and radical heterosexual feminists articulated differing but powerful new visions of sexual self-determination that subverted

47. *See generally* BETTY FRIEDAN, THE FEMININE MYSTIQUE (2010).

48. *See id.* at 166–89 (explaining the falsities of Freud's theory of femininity).

49. *See id.* at 183 (discussing that late 1950's advertising was geared toward the "desexualization of married life" in attempts to sell products that could provide the "missing sexual spark").

50. *Id.* at 133.

51. *See id.* at 26.

52. *Id.* at 297.

53. JANE GERHARD, DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF AMERICAN SEXUAL THOUGHT 1920 TO 1982, at 3 (2001).

several aspects of the existing sexual order. For example, feminist Ti-Grace Atkinson described then-present theories of sexual fulfillment as an instrument of women's oppression.[54] In Atkinson's view, marriage and conventional, heterosexual sex "adjusted women back into [a] female role by con[vincing] them that it was in a woman's interest, by her very nature . . . to be dehumanized and exploited."[55] Like Friedan, Atkinson argued that sex equality would transform woman's sexuality.[56]

Feminists like Atkinson and Kate Millett theorized an important connection between sexual freedom and sex equality. Millett's pioneering work, *Sexual Politics*, described abortion bans as an instrument of patriarchy.[57] Millett reasoned that abortion laws functioned partly by creating a sense of fear and shame for women who had sex outside of marriage.[58] "Shame," Millett wrote, was "the chief weapon in the subjugation of women."[59] Battling laws on illegitimacy, contraception, and abortion would, in Millett's words, require women "to convert sexuality from pain and penalty to pleasure."[60]

Following Friedan, Atkinson, and Millett, feminist novelists and scholars developed a theory of a new, autonomous female sexuality. Sexual liberation could lead to a broader sense of self-acceptance that would cut across different domains in a woman's life. As feminist Anne Koedt explained:

> [I]n addition to being sexually deprived . . . women were told to blame themselves when they deserved no blame. Looking for a cure to a problem that has none can lead a woman on an endless path of self-hatred and insecurity.[61]

Later, lesbian separatists offered a new idea of sexual freedom for women, joining with cultural feminists and anti-pornography activists to describe a new sexual politics. As these activists described it, female (or feminist) sexuality differed in crucial ways from male sexuality: while men pursued pleasure, women sought intimacy and connection. As described by lesbian separatists, sex between men and women was inherently political and touched on power dynamics.[62] An antiracist,

54. *See* Ti-Grace Atkinson, The Institution of Sexual Intercourse 1 (1968) (on file with the Kate Millett Papers, Bingham Library, Duke University).

55. *Id.*

56. *See generally id.*

57. *See generally* KATE MILLETT, SEXUAL POLITICS (1970).

58. *See* Handwritten Notes of Kate Millett (n.d., ca. 1968) (on file with the Kate Millett Papers, Abortion File, Bingham Library, Duke University).

59. *Id.*

60. *Id.*

61. Anne Koedt, *The Myth of the Vaginal Orgasm*, NOTES FROM THE SECOND YEAR, 1970, at 40 (on file with the Kate Millett Papers, Bingham Library, Duke University).

62. *See, e.g.*, GERHARD, *supra* note 53, at 6.

feminist sexuality would, its supporters hoped, unite and fulfill a wide variety of women.[63] While none of these theories of sex united the diverse members of the women's movement,[64] feminists presented radically new visions of sexual freedom and its meaning for women.

Reproductive-health activists in organizations like the Committee for Abortion Rights and Against Sterilization Abuse ("CARASA") and the Reproductive Rights National Network ("R2N2") characterized sexual freedom in a similar way, expressing particular concern about the rights of women of color and poor women.[65] Emphasizing that the law denied minority and poor women equal sexual liberty, CARASA presented a liberated sexual morality as part of reproductive choice, that is, the "[r]ight to decide when and whether to have/not have children; and [the] material possibility of making that choice."[66] A liberated sexuality would require the State to stop seeking to deter illicit sex and to divide responsibility for birth control and caretaking more evenly between men, women, and the State. CARASA even questioned the motives of those behind a surge in government interest in decreasing out-of-wedlock pregnancies among adolescents.[67]

The sex education movement also championed a similarly complex understanding of the relationship between sexuality and equal treatment. Formed in 1964, the Sexual Information and Education Council of the United States ("SIECUS") brought together medical professionals, activists, and educators who championed a new vision of sexuality—describing it as "the totality of being and the expression of maleness or femaleness."[68] In this analysis, sexuality touched not just on intimate conduct but also on an individual's interest in self-expression and identity. By 1972, SIECUS endorsed a far-reaching idea of sexual freedom,

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63. *See id.* ("Lesbian separatists shared sexual self-determination as a value with radical heterosexual women, with feminists . . . and with the 'militant clitorialists.'"). For further historical discussion of the sex wars conducted by feminists, see, for example, Lisa Duggan, *Introduction* to Lisa Duggan & Nan D. Hunter, Sex Wars: Sexual Dissent and Political Culture 1–12 (2006); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 Colum. L. Rev. 304 (1995).

64. *See generally supra* note 63.

65. *See, e.g.*, Rebecca M. Kluchin, Fit to Be Tied: Sterilization and Reproductive Rights in America, 1950 to 1980, at 196–210 (2011); Jennifer Nelson, Women of Color and the Reproductive Rights Movement 150–55 (2003).

66. Defend Women's Right to Choose: Draft Outline of CARASA Strategy (n.d., ca. 1978) (on file with the Meredith Tax Papers, Bingham Library, Duke University).

67. Arden Handler, *Teen Pregnancy—Who Defines the Problem?*, Reprod. Rts. Newsl., Summer 1980, at 20 (on file with the Meredith Tax Papers, Bingham Library, Duke University).

68. *The SIECUS Purpose: SIECUS 1967—Retrospect and Prospect*, SIECUS Newsl.,Winter 1967, at 1 (on file with the Takey Crist Papers, Bingham Library, Duke University). For further discussion of the history of SIECUS, see, for example, David Allyn, Make Love, Not War: The Sexual Revolution: An Unfettered History 178–79 (2001); Janice M. Irvine, Talk About Sex: The Battles over Sex Education in the United States 17–34 (2002).

describing "personal sexual choice" as "a fundamental human right"—a right "to enter into relationships with others regardless of their gender, and to engage in such sexual behaviors as are satisfying and non-exploitative."[69] As SIECUS argued, sexual freedom implicated an interest in equal treatment as well as personal liberty.

Second-wave feminism, reproductive-rights activism, and sex education advocacy built on a broader social challenge to conventional sexual norms. Clark Vincent's pioneering work severed a previously unchallenged connection between mental illness, poverty, and unwed motherhood, suggesting that "normal" women had sex (and children) outside of wedlock.[70] Writing in the early 1960s, the prolific psychologist Albert Ellis went so far as to argue that sexual experimentation, even for women, represented a "freeing of the human spirit"—an expansion of "one's experiential outlook."[71] Sociologists began to concede that a woman "denied a husband and children" may nonetheless "become a useful, happy participant in society."[72]

The idea of equal sexual liberty began as a demand for social change—an insight that state control of sexuality implicated not only intimate behavior but also the equal treatment of women and racial minorities. By the late 1960s, cause attorneys began to formulate these beliefs in new and explicitly constitutional ways.

D. *Constitutionalizing Equal Sexual Liberty*

Feminists, sexual dissenters, medical professionals, and civil libertarians developed a powerful analysis of the connection between sex discrimination, race discrimination, and sexual oppression. Beginning in the late 1960s and early 1970s, cause lawyers translated these claims into constitutional terms. Relying on the Fourteenth Amendment, lawyers brought to the surface the ways in which the State used sexual regulations to reinforce existing race and gender hierarchies. At the same

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69. Mary S. Calderone, *SIECUS—Where Next?*, SIECUS REP., Mar. 1975, at 1 (on file with the Takey Crist Papers, Bingham Library, Duke University). For further discussion of SIECUS's activities in the period, see Robert Long, *Sexual Health Care*, SIECUS REP. (Sept. 1974) (on file with the Takey Crist Papers, Bingham Library, Duke University); Richard A. Myren, *Sex: The Law and the Citizen*, SIECUS REP., Mar. 1975, at 24 (on file with the Takey Crist Papers, Bingham Library, Duke University). An earlier generation of reformers similarly questioned the boundaries of sexual liberty. For discussion of this history, see, for example, Ellen Carol DuBois & Linda Gordon, *Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought*, 9 FEMINIST STUD. 7 (1983).

70. *See supra* notes 16–17 and accompanying text.

71. Albert Ellis, *Sexual Promiscuity in America*, 378 ANNALS AM. ACAD. POL. & SOC. SCI. 58, 65 (1968).

72. Luther G. Baker, Jr., *The Personal and Social Adjustment of the Never-Married Woman*, 30 J. MARRIAGE & FAM. 473, 478 (1968).

time, the State made sexual liberty unevenly available while offering no assistance for caretaking work. For this reason, demands for equal sexual liberty touched on both the Due Process and Equal Protection Clauses.

Arguments about equal sexual liberty played a prominent part in the litigation of *King v. Smith*, one of the Supreme Court's first cases on illegitimacy laws.[73] *King* involved a constitutional challenge to Alabama's "substitute father" law, which required a man to support all of a woman's children financially if he cohabited with or "visit[ed]" her—a term Alabama administrators understood to mean "that the man and woman ha[d] 'frequent' or 'continuing' sexual relations."[74] Because Ruby Smith, a mother of four, had allegedly been involved in an affair with a married man, the State cut off her payments under the Aid to Families with Dependent Children program ("AFDC").[75]

Smith's brief suggested that the "substitute father" law might well reflect racial bias, since "the crackdown on [Aid to Dependent Children ("ADC")] recipients" appeared to be "an attempt to strike back at Negroes."[76] Smith argued, however, that the case involved intersecting concerns about racial equality and sexual pluralism. Sexual liberty touched on interests related to the "privacy of the home and personal associations."[77] Smith tried to identify her claim with the right to marry, suggesting that "[t]he freedom to marry is meaningful only so long as there is a freedom to begin relationships that may lead to marriage."[78] However, the right went further, implicating an individual's expression and self-definition. "Privacy in intimate relationships," Smith argued, was "basic to the individual's personal dignity and worth."[79]

Ultimately, the *Smith* Court avoided the constitutional issues raised by the case. The Court held that the Alabama law impermissibly conflicted with the Federal Social Security Act, violating the Supremacy Clause of the Constitution.[80] In discussing Ruby Smith's sexual decisions, however, the Court emphasized that "[t]he State's interest in discouraging illicit sexual behavior and illegitimacy may be protected by other means, subject to constitutional limitations."[81]

Although the *Smith* Court mostly ignored the issue of sexual plural-

73. 392 U.S. 309 (1968).

74. *Id.* at 314.

75. *See id.* at 315–16.

76. Brief for Appellees at 62 n.47, King v. Smith, 392 U.S. 309 (1968) (No. 949) (citing Loren Miller, *Race, Poverty, and the Law*, 54 CAL. L. REV. 386, 397–401 (1966)).

77. *Id.* at 69.

78. *Id.* at 73.

79. *Id.* at 73 n.59.

80. *See Smith*, 392 U.S. at 326–27.

81. *Id.* at 334.

ism, progressives further developed the idea of equal sexual liberty in the early 1970s. In the context of prostitution, Marilyn Haft, the head of the American Civil Liberties Union's Sexual Privacy Project, publicized arguments linking sexual pluralism and sex discrimination.[82] In cases involving sodomy and prostitution, the project described a right to sexual liberty that was systematically denied to sexual minorities and women. In the later 1970s, the Sexual Privacy Project argued that prostitution laws violated women's right to control their own bodies.[83] Moreover, such laws reinforced a sexual double standard.[84] Something similar was true of sodomy bans used to persecute gays and lesbians.[85] As Haft reasoned, sex, sexual orientation discrimination, and limits on sexual liberty were inextricably linked.

Feminists deployed similar claims in challenging the constitutionality of laws on contraception and abortion. In *Eisenstadt v. Baird*,[86] a challenge to a Massachusetts' law limiting unmarried persons' access to contraception, Human Rights for Women, a feminist organization, used the idea of equal sexual liberty in questioning the constitutionality of the law.[87] The case, the organization argued, involved "a right of single persons to sexual relations without unwanted pregnancy."[88]

Human Rights for Women presented sexual liberty as an integral part of women's health—an essential ingredient for "the general mental, emotional, and physical well-being of the individual."[89] The denial of sexual liberty disproportionately harmed women because of "the continued existence of the [d]ouble [s]tandard in sexual matters, with its attendant suppression of female sexuality."[90]

According to the brief submitted by Human Rights for Women in *Eisentstadt*, the sexual double standard also shaped the State's willing-

82. *See, e.g.*, Due Process Committee Meeting Minutes, ACLU (Mar. 19, 1975) (on file with the ACLU Papers, Box 111, Folder 12, Mudd Manuscript Library, Princeton University); Letter from Brian Heffernan to ACLU, Due Process Committee (Mar. 19, 1975) (on file with the ACLU Papers, Box 111, Folder 12, Mudd Manuscript Library, Princeton University) (describing an existing constitutional right to privacy that would cover sexual intimacy).

83. *See, e.g.*, Marilyn G. Haft, *Hustling for Rights*, 1 C.L. REV. 8 (1974).

84. *See id.* at 15–16.

85. On Haft and the ACLU's Sexual Privacy Project's involvement with sodomy litigation, see, for example, WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 185–89 (2008).

86. 405 U.S. 438 (1972).

87. *See* Brief for Human Rights for Women, Inc. as Amicus Curiae at 5, Eisenstadt v. Baird, 405 U.S. 438 (1972) (No. 70-17) [hereinafter Brief for Human Rights for Women] ("While the Massachusetts legislature should be commended for its concern in safe-guarding the morals and chastity of the single people of that state, such concern is not compelling enough to adversely affect the right of single women to sexual relations free of unwanted pregnancy.").

88. *Id.* at 2.

89. *Id.*

90. *Id.*

ness to deny women fertility control. The right to sexual liberty applied to men and women under *Griswold v. Connecticut*,[91] which made "clear that private sexual relations [were] beyond the purview of the state."[92] However, denials of that right targeted women. As the brief explained: "Men do not risk pregnancy with the non-use of contraceptives, and the unwed father is simply not comparable to the unwed mother in terms of social stigma, disruption of life plans, and the risk to life and health that accompany pregnancy."[93]

In the mid-1970s, feminists continued making arguments for sexual liberty, particularly during the litigation of *Roe v. Wade*.[94] One feminist brief in *Roe* highlighted the relationship between sex discrimination, fertility control, and sexual liberty.[95] The brief first described the intersection of these constitutional interests by drawing on the Eighth Amendment's prohibition of cruel and unusual punishment:

> Forcing a woman to bear a child against her will is indeed a form of punishment, a result of society's ambivalent attitude towards female sexuality. The existence of the sexual "double standard" has created the social response that when a woman becomes pregnant accidentally, she must be "punished" for her transgression, particularly if she is single.[96]

This Eighth Amendment argument touched on women's interests in both equality and liberty. If women and men enjoyed an equal liberty to have sex, society could not fairly punish only women for having sex. Abortion restrictions therefore violated women's interest in sexual liberty and equal treatment.

The brief further connected women's interest in equal citizenship to the caretaking burdens facing unwed mothers. Because the State punished sexually active women, pregnant women and caretakers had no support from the government. A woman was "alone with the problem of seeking and financing an abortion and if [she] fail[ed], she [was] alone [in] paying the expenses of pre-natal care and childbirth and raising and supporting the child."[97] Because of the sexual double standard, women had little support for caretaking work, and an unwanted pregnancy often meant a lifetime of child-rearing that the State neither supported nor valued. "As long as [the woman] is forced to bear such an extraordi-

91. 381 U.S. 479 (1965).

92. Brief for Human Rights for Women, *supra* note 87, at 8.

93. *Id.* at 7.

94. 410 U.S. 113 (1973).

95. *See generally* Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) [hereinafter Brief of New Women Lawyers].

96. *Id.* at 34–35.

97. *Id.* at 28–29.

narily disproportionate share of the pains and burdens of childrearing," the brief argued, "then, to deprive her of the ultimate choice as to whether she will in fact bear those burdens 'violates the most basic aspects of our American ideal of fairness.' "[98]

Other feminist briefs in *Roe* further identified a connection between sex equality, sexual liberty, and race discrimination. Poor, often non-white women had less access to healthcare, contraception, and even the abortions authorized under therapeutic abortion laws. The Planned Parenthood Federation of America suggested that if abortion were legal, "[d]iscrimination against the poor and the non-white [women would be] substantially eliminated."[99] In the abortion context, race and sex discrimination were closely connected. Access to contraception and abortion varied depending on a woman's race or class. The consequences of an unwanted (and often out-of-wedlock) pregnancy fell more heavily on poor, non-white women, who most states had disproportionately targeted.

Women's sexuality was at the heart of constitutional concern about the equal protection of the laws. A sexual double standard, feminists argued, justified the restriction of access to abortion and explained the disproportionate share of caretaking work undertaken by women. The desire to punish female sexuality made abortion bans constitutionally suspect. Moreover, if American law and culture refused support for caretakers, then equal protection of the laws required that women have the power to terminate a pregnancy.

As Parts III and IV will show, the Court's equal protection and substantive due process jurisprudence neglected the issue of equal sexual liberty. Surprisingly, decisions on illegitimacy, contraception, and abortion—matters centrally involving sex—made the issue all but invisible. The decision made by leading attorneys in organizations like the NAACP, the National Association for the Repeal of Abortion Laws ("NARAL"), and the ACLU to downplay sexual pluralism factored into the Court's neglect of the issue. As we shall see, ACLU and NAACP attorneys used conventional sexual moral norms as a tool to undermine discrimination on the basis of race and illegitimacy.

Pursuing an incremental strategy seemed to make tactical sense. Nonetheless, by deferring to state authority to regulate illicit sex, progressives helped to strengthen the very sexual hierarchy they had hoped to challenge.

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98. *Id.* at 31 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

99. Supplemental Brief for Amici Curiae Planned Parenthood Federation of America, Inc. and American Ass'n of Planned Parenthood Physicians at 8, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40).

III. The Sins of the Mother: Illegitimacy and Equal Protection

For some members of the NAACP and ACLU, the battle against illegitimacy discrimination marked a necessary step in the extension of civil rights—both for people of color and those subjected to equally damaging discrimination. However, as this Section shows, both organizations pursued equality using a strategy that assumed the legitimacy of the State's power to punish illicit sex. In litigating under the Equal Protection Clause, the NAACP and ACLU relied on what this Article calls a "like race" tactic, presenting illegitimacy discrimination as both similar to and a pretext for race discrimination. Significantly, both organizations played up the trauma suffered by children victimized by their parents' immorality rather than challenging the State's very ability to police sex. Equal protection litigation for the illegitimate showcased some of the dangers inherent for movements using an incremental approach to litigation.

This Section begins by exploring the social and political responses of organizations like the NAACP and the National Urban League to arguments linking sexual immorality and race. Next, the Section studies how the NAACP and ACLU translated these arguments into constitutional law.

A. *The Morality of Respectable Women of Color*

In 1965, a White House study group warned that a crisis in the African-American family posed the greatest threat to the advancement of civil rights.[100] The report issued by the study group suggested that "the Negro family in the urban ghettos is crumbling."[101] A group of sociologists, including Kenneth B. Clark, the author of the famous doll studies used in *Brown v. Board of Education*,[102] agreed that the "the plight of the Negro family" could mean a "new crisis in racial relations."[103]

The morality of the African-American family played a central part in the illegitimacy backlash. Some progressives, like the authors of the White House study, responded that women of color, like the larger African-American community, were victimized by forces beyond their control. Writing in 1966, Harvard sociology professor Lee Rainwater argued that the family life of lower class African-Americans doomed

100. *The Negro Family: The Case for National Action*, U.S. Dep't Lab. (Mar. 1965), http://www.dol.gov/dol/aboutdol/history/webid-meyniham.htm [hereinafter *The Moynihan Report*].

101. John D. Pomfret, *Capital Parley Planned*, N.Y. Times, July 19, 1965, at 1.

102. 347 U.S. 483, 494 n.11 (1954) (citing works by Kenneth B. Clark).

103. Pomfret, *supra* note 101, at 15.

them to a life of dysfunction.[104] "[I]t is the individuals who succumb to the distinctive family life style of the slum," Rainwater explained, "who experience the greatest weight of deprivation."[105] Offering a similar theory, Kenneth Clark stated: "The symptoms of lower-class society afflict the dark ghettos of America."[106] Chief among these symptoms were "family instability [and] illegitimacy."[107]

By extension, sociologists, nurses, and psychologists suggested that African-American women could not be blamed for their own immorality. As the *American Journal of Nursing* explained in 1967:

> [O]ut-of-wedlock pregnancy is not only a symptom of disturbance in the girl herself . . . . The pregnancy is the final and outward manifestation but the family has the pathology, and the girl is the carrier.[108]

Policymakers used sociological studies of the African-American family as a rationale for legal intervention. As Daniel Patrick Moynihan, the author of an eponymous report on the African-American family, explained: "[t]he children of our slums are being savagely cheated by society, which thinks it is too sophisticated to care about whether children have fathers and women have husbands."[109]

Beginning in 1960, leaders of the African-American community responded that women of color were no more immoral than their white counterparts. Refuting claims of sexual immorality proved central to the NAACP's campaign for school integration. In 1959, for example, Virginia Governor Lindsey Almond pointed to illicit sex and illegitimacy as a strong argument for segregation.[110] Responding to Almond's accusations, NAACP attorney Oliver W. Hill argued that African-Americans conformed to conventional sexual morals:

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104. *See* Lee Rainwater, *Crucible of Identity: The Negro-Lower Class Family*, 95 DAEDALUS 172 (1966).

105. *Id.* at 173.

106. KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 27 (2d ed. 1989).

107. *Id.*

108. Ann L. Clark, *The Crisis of Adolescent Unwed Motherhood*, 67 AM. J. NURSING 1465, 1466 (1967) (citation omitted).

109. John Herbers, *Moynihan Hopeful U.S. Will Adopt a Policy of Promoting Family Stability*, N.Y. TIMES, Dec. 12, 1965, at 74; *see also* Regina G. Kunzel, *White Neurosis, Black Pathology: Constructing Out-of-Wedlock Pregnancy in Wartime and Postwar United States*, *in* NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945–1960, at 320 (Joanne Meyerowitz ed., 1994) ("[T]he scripts of out-of-wedlock pregnancy ultimately said more about their authors and the anxieties of their time and place than they did about the women they were describing."); MELISSA LUDTKE, ON OUR OWN: UNMARRIED MOTHERHOOD IN AMERICA 393 (1999) (discussing how in the 1990's Charles Murray relaunched the idea of "illegitimacy" as a major social concern, echoing Moynihan's efforts in the 1960s). For further discussion of Moynihan's report on African-American family disintegration, see *Text of the Moynihan Memorandum on the Status of Negroes*, N.Y. TIMES, Mar. 1, 1970, at 69.

110. *See* J. Almond Lindsay, Jr., *Virginia Gov. Defends Segregation*, 66 CRISIS 134 (Mar. 1959).

> I would be the last to deny that illegitimacy constitutes a grave social problem which should be corrected at the earliest possible moment. But I submit that the first step in eradicating this evil is the elimination of racial segregation—its breeding place . . . . I deny the basic conclusion . . . that [the] morality of persons of Negro ancestry is lower . . . . [Y]ou not only have to consider illegitimacy statistics, but, I submit, you have to consider the million dollar abortion rings . . . [the] prophylactics and contraceptives used for illicit sexual relations . . . .[111]

Hill's comments laid the groundwork for influential later civil rights strategies. Writing in 1960, *Chicago Defender* columnist Adolph Slaughter suggested that "the actual number of white non-wedlock births will never be known," since white women had better access to abortion, birth control, and private medical facilities.[112] Slaughter agreed that traditional sexual mores were indispensable, but he blamed racism for most of the sexual immorality at issue.[113]

In the mid-1960s, the National Urban League elaborated on these claims. Founded in 1910 to facilitate African-American economic empowerment, the NUL had, by 1961, become a central part of the civil rights movement.[114] Whitney Young, the organization's new leader, made the defense of the African-American family a central priority. In 1964, as part of this effort, Sherwood Ross of the NUL picked up on the claim that "loose" women were white as well as black.[115] If anyone was innocent, Ross suggested, it was the children who were punished for their parents' sexual misbehavior: "What does appear to be immoral," Ross stated, "is the [state] policy of penalizing the children of the poor."[116]

Soon Whitney Young took up the defense of the sexual morality of African-American women. In 1968, he complained: "The standard picture is of the unwed mother, illegitimacy, the pathological matriarch and emasculation of the black male."[117] Nonetheless, Young maintained that "the majority of Negro families are stable."[118]

At the time of Young's assertion, some sociologists were already

111. Oliver W. Well, *NAACP Attorney Offers a Rebuttal*, 66 CRISIS 135, 187 (Mar. 1959).

112. Adolph J. Slaughter, *Protest Misleading Data on ADC: The Truth About ADC Protest Racial Data on Illegitimate Children*, CHI. DEFENDER, Mar. 2, 1960, at A1.

113. *Id.*

114. On the history of the NUL, see GUICHARD PARRIS & LESTER BROOKS, BLACKS IN THE CITY: A HISTORY OF THE NATIONAL URBAN LEAGUE (1971).

115. *See* Sherwood Ross, *The Human Relations Beat*, CHI. DEFENDER, Jan. 11, 1964, at 7.

116. *Id.*

117. John Leo, *Sociology Scored by Negro Leader: Whitney Young Says Errors in Studies Harmed Race*, N.Y. TIMES, Aug. 28, 1968, at 21.

118. *Id.*

beginning to challenge the priority assigned to conventional sexual norms. A new generation of scholars conceded that the African-American family did not always conform exactly to majority expectations about sexual behavior and family formation. However, as these academics maintained, intimate pluralism could be a strength rather than a pathology. In 1971, sociologist Robert Staples argued: "[T]he field of family sociology has a biased value orientation that is reflected in the emphasis on middle-class norms as a barometer of what is regarded as a desirable family structure and behavior."[119] To the extent that African-American families were different, that difference did not signal pathology.[120]

The NUL's position on sexual dissent remained ambiguous. The organization hired a thirty-two-year-old sociologist and Columbia University graduate, Robert Hill, to refute claims about the pathology of the African-American family.[121] In 1971, Hill and the NUL issued a report laying out their conclusions.[122] In part, the NUL report defended the choices made by African-American families.[123] The NUL applauded the "equalitarian pattern" found in many families, "in which neither spouse dominates."[124] Dr. Joyce Ladner, a contributor to the study, asserted: "[W]e will not allow only white scholars to interpret our lifestyle."[125]

Nonetheless, the NUL's primary message was one of conformity to traditional norms. The report stressed that "hard-working, father-dominated black families constitute the great majority."[126] The problem was not the sexual deviance of women of color but rather the "undue attention [given] to the minority of black families . . . in distress."[127] Hill and the NUL also spotlighted the sexual immorality of white women, asking "how much [of an] increase in families headed by single white women would occur if only 7 per cent of their out-of-wedlock children were adopted?"[128]

For strategic reasons, leaders of groups like the NUL mostly conceded that the State could punish women's sexual immorality. Count-

119. Robert Staples, *Toward a Sociology of the Black Family: A Theoretical and Methodological Assessment*, 33 J. MARRIAGE & FAM. 119, 119–20 (1971).

120. On the rise of the new sociology, see CLARK, *supra* note 106, at xv–xvi.

121. *See, e.g.*, Jack Rosenthal, *The 'Female-Headed Household': A Researcher Denies the Negro Family Is Deteriorating*, N.Y. TIMES, July 29, 1971, at 16.

122. *See generally* ROBERT B. HILL, THE STRENGTHS OF BLACK FAMILIES (1972).

123. *See, e.g.*, Thomas A. Johnson, *Matriarchy Denied: A Black Matriarchy Is Denied in Report by Urban League*, N.Y. TIMES, July 27, 1971, at 1.

124. *Id.*

125. *Id.*

126. Rosenthal, *supra* note 121.

127. *Id.*

128. *Id.* While only seven percent of black babies born out of wedlock were put up for formal adoption, "two-thirds of white babies born out of wedlock [were] put up for formal adoption." *Id.*

ering the illegitimacy backlash required civil rights activists to convince the public that integration would not undermine conventional morality. Only in the late 1960s when black power leaders began to argue that African-American culture was unique and even superior to the cultural mainstream did sociologists or attorneys treat women's sexual dissent as justifiable.[129] For much of the 1960s, however, members of organizations like the NAACP and NUL sought to present themselves as a part of a longstanding moral tradition—to assert, as commentators wrote in 1962, that "in the area of moral values, there need be no fear that the level of general moral standards now obtaining in our American institutions will be either destroyed or diluted by the presence or participation of the Negro minority."[130]

B. *Equal Protection, Illegitimacy, and Illicit Sex*

Anxieties about illicit sex and the African-American family also shaped the strategy used by the ACLU and NAACP in litigating cases on illegitimacy discrimination. Beginning in the late 1960s, attorneys working with both organizations framed discrimination on the basis of illegitimacy as both similar to and a proxy for discrimination on the basis of race.

These arguments varied from well-studied feminist efforts to "reasoning from race" in challenging the social foundation and constitutional justification for sex discrimination.[131] In the context of both sex and illegitimacy, lawyers urged courts to scrutinize other forms of classification as closely as they did regulations based on race, and in both instances, some attorneys, like feminist Pauli Murray, perceived differing forms of discrimination—on the basis of race, sex, and illegitimacy—as intertwined.[132] As Serena Mayeri has shown, feminists highlighted similarities between race and sex as legal categories in challenging sex discriminatory laws in court and convincing the broader public that "sex inequality, like racial subordination, betrayed the American promise of egalitarian democracy."[133] However, in the context of illegitimacy, activists reasoned from race in different ways. Rather than simply comparing race and illegitimacy, "like race" arguments exposed

129. *See* CLARK, *supra* note 106, at xv–xvi.

130. Edward E. Brewster & Martelle D. Trigg, *Moral Values Among Negro College Students: A Study of Cultural and Racial Determinants*, 23 PHYLON 286, 292 (1962).

131. *See, e.g.*, SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 1–8 (2011) [hereinafter MAYERI, REASONING FROM RACE]; Serena Mayeri, Note, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1052–60 (2001).

132. *See, e.g.*, MAYERI, REASONING FROM RACE, *supra* note 131, at 3–6.

133. *Id.* at 3.

as racist seemingly neutral complaints about illegitimacy. Such claims also highlighted different areas of overlap with race discrimination. Rather than presenting discrimination against the non-marital family as a form of subordination, "like race" arguments focused on the mental distress both forms of bias inflicted on innocent children.

Just the same, the race analogy played an important part in the legal advocacy of the NAACP and ACLU, covering up the ways in which illegitimacy differed from a conventional suspect classification. Generally, a classification was suspect if a group had a visible or immutable trait, if the group had experienced a history of discrimination, and if a group was politically powerless.[134] Illegitimate children had certainly been subject to a set of legal disabilities governing inheritance and welfare benefits.[135] Nonetheless, illegitimacy was neither visible nor immutable in the same way as race or sex. At least in some states, a parent could confer rights on an illegitimate child by virtue of marriage or by use of a variety of other legal instruments, whereas no states allowed an individual legally to change her race.[136] Illegitimate children could not even arguably be identified by any visual or physical trait.[137] The "like race" analogy drew attention to the psychological damage done by illegitimacy-based discrimination and downplayed the ways in which illegitimacy did not fit the conventional equal protection framework.

However, the "like race" argument obscured the role that sex discrimination and sexual behavior played in the illegitimacy backlash. Indeed, in litigating illegitimacy cases, the ACLU and NAACP did not challenge the State's ability to regulate sexual decisionmaking. Instead, cause attorneys argued that the State could not fairly or effectively change the sexual behavior of parents by punishing innocent children.

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134. *See* Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (citing Lyng v. Castillo, 477 U.S. 635, 638 (1986)).

135. *See, e.g.*, LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 120, 126–28 (2004) (for example, illegitimate children had been considered to have no legal parent and thus had no right to inherit from anyone).

136. Louisiana's law, challenged in *Levy v. Louisiana*, discussed *infra* Part III.C, allowed parents some freedom to change the status and rights of illegitimate children. LA. CIV. CODE ANN. art. 2315 (1970). Of course, "passing" allowed some people to move easily from one race to another. *But see, e.g.*, Karen Grigsby Bates, *'A Chosen Exile': Black People Passing in White America*, NPR (Oct. 7, 2014), http://www.npr.org/blogs/codeswitch/2014/10/07/354310370/a-chosen-exile-black-people-passing-in-white-america; *see generally* DANIEL J. SHARFSTEIN, THE INVISIBLE LINE: A SECRET HISTORY OF RACE IN AMERICA (2011). On the legal construction of whiteness, see, for example, RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS (1993); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (Richard Delgado & Jean Stefanic eds., 1996); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

137. On the workings of the immutable trait prong, see, for example, Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 494–96 (1998).

This strategy promised incremental change, allowing activists to chip away at state punishment of sexual dissent. Ultimately, however, this incremental strategy helped to reinforce some of the sexual hierarchies activists had hoped to undermine.

C. Levy v. Louisiana *and the Limits of Analogy*

The "like race" analogy debuted during the litigation of *Levy v. Louisiana*.[138] *Levy* involved a challenge to Louisiana's wrongful death statute, which precluded recovery by illegitimate children.[139] Louise Levy had been raising her five children in New Orleans, Louisiana, sending them to Catholic school, and working as a domestic when she died as the result of medical malpractice.[140] Because Levy's children had been born out of wedlock, the State of Louisiana barred her wrongful death suit.[141] The ACLU and NAACP both involved themselves in the case, believing, as ACLU attorney Norman Dorsen explained, that "[t]he question of the constitutional rights of illegitimates [was] one which seems ripe for Supreme Court review."[142]

Ultimately, between 1967 and 1968, the two organizations arrived at a similar legal strategy, comparing illegitimacy to race. In his notes in developing a legal strategy, Dorsen listed ways in which illegitimacy was "[a]nalogous to race": both involved victims of "prejudice and abuse," both created a "psych[ological] catastrophe" for victims of discrimination, and both were created by conditions of birth over which the victims had no control.[143] Dorsen and the ACLU both spotlighted the disproportionate impact illegitimacy discrimination had on children of color, noting that a "very high [percentage] of victims [were] Negroes," and that there was a close historical relation between race and illegitimacy because "all child[ren of] slaves [were] illegit[imate.]"[144]

Significantly, the "like race" strategy drew on *Brown*, making psychological trauma the touchstone of constitutional analysis. The NAACP argued: "[T]he psychological effect of the stigma of bastardy upon its

138. 391 U.S. 68 (1968).

139. *See id.* at 68–70.

140. *See* Petition for Writs of Certiorari and Review to the Court of Appeal, Fourth Circuit, State of Louisiana 1–2, Levy v. State, 193 So. 2d 530 (La. 1967) (No. 48518) (on file with the Norman Dorsen Papers, New York University).

141. *See Levy*, 391 U.S. at 68–70.

142. Letter from Norman Dorsen to Marvin Karpatkin, Acting Legal Dir., American Civil Liberties Union (June 2, 1967) (on file with the Norman Dorsen Papers, New York University). For an in-depth discussion of the ACLU's work on illegitimacy and sexual liberty, see generally, for example, WHEELER, *supra* note 19.

143. Handwritten Notes of Norman Dorsen on Levy v. Louisiana (n.d., ca. 1968) (on file with the Norman Dorsen Papers, New York University).

144. *Id.*

victim seems entirely comparable to the damaging psychological effects upon the victims of racial discrimination."[145] Significantly, the NAACP attributed the trauma suffered by the illegitimate only partly to discrimination. Instead, the loss of a traditional family and the condition of being "fatherless" made the illegitimate child "completely abnormal."[146]

Levy allowed the ACLU and the NAACP to test the limits of equal protection jurisprudence, suggesting that racially disparate impacts were constitutionally significant under *Brown*. The NAACP urged the Court to read the illegitimacy-based classification in a historical and social context, particularly since more African-American children were born out of wedlock and were also less likely to be adopted.[147] The ACLU similarly argued for heightened scrutiny, since the classification tended "to fall most heavily on Negroes . . . and in some instances may have been designed to achieve this end."[148] The briefs stopped short of describing illegitimacy-based discrimination as race discrimination. Nonetheless, both briefs drew attention to new directions in race discrimination jurisprudence, arguing that racially disproportionate impacts and the racial history of seemingly neutral regulations deserved heightened scrutiny.

If the *Levy* briefs tested the boundaries of race-discrimination jurisprudence, however, advocates took up a conventional view of sexual morality. For example, in responding to the State of Louisiana's reply brief, the ACLU took particular issue with what the organization called "totalitarian name calling" on the part of the opposition.[149] "We have not questioned the value of family," an internal memorandum asserted.[150] The ACLU had instead shown that "the discrimination here [was] wholly ineffectual in deterring illegitimacy or securing legitimate families."[151] Similarly, the organization did not dispute that the State had an interest in "encouraging marriage and discouraging sexual deviation."[152] Instead, the ACLU described illegitimacy discrimination as "an absurdly ineffectual means" of protecting moral norms.[153] The NAACP similarly asserted that there was "no question that the state may properly regulate

145. Motion for Leave to File Brief Amicus Curiae and Accompanying Brief at 9, Levy v. Louisiana, 391 U.S. 68 (1968) (No. 508).

146. *Id.* at 8 n.2.

147. *See id.* at 19–20.

148. Brief for the Appellants at 8–9 & n.6, Levy v. Louisiana, 391 U.S. 68 (1968) (No. 508) (discussing measures by states to "penalize illegitimate children and their parents").

149. Memorandum on Reply Brief to Louisiana Attorney General (Feb. 22, 1968) (on file with the Norman Dorsen Papers, New York University).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

many aspects of sexual conduct."[154]

To some extent, this strategy seemed to pay dividends when *Levy* came down. In a short opinion by Justice William Douglas, the *Levy* Court held that the Louisiana law violated the Equal Protection Clause partly because of the constitutional significance of the bond between mother and child.[155] *Levy* did not explicitly adopt the analogy between race and illegitimacy advanced by the ACLU and NAACP. However, *Levy* followed the briefs in downplaying the woman's sexual choices. Douglas' opinion described a woman who was not a sinner but a traditional, loving mother: "These children," Douglas wrote, "were dependent on [the mother]; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense."[156]

Under *Levy*, equal treatment for the illegitimate depended on the ways in which unwed mothers performed the traditional role assigned to women. Far from embracing sexual liberty, the *Levy* Court justified rights for the illegitimate on the basis of the traditional bond children enjoyed with their mothers. Instead of challenging the sex stereotypes that fueled the illegitimacy backlash, the *Levy* Court reinforced conventional ideas of women's roles.

Just the same, in *Labine v. Vincent*,[157] the ACLU continued to acknowledge the State's power to punish illicit sex. That case addressed a Louisiana law that prevented illegitimate children publicly acknowledged by their fathers from inheriting when the latter died without a will.[158] In *Labine*, the ACLU again experimented with new theories of race discrimination under the Equal Protection Clause, stressing the harms worked by racially disproportionate impacts.[159] Nonetheless, the ACLU stressed that the State could justly punish illicit sex; illegitimacy-based discrimination was problematic because it made "no sense to punish an innocent party for someone else's misconduct."[160]

When the Supreme Court issued its opinion in 1971, *Labine* revealed some of the limits of the approach that the NAACP and ACLU had taken. The *Labine* majority held that states could, within certain bounds, discriminate against illegitimate children because of their par-

154. Motion for Leave to File Brief Amicus Curiae and Accompanying Brief, *supra* note 145, at 10.

155. *See* Levy v. Louisiana, 391 U.S. 68, 71–72 (1968).

156. *Id.* at 72.

157. 401 U.S. 532 (1971).

158. *Id.* at 534–36.

159. *See* Motion for Leave to File Brief, Amicus Curiae, and Brief of American Civil Liberties Union, Amicus Curiae at 4–5, Labine v. Vincent, 401 U.S. 532 (1971) (No. 5257) ("Although illegitimacy, on its face, seems to be a neutral criterion, it actually operates far more severely upon Negroes as a class than it does upon whites.").

160. *Id.* at 7.

ents' conduct.[161] The majority compared the Louisiana law at issue to rules that "'discriminate' in favor of wives and against 'concubines.'"[162] The State could justly treat these groups differently because "[o]ne set of relationships [was] socially sanctioned, [and] legally recognized," while "[t]he other set of relationships [was] illicit and beyond the recognition of the law."[163] By ignoring the issue of sexual liberty, the ACLU and NAACP strategy left a gap in protections for illegitimate children. As *Labine* framed it, the State could satisfy the requirements of the *Levy* doctrine by repackaging a law as one governing the parents' immorality.

The Court elaborated on the meaning of *Levy* in its subsequent cases, describing a limited and contradictory form of equality for the illegitimate. The clearest articulation of the Court's reasoning came in 1971, in *Weber v. Aetna Casualty & Surety Co.*, a case on the rights of unacknowledged illegitimate children to recover under Louisiana's workmen's compensation law.[164] While striking down the Louisiana law, *Weber* reaffirmed the value that the Court attached to the protection of the traditional family unit.[165] If the State wanted to punish sexual immorality, however, innocent children were not fair game:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. . . . Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.[166]

Weber made clear that illegitimacy discrimination was not the same as discrimination on the basis of an individual's sexual decisions. While carving out narrow protections for children born out of wedlock, illegitimacy jurisprudence further entrenched discrimination against anyone participating in illicit sex. Framed in this way, illegitimacy discrimination was unconstitutional because it unfairly targeted children and repentant women; loving mothers and innocent children did not deserve the punishment set forth by the State. By extension, illegitimacy jurisprudence reinforced the State's power to discipline true sexual transgressors more directly. If anything, laws affecting illegitimate children could pass muster if the State could convincingly present illicit sex as its true target.

For this reason, the Court's illegitimacy jurisprudence proved to be

161. *Labine*, 401 U.S. at 537–38.
162. *Id.*
163. *Id.*
164. 406 U.S. 164, 165 (1972).
165. *See id.* at 175–76.
166. *Id.* at 175.

a double-edged sword for progressive activists. While recognizing new protections for illegitimate children, the Court reaffirmed both state control over intimacy and the inferiority of illicit sex. Moreover, the protections provided to the illegitimate were limited and unreliable because the State could justify discriminatory laws through framing them as protections of proper sexual mores. Progress for the illegitimate reinforced, rather than undermined, the State's power to police sex.

In the 1960s and 1970s, this sex-negative strategy reached beyond the issue of illegitimacy. As had been the case with the civil rights movement, the abortion-rights movement helped to craft a jurisprudence that assumed an expansive state power to regulate illicit sex. The Court's jurisprudence mostly obscured any connection between sexual liberty, equal treatment, and reproductive liberty. If anything, some sexual decisions appeared primarily to be a source of stigma and psychiatric distress rather than anything deserving of constitutional protection.

As had been the case with the Court's illegitimacy cases, reproductive-rights activists drew a surprising parallel between *Brown* and their own cases. *Brown* had predicated its analysis partly on the psychological trauma segregation produced in children. Abortion-rights activists used similar reasoning, suggesting that restrictions on contraception and abortion inflicted psychological harm. Framing the issue in this way allowed the movement to demand reproductive rights for women without assigning them blame for still unpopular sexual choices.

The Court followed the lead of abortion-rights activists in stressing the costs of sex and unintended pregnancy. The consequences of illicit sex helped to explain why the abortion decision was of constitutional dimension. Far from presenting abortion as part of a broader form of equal sexual liberty, the Court framed fertility control as necessary for women who wanted to avoid the trauma that followed illicit sex.

IV. Sexuality, Psychological Distress, and Substantive Due Process

Since the late 1960s, some feminist activists and theorists have connected abortion to women's sexual liberty and efforts to combat the sexual double standard. *Roe v. Wade* and *Doe v. Bolton*, by contrast, rejected the idea of a broad right to control one's own body. The Court instead explained the importance of the abortion right partly by highlighting the effect of unintended pregnancy on women.

As this Section shows, the absence of sex in *Roe* was no coincidence. At least partly for strategic reasons, abortion-rights activists often dodged the issue of sexual liberty, describing women and unwanted children as the victims of changing sexual norms. Moreover, by setting

aside the question of sex, movement leaders largely neglected the connections between race, class, reproduction, and sexual pluralism that emerged during the illegitimacy backlash. Disproportionately lacking access to therapeutic or safe abortion, poor and non-white women most often found themselves targeted by anti-illegitimacy crusaders, their sexual behavior particularly supervised, chastised, and punished. The abortion-rights movement did little to criticize the racial and class politics of abortion law, instead presenting abortion as a way to make illegitimacy less common and costly.

This Section begins by tracing the origins of the decision to downplay sexual liberty made by some leaders of groups like the NARAL or Planned Parenthood. Next, the Section studies the transformation of trauma claims into arguments against the constitutionality of abortion restrictions. This reasoning resurfaced in crucial Supreme Court decisions on contraception and abortion, as the Section shows. Ultimately, as in the illegitimacy context, the incremental progress achieved by trauma arguments proved unreliable, setting the stage for the Court's later retreat from abortion rights.

A. *Abortion, Psychiatry, and Promiscuity*

In the late 1960s and early 1970s, abortion-rights activists had to explain the relationship between sexual expression and liberalized laws on contraception and abortion. As Leigh Ann Wheeler has argued, liberalizing laws on contraception, abortion, and pornography can be understood as an expansion of sexual liberty.[167] Nonetheless, abortion-rights activists and civil libertarians had to explain how, if at all, the Constitution protected sex itself. Progressive activists did work to expand sexual privacy directly, in cases on prostitution, "swinging," sodomy, and sexual orientation discrimination.[168] These efforts generally ended in frustration, while the campaign to reform contraception and abortion bans remade the legal landscape.[169]

But how did the abortion-rights movement explain the relationship between sexual liberty and reproductive rights? As early as 1965, abortion opponents had argued that liberalized abortion laws would increase sexual promiscuity and psychological damage to women. Robert Drinan, a pro-lifer who later switched sides, articulated the view that reforming existing bans could remove a natural deterrent—pregnancy—thereby increasing sexual promiscuity, particularly among women.[170] Antiabor-

167. *See generally* WHEELER, *supra* note 19.

168. *See, e.g.*, GARROW, *supra* note 19, at 621–61.

169. *See, e.g.*, *id.*

170. *See* Robert F. Drinan, *The Inviolability of the Right to Be Born*, 17 W. RES. L. REV. 465,

tion activist Charles Rice similarly argued that abortion allowed for "promiscuity with impunity."[171] These arguments drew on conventional views of women's social role. Women who had sex or got pregnant without intending to procreate were both sick and dangerous.

Criminal law and psychiatry had long treated non-marital female sexuality as pathological. Studies published in the period still indicated that a majority of women convicted of juvenile delinquency committed offenses related to sexual "misbehavior."[172] A 1964 analysis found that "50 percent of female delinquents [were] charged with sex offenses, family offenses, or sex connected offenses."[173] A 1970 study in the *American Sociology Review* asserted that female promiscuity was "viewed by a considerable number of people as reprehensible and beyond the tolerance limit."[174]

Opponents of legal abortion expanded on this theme, suggesting that women who had abortions suffered psychiatric harm. Writing in the 1960s, legal scholar Dennis Mahoney explained: "[T]herapeutic abortion on psychiatric grounds is often a double-edged sword and frequently carries with it a degree of emotional trauma far exceeding that which would have been sustained by continuation of the pregnancy."[175] Mahoney explained that a woman choosing abortion suffered "guilt feelings" as a result of her "consent to the destruction of the offspring which she has had a part in creating."[176]

Similar arguments played an important part in divisions within the American Medical Association ("AMA") about the desirability of abortion reform. In 1967, one AMA member asserted that "all clinical experience shows that abortion is a mental wound as well as a physical

476 (1965) (including "promiscuity among single persons" as a factor in deciding the "basic legal-moral policy which America should adopt with respect to the availability of abortion for unwed mothers").

171. CHARLES E. RICE, THE VANISHING RIGHT TO LIVE 125 (1965).

172. *See, e.g.*, Ruth R. Morris, *Female Delinquency and Relational Problems*, 43 SOC. FORCES 82, 82 & n.2 (1964).

173. *See, e.g.*, *id.*

174. Ira L. Reiss, *Premarital Sex as Deviant Behavior: An Application of Current Approaches to Deviance*, 35 AM. SOC. REV. 78, 78 (1970).

175. Dennis M. Mahoney, *Therapeutic Abortion—The Psychiatric Indication—A Double-Edged Sword?*, 72 DICK. L. REV. 270, 284 (1968) (quoting Nicholson J. Eastman, *Forward* to THERAPEUTIC ABORTION: MEDICAL, PSYCHIATRIC, LEGAL, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS xix (Harold Rosen ed., 1954)).

176. *Id.* at 295; *see also* John G. Herbert, *Is Legalized Abortion the Solution to Criminal Abortion?*, 37 U. COLO. L. REV. 283, 289 n.45 (1965) (quoting Martin Ekblad, *Induced Abortion on Psychiatric Grounds: A Followup of 479 Women*, 99 ACTA PSYCHIATRY & NEUROLOGY 168 (1955)) ("'It is inevitable that a legal abortion should leave certain traces just as everyother event of considerable importance . . . . [I]t is probable that the abortion tends to arouse feelings of guilt in the same way as other actions in connection with sex life which have not gained general acceptance. . . .'").

wound."[177] These understandings of abortion regret relied heavily on a stereotype about women's behaviors and preferences. As women experienced an overwhelming bond with their unborn children, women who chose abortion likely suffered serious psychological damage as a result of their choice.

Beginning in the late 1960s, abortion-rights activists responded that unintended pregnancy and childbirth, rather than abortion, psychologically scarred women. Significantly, mainstream organizations, like NARAL, did not argue that abortion would increase sexual liberty for women. Instead, activists disputed that legal abortion would lead to more illicit sex. If anything, movement members borrowed from contentions about the psychological damage produced by illicit sex and its consequences, particularly unwanted pregnancy and unplanned children.

B. *Medicalizing Desire: Therapeutic Abortion and Trauma*

The abortion-rights movement first drew on psychiatric arguments in defending physicians from criminal liability. Starting in the 1960s, physicians performing abortions had to justify their decisions under relatively narrow, therapeutic reform laws.[178] Many such regulations followed the recommendations made by the American Law Institute ("ALI"), which would allow for abortion in cases of rape, incest, fetal deformity, or a threat to the health of the mother.[179] Cases of rape, incest, and fetal abnormality were relatively rare, and with improvements to obstetric and gynecological care, fewer physicians could justify abortion for reasons of physical health.[180] Indeed, several studies completed in the late 1960s showed a dramatic increase in the number of abortions performed for psychiatric reasons. Researcher Christopher Tietze found that the number of such procedures completed between 1963 and 1968 increased by a factor of almost seven.[181]

To avoid legal liability, physicians had to present as eligible for psychiatric abortions women making a variety of social, economic, and sexual decisions. In 1970, *Studies in Family Planning* found that a majority of psychiatric abortions were not "strictly psychiatric" but rather justified on the basis of "impulsive behavior, misjudg-

177. Martin Tolchin, *Doctors Divided on Issue*, N.Y. TIMES, Feb. 27, 1967, at 1.

178. *See, e.g.*, LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973, at 173–81 (1997).

179. *See American Law Institute Abortion Policy, 1962*, *in* BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT DECISION 24, 24–25 (Linda Greenhouse & Reva B. Siegel eds., 2d ed. 2012) (citing MODEL PENAL CODE § 230.3 (1962)).

180. *See, e.g.*, Kristin Luker, ABORTION AND THE POLITICS OF MOTHERHOOD 54 (1984).

181. *See, e.g.*, Christopher Tietze, *United States: Therapeutic Abortions, 1963 to 1968*, 1 STUD. FAM. PLANNING 5, 5 (1970).

ment . . . [and] environmental [factors] . . . [like] alcoholism, drug addiction, and some types of adolescent behavior."[182] In diagnosing a woman as depressed or suicidal, other studies reported that physicians took into account a woman's socioeconomic or marital status.[183]

To justify abortions under such circumstances, physicians had to develop a new understanding of the psychiatric trauma produced by sexual misbehavior. In the 1960s—as white, middle-class women began more often to have sex before marriage—psychologists and sociologists chronicled new psychological harms supposedly produced by sexual dissent. In the mid-1960s, the *New York Times* summarized the common view that sexual non-conformity reflected mental trouble: "[T]here are girls who are troubled by emotional problems that cause them to seek the semblance of affection wherever they can."[184] Several years later, a study published in the *Journal of the American Medical Association* concluded that "[p]ermissive sexual activity seems to be highly correlated with mental illness."[185] The study found that "sexual relationships before marriage have had an especially intense effect upon female students."[186] Dr. Seymour Halleck, a professor at the University of Wisconsin and a champion of these arguments, described unmarried sexually active women as "casualties of the sexual revolution," explaining that "[t]he girl who uses sex to combat loneliness, to gain status, or to exploit others cannot escape a certain amount of guilt."[187]

If "promiscuity" reflected mental illness, out-of-wedlock pregnancy supposedly represented both a symptom and cause of psychiatric distress. A 1960 federal study attributed a higher infant mortality rate among unwed mothers partly to "the emotional and psychological strain frequently associated with illicit conceptions."[188]

The stress produced by an illicit conception arguably qualified a woman for a therapeutic abortion. Women could make out a psychiatric justification for abortion, as one physician explained, when they could not be "trusted with the responsibilities of an adult, and [could not] . . .

182. Sidney Newnan et al., *Abortion, Obtained and Denied: Research Approaches*, 1 STUD. FAM. PLANNING 1, 4 (1970).

183. *See, e.g.*, John R. Partridge et al., *Therapeutic Abortion, A Study of Psychiatric Applicants at North Carolina Medical Hospital*, 32 N.C. MED. J. 131, 131–36 (1971) (on file with the Takey Crist Papers, Bingham Library, Duke University); John A. Ewing & Beatrice A. Rouse, *Therapeutic Abortion and a Prior Psychiatric History*, 130 AM. J. PSYCH. 37, 37 (1973) (on file with the Takey Crist Papers, Bingham Library, Duke University).

184. Andrew Hacker, *The Pill and Morality*, N.Y. TIMES, Nov. 21, 1965, at SM32.

185. Donald Johnson, *Campus Sex Tied to Mental Ills: Psychiatrist's Study, Done at Wisconsin U., Finds Students Disturbed*, N.Y. TIMES, May 20, 1967, at 37.

186. *Id.*

187. Joan Beck, *Sex and the College Girl*, CHI. TRIB., Oct. 6, 1968, at 38–39.

188. *Illegitimacy Tied to Mortality Rise: U.S. Reports Say Mother's Health Status Is Factor in Immature Births*, N.Y. TIMES, Nov. 13, 1960, at 80.

function the way mothers, as adult women, [were] expected to function."[189] Unwed mothers apparently demonstrated the kind of unfitness and instability that made a psychiatric abortion easier to justify.[190] As the doctor explained: "Some physicians are more prone to recommend interruption, for instance, for a cardiac patient who is unwed, on relief, and already the mother of several children than for one with the same degree of cardiac pathology who is married, childless, and well-to-do."[191]

In practice, however, therapeutic abortion laws primarily served the interests of relatively well-to-do and often white women. In particular, "the increasing use of psychiatric necessity . . . create[d] the discrepancy between private and indigent patients."[192]

C. *Women Victims*

For abortion-rights activists, the challenge was to justify already legal abortions and to demand broader access without touching off concern about sexual promiscuity. At first, abortion-rights activists wanted to stress that most women who sought abortions were married and respectable. "[D]espite the myth that most abortions are the desperate goal of single girls escaping the penalty of promiscuity," wrote future NARAL leader Larry Lader, "the majority of [therapeutic abortions] are sought by married women who do not want another child."[193] Without explicitly addressing the question of race, Lader's comments brought to mind the affluent white women often provided with therapeutic abortions, women whose choices posed no real threat to the sexual status quo.

Feminist reformers also shied away from justifying abortion as a means for achieving sexual liberty. In November 1967, when the National Organization for Women ("NOW") first considered the abortion issue, Betty Friedan presented abortion partly as an issue of sexual liberty—related to "the right of every woman to control her sexual

189. Harold Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 W. RES. L. REV. 435, 446 (1965).

190. *See id.* ("[A] fairly large number of psychiatrists are agreed that interruption of pregnancy for psychiatric reasons is indicated in those patients who, because of their very pronounced emotional immaturity, must themselves be babied . . . .").

191. *Id.* at 450.

192. Note, *The Right to Equal Access to Abortions*, 56 IOWA L. REV. 1015, 1018 (1971). For further discussion of unequal abortion access in the pre-*Roe v. Wade* era, see, for example, MARK GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 53–68 (1999).

193. Lawrence Lader, *The Scandal of Abortion Laws*, N.Y. TIMES, Apr. 25, 1965, at SM32.

life."[194] Others present agreed that legal abortion constituted "part of the sexual revolution."[195] Feminist sociologist Alice Rossi put the point succinctly: "If no harm will come of it, People should be free to do as they choose. If they want pre-marital relations, then let them."[196]

Others insisted that NOW should not tie sexual liberty to abortion. Phineas Indritz, the organization's attorney, emphasized that for strategic reasons "NOW should not support pre-marital relations."[197] Ultimately, the organization approved an abortion resolution that made no mention of sexual liberty, endorsing a woman's right to control her reproduction alone.[198]

Later, NOW and other abortion-rights organizations emphasized the psychological trauma averted by legal abortion. In promoting the repeal of all abortion restrictions in New York State, Barbara Sykes Wright, a member of NOW, testified in 1968 that "sexual morality" was not the "primary issue" in abortion.[199] Instead, Wright emphasized that restricting abortion was "against the best interests of society on many grounds, social as well as psychological."[200]

NOW and other groups drew on an emerging psychiatric literature suggesting that unintended pregnancy, if brought to term, produced trauma for both the mother and child. As the Group for the Advancement of Psychiatry proclaimed in 1971: "There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood."[201]

Over time, organizations like NARAL and Planned Parenthood increasingly relied on arguments about the distress produced by illicit sex and its consequences, developing a racially coded discourse of injury, trauma, and crime. When describing white or well-to-do women, activists focused on the mental distress produced by unwanted pregnancy, the "disrupt[ion] to a woman's spirit."[202] By contrast, poor

194. Meeting Minutes, Nat'l Org. for Women (Nov. 18, 1967) (on file with the Betty Friedan Papers, Box 44, Folder 1533, Schlesinger Library, Harvard University).

195. *Id.* at 2.

196. *Id.*

197. *Id.*

198. *See id.* at 1–4.

199. *See* Barbara Sykes Wright, Testimony Before the Governor's Commission for the Study of Abortion (Feb. 24, 1968) (on file with the Kate Millett Papers, Bingham Library, Duke University) ("[T]he main issue is truly this: Do women have the right to control their own reproductive function?").

200. *Id.* at 5.

201. Ruth W. Lidz, *More Light on Abortion*, 3 FAM. PLANNING PERSP. 63, 63–64 (1971) (reviewing DANIEL CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY (1970); COMM. ON PSYCHIATRY & LAW, THE RIGHT TO ABORTION: A PSYCHIATRIC VIEW (1970)).

202. *Id.* This Section explores these claims in greater depth.

women or women of color appeared in abortion-rights literature as both victims and perpetrators, forced into deviant behavior by an unintended pregnancy. In a strategy memorandum to abortion-rights activists, leading advocate Larry Lader wrote:

> When [antiabortion activists] bring up innocent fetal life, keep hammering at the tragedy of the mature woman, the deformed and unwanted infant. Cite cases of how women's lives were ruined by being forced to bear unwanted children . . . [and] the tragedy of the unwanted child, possibly leading to the battered child and infanticide.[203]

Similarly, NARAL's official debate manual described the psychological harms averted by legal abortion—harms implicitly related to a woman's race and class. Liberalizing abortion laws would "decrease the number of unwanted children, battered children, child abuse cases, and possibly subsequent delinquency, drug addiction, and a host of social ills believed to be associated with neglectful parenthood."[204] Legal abortion would allow both the State and individual women to avoid the costs of illicit sex, particularly when a woman was poor or black. Rather than questioning the State's power to punish and regulate sex, abortion-rights activists presented reform as a tool for reducing the costs of sexual misconduct that segregationists had associated with unmarried African-American women.

The manual also counseled activists on how to respond to allegations that abortion would psychologically damage women, regardless of race or sex. Instead of pinpointing the harms produced by a sexual double standard, the manual presented all women as victims, traumatized by the prospect of unplanned motherhood. When activists faced questions about the mental distress produced by abortion, the response was that: "While many women are known to be hospitalized with mental illness following childbirth, such severe psychosis following abortion is virtually unknown."[205]

Significantly, many abortion-rights activists neglected the connections between race, class, sex, and reproduction brought to the surface by the illegitimacy backlash. Abortion bans had particularly affected poor and non-white women, many of whom lacked access to physician-provided care often available only to affluent white women.[206] Partly for

203. Letter from Larry Lader, Chairman of the Board, to NARAL Board Members et al. (Fall 1972) (on file with the NARAL Papers, Carton 7, Schlesinger Library, Harvard University).

204. Memorandum from NARAL on Debating the Opposition, NARAL Speaker and Debater's Manual (n.d., ca. 1972) (on file with the NARAL Papers, MC 313, Carton 7, Schlesinger Library, Harvard University) [hereinafter NARAL Debating the Opposition].

205. *Id.*

206. *See* REAGAN, *supra* note 178, at 137.

this reason, segregationists, moral crusaders, and traditionalists could present illegitimacy as a defining trait of "the Negro family" or of "a culture of poverty" afflicting lower class women.[207] As importantly, the illegitimacy backlash raised crucial questions about whether the State had any reason to stigmatize non-marital families—women who had sex outside of marriage—in the first place.[208]

To achieve incremental progress, some movement leaders largely left for another day questions about race, sex, and class. Abortion would, as the NARAL manual asserted, reduce illegitimacy rates and allow women to avoid the full social weight of the sexual double standard.[209] For the State, abortion would make the regulation of illicit sex more effective, helping to remove the price tag associated with out-of-wedlock births, welfare, and even crime and child abuse. Instead of redefining licit sex, the movement's strategy presented the State's regulatory power as vitally important.

D. Eisenstadt *and* Roe

Deference to the State's interest in policing sex also marked the litigation of *Eisenstadt v. Baird* and *Roe v. Wade*. In *Eisenstadt*, Human Rights for Women used the idea of psychological trauma in responding to claims that sexual misbehavior traumatized women.[210] The organization's amicus brief asserted that sexually repressed women suffered mental harm:

> Thwarting [sexual] expression causes deep psychic disturbance and inability to adjust to the ordinary problems of living. Women suffer emotional disturbance on a much larger scale than men.[211]

However, Human Rights for Women stopped short of demanding sexual freedom for women. The organization insisted that it was not advocating "free love."[212] The State retained the power to regulate illicit sex, but realistically, it could "not deter non-marital sexual relations" by prohibiting unmarried persons from accessing contraception.[213] As had been the case in illegitimacy litigation, progressive activists did not fully explain why the Constitution should protect sexual liberty.

The Court's decision in *Eisenstadt* similarly failed to confront the

207. On the identification of illegitimacy with race and class deviance, see, for example, REGINA G. KUNZEL, FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK 1890–1945, at 165 (1993).

208. *See supra* Part II.

209. *See* NARAL Debating the Opposition, *supra* note 204.

210. *See* Brief for Human Rights for Women, *supra* note 87, at 2.

211. *Id.*

212. *Id.*

213. *See id.* at 8.

issue of sexual liberty. Justice Brennan's majority opinion took up the issue of whether the statute at issue intended to "discourage premarital sexual intercourse."[214] However, the *Eisenstadt* Court avoided any conclusion about whether the State could constitutionally pursue this goal, holding instead that the statute could not conceivably have achieved or even been intended to accomplish such an end.[215] The Court focused on the mismatch between the government's stated means and ends rather than analyzing whether regulating sexual morality was a rational or acceptable basis for passing a law: "It would plainly be unreasonable," *Eisenstadt* reasoned, "to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as a punishment for fornication, which is a misdemeanor."[216]

The *Eisenstadt* Court struck down the Massachusetts law on Equal Protection grounds rather than Due Process grounds. Without clearly holding that the Constitution protected a right for single persons to access contraception, the Court held that the rights protected must be the same for "the married and unmarried alike."[217] Nonetheless, *Eisenstadt* presented the right at issue as involving procreation rather than sex. "If the right to privacy means anything," the Court held, "it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[218] Framed in this way, contraception enjoyed constitutional protection because of the consequences of pregnancy and childbirth. Sexual liberty had no such protection in and of itself.

The marginalization of sexuality in substantive due process jurisprudence continued in *Roe v. Wade*. *Roe* and its companion case, *Doe v. Bolton*, involved two statutes: a Texas law banning all abortions not necessary to save the life of the woman,[219] and a Georgia version of the ALI statute.[220] As we have seen, some feminist briefs illuminated the intersection of discrimination on the basis of sexual behavior, sex, and race.

More often, however, progressive amicus briefs in *Roe* presented

214. Eisenstadt v. Baird, 405 U.S. 438, 448 (1971).

215. *See id.*

216. *Id.*

217. *Id.* at 453.

218. *Id.*

219. *See* Roe v. Wade, 410 U.S. 113, 117–20 (1973).

220. *See* Doe v. Bolton, 410 U.S. 179, 182–83 (1973) ("[T]he 1968 statutes are patterned upon the [ALI]'s Model Penal Code . . . and thus makes noncriminal, an abortion . . . [when] continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; . . . [t]he fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or [t]he pregnancy resulted from forcible or statutory rape.").

abortion as a right to give and receive adequate healthcare—a right to avoid the trauma of unintended pregnancy, childbirth, and childrearing. One feminist brief all but conceded that the State could deter immoral conduct while insisting that an abortion ban would fail to do so, stating that an abortion ban not limited to "specifically criminal conduct . . . sweeps too broadly, prohibiting abortion for unwanted pregnancy occurring in marriage, or without criminal sexual conduct, as well as that resulting from an unlawful relationship."[221] As importantly, the brief insisted that denying women access to legal abortion scarred them both physically and psychologically. "Bearing and raising a child demands difficult psychological and social adjustments," the brief explained, and "[t]he mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources."[222]

The appellants' brief in *Roe* also took up the issue of trauma, refuting the claim that abortion did psychological damage to women. Indeed, in explaining why the constitutional right to privacy extended to the abortion decision, the brief contended: "The physical and psychological harm caused by the statute fully warrants a demonstration of [a] compelling justification to sustain it."[223]

Other amicus briefs echoed racially charged concerns about the psychological distress that unintended childbirth produced for women and children. Planned Parenthood emphasized the results of a study conducted in Sweden indicating that unwanted children more often received psychiatric treatment.[224] A second feminist brief described unwanted pregnancy and childbirth as a psychological wound:

> [A] woman who does not want her pregnancy suffers depression through nearly the entire pregnancy and often that depression is extremely severe. . . . [E]ven after birth [women] may go into psychotic states, and [unintended pregnancy] may result in permanent emotion[al] damage to the woman.[225]

Trauma-based claims allowed the movement to avoid addressing the issues of sex or sexuality. As Kate Millett and Betty Friedan had recognized, abortion was partly an issue of sexual liberty, allowing women to exercise sexual liberty on equal terms with men without mak-

221. Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 29, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40).

222. Supplemental Brief for the Appellants at 9, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) (citing Abele v. Markle, 342 F. Supp. 800, 801 (D. Conn. 1972)).

223. Brief for the Appellants at 114, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40).

224. *See* Brief as Amici Curiae for the Planned Parenthood Federation at 28–29, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40).

225. Brief of New Women Lawyers, *supra* note 95, at 38.

ing disproportionate economic and social sacrifices. Instead of defending such a liberty, however, mainstream movement members often presented women as victims of sex, pregnancy, and childbirth. In the context of illegitimacy and equal protection, progressive movement members had demanded constitutional protection for innocent children when the State sought to punish the sexually culpable. Similarly, in the context of abortion, abortion-rights activists demanded protection for traumatized women and children victimized by poor sexual decisions and unwanted pregnancy. While demanding decisional autonomy for women, activists did not consistently demand sexual liberty for women. Sexual immorality, in this analysis, harmed society, children, and even women themselves.

Roe adopted a similar analysis of childbirth, childrearing, and female sexuality. The Court presented abortion as both a medical procedure and a constitutionally protected privacy interest. In explaining why women had a privacy interest in abortion, the Court stressed the psychological impact unintended pregnancy and childbirth had on women:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[226]

Pregnancy signaled mental problems and "a distressful life and future."[227] Women, who the Court assumed to be caretakers, would have their mental health taxed by childcare, as well as by the impact of having unwanted children.[228] These harms followed inevitably from a woman's sexual decisions. Women became victims of their own choices, suffering on account of the "continuing stigma of unwed motherhood" and the "psychological harm" associated with unwed motherhood.[229]

Roe explicitly rejected the claim that abortion figured centrally in a broader right to sexual and reproductive freedom—a right to control

226. Roe v. Wade, 410 U.S. 113, 153 (1973).
227. *Id.*
228. *See id.*
229. *Id.*

one's own body. "[I]t is not clear to us," the Court explained, "that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions."[230] Indeed, even in terms of reproductive decisionmaking, *Roe* recognized a right to make decisions only before fetal viability and perhaps only in consultation with a physician.[231]

Doe v. Bolton similarly characterized abortion as a medical procedure that protected women from psychiatric distress. The Court stressed the appellants' claim that the reform statute harmed women insofar as it would be "physically and emotionally damaging . . . to bring a child into [a] poor, 'fatherless,' family."[232] The Justices suggested that the abortion decision belonged properly to the physician who could prevent the injuries produced by unintended pregnancy. Under *Roe*, the *Doe* Court explained, the physician's "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to . . . his best medical judgment."[233]

Roe and *Doe* did not discuss the obvious ways in which legalizing abortion advanced women's sexual liberty. With restrictive abortion laws in place, women's sexual decisions had different consequences than did those made by men. A sexual double standard helped to explain the stigma associated with unwed motherhood and the lack of state support for women doing caretaking work.

Nor did *Roe* address the relationship between race, class, and sexual pluralism. At the outset, the *Roe* majority mentioned "racial overtones"[234] in passing, and both *Roe* and *Doe* presented illegitimate births as a source of trauma for both the woman and the child.[235] By legalizing abortion, the Court made available a procedure that some feminists had identified with sexual and reproductive liberty. Just the same, in *Roe* and *Doe*, the Court avoided any explicit endorsement of a right to control one's body that covered sex as well as reproduction.[236] Indeed, in explaining why legal abortion mattered to women, the Court relied on

230. *Id.* at 154.

231. *Id.* at 163–64 ("[F]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.").

232. Doe v. Bolton, 410 U.S. 179, 190 (1973).

233. *Id.* at 192.

234. *Roe*, 410 U.S. at 116 ("One's philosophy, one's experiences, . . . and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.").

235. *Id.* at 153; *Doe*, 410 U.S. at 190–91.

236. *See supra* text accompanying note 230.

the shame associated with unwed motherhood.[237]

The omission of sex in *Eisenstadt*, *Roe*, and *Doe* limited the reach of reproductive rights jurisprudence. These cases undercut the potential of the emerging substantive due process canon, grounding it firmly in traditionally privileged relationships. By disconnecting sex and reproduction, both decisions had revolutionary implications for sexual as well as reproductive liberty. However, *Roe*, *Doe*, and *Eisenstadt* obscured the relevance of sexuality and denied the existence of a right to control one's own body. The Court crafted a narrow jurisprudence protecting only reproduction, not all of the choices leading to it. As importantly, by neglecting the issue of sexual liberty, the Court's opinions left intact a far-reaching state power to regulate illicit sex.

Partly for this reason, *Roe*, *Doe*, and *Eisenstadt* set the stage for later opinions carving out a powerful state interest in protecting fetal life and arbitrating the moral behavior of those inclined to end it. *Roe* describes the devastating stigma attached to sexual dissent or unwanted pregnancy without criticizing this stigma or spotlighting the State's role in creating it. The Court's substantive due process decisions do little to challenge the State's broader power to map the boundaries of licit sex. If the State can legitimately serve as an arbiter of moral behavior, why is the government unable to aggressively push its own moral vision of the fetus?

Furthermore, by justifying abortion rights as a cure for psychiatric distress, *Roe* and *Doe* left reproductive rights vulnerable to later attack. If opponents could convincingly argue that abortion caused, rather than averted trauma, the rationale for abortion rights would lose a great deal of force.

In later years, abortion opponents exploited claims of psychiatric harm in chipping away at abortion rights. As we have seen, since the 1960s, some activists claimed that abortion produced trauma and regret. In the late 1980s and early 1990s, abortion opponents began putting such statements to effective political use.[238] In 1993, the Elliott Institute, an

237. *See, e.g.*, *Roe*, 410 U.S. at 153 ("[T]he additional difficulties and continuing stigma of unwed motherhood may be involved.").

238. *See, e.g.*, Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Regulations Under* Casey*/*Carhart, 117 YALE L.J. 1694, 1713–18 (2008). The Supreme Court highlighted this "phenomenon" of trauma in its 2007 decision affirming the constitutionality of a Nebraska prohibition of a specific form of abortion. *See* Gonzales v. Carhart, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. While we find *no reliable data* to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.") (emphasis added). Notably, the Court provided no authority, aside from its own opinion, to support this proposition.

organization operated by abortion opponent David Reardon, identified the potential influence of trauma claims: "The[ ] people have hardened their hearts to the 'fetus.' . . . Therefore the only way to reach them is for us, too, to focus on the woman."[239] In particular, Reardon argued that the movement could reach parents by "giv[ing] them facts about the destructive impact of abortion on teenage girls."[240] Reardon described the "many victories" such a strategy would confer.[241] It would "decrease abortions," "increase the malpractice liability of abortionists," and decrease public support for abortion.[242] "If abortion doesn't help women," Reardon argued, "it doesn't make sense."[243]

Beginning in the mid-1990s, abortion opponents used trauma arguments to promote successful informed-consent restrictions, to bring medical malpractice suits against abortion providers, and to discourage women from pursuing abortion.[244] Organizations like Life Dynamics waited outside of abortion clinics to distribute pamphlets to women explaining their right to sue: "If you are physically or emotionally injured during an abortion, you always retain your constitutional right to seek compensation in a court of law."[245]

Beginning in 1992, with the decision of *Planned Parenthood v. Casey*, the Supreme Court also advanced trauma as a justification for abortion restrictions.[246] *Casey* upheld a Pennsylvania informed-consent restriction, using the idea of trauma in justifying the regulation.[247] The law at issue required providers to notify women of the availability of child support, of the health risks associated with abortion and childbirth,

239. THE ELLIOT INSTITUTE, POST-ABORTION TRAUMA: LEARNING THE TRUTH, TELLING THE TRUTH (1992) (on file with the Feminist Women's Health Center Papers, Bingham Library, Duke University).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* For further discussion of Reardon's strategy, see, for example, *After Abortion: Steps Toward Healing*, ELLIOT INST. (1998) (on file with the Feminist Women's Health Center Papers, Bingham Library, Duke University), *available at* http://afterabortion.org/1999/after-an-abortion-steps-toward-healing/; David C. Reardon, *G.O.P. Abortion Plank Needs New Emphasis on Compassion*, ELLIOT INST. (June 24, 1996) (on file with the Feminist Women's Health Center Papers, Bingham Library, Duke University), *available at* http://afterabortion.org/1999/the-gop-and-abortion-a-better-strategy-for-being-both-pro-life-and-pro-woman/.

244. *See, e.g.*, Elliott Institute Pamphlet (n.d., ca. 1998) (on file with the Feminist Women's Health Center Papers, Bingham Library, Duke University). For more on Life Dynamics' campaign, see JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES 169 (2000); CAROL MASON, KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS 48–55 (2002).

245. Elliott Institute Pamphlet, *supra* note 244.

246. *See* 505 U.S. 833, 882 (1992) (plurality opinion).

247. *See id.* at 882.

and of the probable gestational age of the unborn child.[248] Overruling earlier precedents governing informed consent, the Court described such regulations as legitimate, health-based regulations.[249] The *Casey* majority emphasized that "psychological well-being is a facet of health."[250] Abortion restrictions could protect a woman's mental health:

> [M]ost women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.[251]

Roe and *Doe* had made a woman's mental distress a central constitutional concern. *Casey* simply reformulated it. *Roe* had presented women as mentally fragile. *Casey* cited this fragility as a justification for informed-consent regulations. Whereas *Roe* used psychological distress in explaining women's need for fertility control, *Casey* made the same kind of trauma a justification for state interference with women's decisions.

The latest manifestation of trauma arguments came with the Supreme Court's 2007 decision in *Gonzales v. Carhart*.[252] *Carhart* upheld the federal Partial-Birth Abortion Act of 2003 ("PBAA"), drawing heavily on pathology-based rhetoric in justifying its decision.[253] *Carhart* applied *Casey*'s undue-burden framework, asking whether the PBAA had the purpose or effect of placing a substantial obstacle in the path of a woman choosing abortion.[254] In analyzing the purpose of the PBAA, the majority drew on trauma-based claims forged in the 1960s. As *Carhart* reasoned, it was "unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained."[255] As abortion opponents had long argued, regret resulted from the breaking of "the bond of love the mother has for her

248. *Id.* at 881.

249. *See id.* at 882–86.

250. *Id.* at 882; *cf. id.* at 916 (Stevens, J., concurring in part and dissenting in part) ("The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. . . . Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best.").

251. *Id.*

252. 550 U.S. 124 (2007).

253. *See id.* at 151–67.

254. *See id.* at 160.

255. *Id.* at 159.

child."[256] A pregnant woman, according to *Carhart*, had to navigate a difficult psychological course. The decision to abort or remain pregnant was "fraught with emotional consequence."[257] Abortion could produce "[s]evere depression and loss of esteem."[258]

Carhart certainly reflects the particular strand of woman-protective antiabortion argument crafted by the pro-life movement in the late 1990s. However, the psychosocial portrayal of pregnant women goes back much further, not just to antiabortion advocacy but also to the abortion-rights movement's portrayal of pregnant women in the 1960s. Since that time, the movement has presented women as both mentally fragile and autonomous enough to make major decisions regarding their reproductive future. In abortion-rights advocacy, these images of women have uneasily coexisted.

Other studies explore the origins and limits of the Court's foundational jurisprudence on reproduction and sexuality. However, this Article covers new ground in documenting how progressive movements exploited discomfort with illicit sex in the effort to secure reforms. In illegitimacy, abortion, and contraception cases, members of groups like the ACLU, NAACP, NARAL, and NOW deferred to the State's authority to deter illicit sex. Indeed, the harms produced by sexual "misbehavior" served as an argument for reforms to existing regulations of morals. Part V next considers the normative implications of this history.

V. The Sex Gap

For tactical reasons, progressives have used public discomfort with illicit sex as a means to reform laws on illegitimacy and reproduction. In some ways, this strategy proved effective, presenting radical changes to morals regulations as modest and palatable, positioning new doctrine as part of an existing tradition that privileged the traditional family.

Nonetheless, there were substantial costs tied to the strategy pursued by groups like the ACLU, NAACP, and NARAL. By conceding the State's power to regulate illicit sex, activists helped to produce a limited and contradictory set of constitutional protections. Illegitimacy protections did not require entirely equal treatment of children born outside of wedlock. Moreover, states could discriminate on the basis of illegitimacy by passing laws apparently targeting parents rather than children. Jurisprudence on contraception and abortion had similar limits. By presenting abortion rights as necessary to avoid trauma, the Court's

256. *Id.*
257. *Id.*
258. *Id.*

substantive due process cases opened the door to later efforts to restrict abortion rights on similar grounds.

The history presented here has two important implications for contemporary scholarship. First, the Article offers important perspective on the origins of the domesticated liberty protected by the *Lawrence* Court and advocated by gay rights activists. In 2003, in the wake of marriage equality victories in several state supreme courts, the *Lawrence* Court struck down laws banning same-sex sodomy.[259] *Lawrence* represented the clearest expression to date of a right to enter into committed, intimate relationships.[260]

Indeed, Ariela Dubler presents *Lawrence* as the "final repudiation" of a legal logic that made marriage the defining feature of licit sex.[261] As Dubler explains, in *Lawrence*, "[t]he Court moved a sexual relationship from the genus of illicit sex into the genus of licit sex noting precisely that the relationship made no claim to marriage."[262] As Dubler reasons, *Lawrence* affords protection to sex for those who were not married and could not legally change that fact.

Just the same, *Lawrence* made clear that the interest protected by the Constitution did not involve mere intimacy. While the State could no longer criminalize certain sex acts, the Supreme Court did not recognize a right to choose those sex acts. Instead, under *Lawrence*, intimate conduct deserved protection because it often led to or took place within a committed relationship, and that relationship resembled marriage.[263] The Court viewed sodomy bans as unconstitutional because of their impact on committed relationships, not because individuals' choice to engage in sodomy is protected. "When sexuality finds overt expression in intimate conduct with another person," *Lawrence* concluded, "the conduct can be but one element in a personal bond that is more enduring."[264]

Scholars offer a variety of explanations for the elevation of what Katherine Franke calls "domesticated liberty."[265] Dale Carpenter and Marc Spindelman trace the litigation strategies that helped to produce this outcome.[266] This Article offers new insight by showing that *Lawrence*'s domesticated liberty reflected a longer-standing constitutional tradition. *Lawrence* was a logical extension of the sex gap in the

259. Lawrence v. Texas, 539 U.S. 558, 567 (2003) (finding that the statutes sought to control personal relationships that are grounded in the liberty of persons).

260. *See id.*

261. Dubler, *supra* note 15, at 807.

262. *Id.* at 812.

263. *See id.* at 807; *see also Lawrence*, 539 U.S. at 567.

264. *Id.* at 567.

265. *See generally* Franke, *Domesticated Liberty*, *supra* note 1.

266. *See generally* CARPENTER, *supra* note 19; Spindelman, *supra* note 7.

Supreme Court's foundational equal protection and substantive due process decisions. Marriage equality advocates face the constraints forged in earlier struggles to challenge the sexual status quo.

The Article also illuminates the unintended consequences of efforts, like those made by progressives in the 1960s and 1970s, to seek incremental social change through the courts. Other studies have illustrated the consequences for social movements of moving too fast, particularly in the courts.[267] If the public does not support a particular form of social change, the courts will not likely endorse it, and even favorable court decisions can trigger a backlash. As the Article shows, however, incremental strategies come with costs of their own. By conceding the State's power to regulate illicit sex, activists and attorneys working with groups like NARAL or the NAACP strengthened an existing hierarchy of intimate relationships.

Incremental litigation may also require cause attorneys to challenge only one part of a broader legal regime, lowering the stakes of any subsequent judicial decision.[268] In the process, cause lawyers often stress what they are not asking the courts to do, reaffirming certain aspects of the legal, political, and social status quo. Courts are often reluctant to outpace social change dramatically, and setting realistic goals may increase a movement's success.[269] Inadvertently, however, a movement may help to legitimate existing social arrangements. By conceding the State's power to privilege marriage and punish illicit sex, as the Article shows, progressive activists entrenched state control over sex and sexuality.

The Article also offers important lessons for the marriage equality movement. Scholarship on the subject has been strongly polarized.

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267. Some of the most prominent arguments about backlash concern *Roe* itself. *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005) ("*Roe* essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don't bother going to state legislatures to reverse that decision."); Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1751 (1997) (describing the "conventional understanding of *Roe v. Wade*" as being "that, far from reconciling abortion opponents to a woman's fundamental right to terminate her pregnancy, the decision actually spawned a right-to-life opposition which did not previously exist").

268. Indeed, William Eskridge has argued that the courts should use judicial decisions to lower the stakes of ordinary politics. *See, e.g.*, Eskridge, Jr., *supra* note 267, at 1294.

269. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (using the history of race-discrimination cases to argue that judges inevitably reflect popular opinion); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 4 (2006) (arguing that courts reflect the views of popular majorities); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1284 (2004) (stating that the idea of separating law from politics "may not even be coherent").

Some defend the exclusivity and limits of existing marriage law,[270] while others promote its expansion to include gay and lesbian couples.[271] Still others point out the dangers of a strategy that extends state control over intimate relationships and reinforces the privileges attached to what had been a sexist and heteronormative institution.[272]

This Article uses the history of struggles for sexual pluralism as a new entry point in this debate, since there are several parallels between progressive responses to the illegitimacy backlash and contemporary marriage equality advocacy. First, in both cases, progressives demanded change by distinguishing their preferred reforms from more transgressive forms of sex. Writing for the dissent in *Lawrence*, Justice Scalia has suggested that the 2003 decision would lead to the legalization of adultery, fornication, and polygamy, among other things.[273] Opponents of marriage equality have long made similar claims.[274]

In response, some proponents of gay rights do not ask whether there would be anything wrong with legalizing any of the sexual practices Scalia set forth—sometimes even describing these intimate relationships as "deviant" or "sick."[275] On some occasions, movement members have instead conceded the State's power to regulate illicit sex while insisting on relevant differences between sodomy and marriage equality on the one hand and less favored forms of sex on the other. For example, in 2007, activist Arlene Isaacson argued: "Our opponents use every negative and false stereotype about gay people—you'll end up

270. *See, e.g.*, Lynn D. Wardle, *'Multiply and Replenish': Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001).

271. *See supra* note 3 and accompanying text.

272. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 230–33 (1995) (arguing that child-parent and other dependency relationships should be the subject of state recognition); POLIKOFF, *supra* note 1 (arguing for alternatives to marriage to determine when legally enforceable responsibilities and entitlements have accrued in interpersonal relationships); ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 205–11 (2007) (advocating universal civil unions); Alice Ristoph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010) (developing a theory of disestablishment, analogous to religious disestablishment, of the family whereby the government would cease to prefer some family forms over others); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 191, 229 (2007).

273. *See* Lawrence v. Texas, 539 U.S. 558, 599 (Scalia, J., dissenting).

274. *See, e.g.*, Robert Knight, *Marriage Ruling Is Only a Ban on Truth*, WASH. TIMES, Aug. 12, 2010, at B1; Jeffrey T. Kuhner, *Obama's Homosexual America*, WASH. TIMES (Feb. 24, 2011), http://www.washingtontimes.com/news/2011/feb/24/obamas-homosexual-america/.

275. *See, e.g.*, Shawn Lang, *My Partner and I Work for a Better World. I Love My Son and My Family. So, Why Don't You Want to Let Me Get Married?*, HARTFORD COURANT, May 2, 2004, at 5, *available at* http://articles.courant.com/2004-05-02/news/0405020055_1_gay-issues-lesbian-gay-civil-rights; *see also* Robert L. Pela, *Marry Me a Little*, PHOENIX NEW TIMES (Apr. 29, 2004), http://www.phoenixnewtimes.com/2004-04-29/culture/marry-me-a-little/full/; Tovia Smith, *Looming Legal Fight Clouds Gay Marriage Milestone*, NAT'L PUB. RADIO (May 17, 2007), http://www.npr.org/templates/story/story.php?storyId=10221380.

with . . . polygamy . . . . It's a red herring. It's nonsense . . . ."[276] Jonathan Rauch, a proponent of marriage equality, similarly explained: "[T]he truth is that this isn't Pandora's Box, it's the lock on the box. Because gay marriage is the opposite of polygamy; it says that the principle of monogamy should be universalized."[277]

As many commentators have noted, arguments about illicit sex have been a part of both anti-civil rights, antiabortion, and anti-marriage advocacy. As this Article makes clear, however, the response offered by those seeking social change has, at times, been dismayingly consistent: a reaffirmation of the harms created by illicit sex and an effort to differentiate the reform at hand from other forms of intimate conduct. This Article has used the history of the sex gap as a lens through which to view the dangers of such a strategy. Sacrificing sexual freedom to obtain other rights limits the protections those rights provide and strengthens the disciplinary power of the State.

Similarly, in the context of adoption and parental rights cases, gay rights advocates have also leveraged belief in the superiority of marriage to secure an advantage. Consider as an example *Gartner v. Department of Public Health*, an Iowa case addressing whether both members of a married lesbian couple should be listed on a birth certificate.[278] The litigation in *Gartner* began when the Iowa Department of Public Health refused to put both spouses' names on their child's birth certificate, citing language requiring the listing of a child's "father."[279]

In some ways, *Gartner* was a straightforward case. In 2009, the Iowa Supreme Court had recognized marriage equality,[280] and *Gartner* simply clarified that married gay and lesbian couples had the same rights as married straight couples.[281] In explaining the importance of the couple's rights, Lambda Legal, the organization that brought the case, exploited the social stigma attached to non-marital children. The "refusal to acknowledge that children of same-sex spouses have two parents at birth," the brief argues, "serves only to punish children of same-sex

276. Smith, *supra* note 275.

277. Pela, *supra* note 275. Recently, those in polyamorous relationships have had some success in federal court, although no case recognizes access to plural marriage. *See, e.g.*, Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013) (finding "the cohabitation prong of the Statute unconstitutional," but adopting a narrow construction of it, "thus allowing the Statute to remain in force as prohibiting bigamy in the literal sense").

278. For the Iowa Supreme Court's decision, see 830 N.W.2d 335 (Iowa 2013).

279. *See id.* at 341–42.

280. *See* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

281. *See Gartner*, 830 N.W.2d at 354 ("We find the presumption of parentage statute violates equal protection under the Iowa Constitution as applied to married lesbian couples.").

couples . . . and to stigmatize them as less worthy."[282] The brief described the discrimination confronted by non-marital families and their children without questioning its origin.[283]

In *United States v. Windsor*,[284] one of the most recent marriage equality cases to come before the Supreme Court, some supporters of marriage equality challenging the federal Defense of Marriage Act ("DOMA") again insisted that denying access to fully equal marriage "hurts children . . . by sending the message that their families are inferior."[285] Another amicus curiae brief picked up on claims used in *Levy* that "the government may not punish children . . . based on moral disapproval of the parents' relationship, or in an effort to regulate the parents' conduct."[286] According to this logic, children whose parents could not marry or enjoy all of the legal benefits associated with marriage necessarily understood their parents' relationship to be inferior.[287]

Borrowing from this reasoning, a Supreme Court majority struck down DOMA, again using the stigma surrounding illegitimate children (and presumably illicit sex) in expanding access to marriage. Justice Kennedy's majority criticized DOMA for "humiliat[ing] tens of thousands of children now being raised by same-sex couples."[288] Unless their parents had access to fully equal marriage, children of same-sex couples would suffer the same kind of trauma described by the NAACP and ACLU in *Levy*. As Kennedy explained, "[t]he law in question makes it even more difficult for the children to understand the integrity and closeness of their own family."[289]

As progressive movements had in the 1960s and 1970s, proponents of marriage equality have helped to forge new rights. In so doing, how-

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282. Proof Brief of Petitioners-Appellees and Request for Oral Argument at 18, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (2013) (No. 12-0243).

283. *See, e.g.*, *id.* at 44–52.

284. 133 S. Ct. 2675 (2013).

285. Brief of Amici Curiae Family and Child Welfare Law Professors Addressing the Merits and in Support of Respondents at 35–36, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

286. Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondent Edith Windsor Addressing the Merits and Supporting Affirmance at 3, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (citing Levy v. Louisiana, 391 U.S. 68, 72 (1968)). For discussion on *Levy*, see *supra* Part III.C.

287. *See id.* at 5 ("DOMA also stigmatizes and physiologically harms all children of same-sex couples by declaring their families inferior to those headed by opposite-sex couples."); *see also* Brief of Amici Curiae American Anthropological Ass'n in Support of Respondents and Affirmance, Addressing California Proposition 8's Stigmatizing Effects at 6, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144) (arguing that "the substantial social and psychological effects of this stigmatization are borne not only by same-sex couples and individuals, but by their children as well").

288. *Windsor*, 133 S. Ct. at 2694.

289. *Id.* at 2694.

ever, advocates have sometimes reinforced the privileged position of the traditional family, the State's authority to discipline sexuality, and the traumatic consequences of illicit sex. In defending the rights of married gay and lesbian parents, activists highlight the unique benefits for children born in a marital family. Demands for marriage equality also often make clear what the gay rights movement is not asking for—including the reform of laws on other forms of intimacy. Indeed, the movement often emphasizes the ways in which marriage is better than disfavored sexual relationships. Finally, in defending the parental rights of married couples, the movement uses trauma to children in demanding legal change.

If the gay rights movement inadvertently reinforces an intimate hierarchy, racial minorities and the poor again stand to lose the most. As June Carbone has shown, marriage has increasingly become a refuge for relatively well-to-do and mostly white couples.[290] There are reasons to be skeptical of any strategy that expands the sexual autonomy of some by reinforcing the inferiority of others. Grounds for concern become more obvious when marital-status discrimination intersects with race and class.

The history of the sex gap teaches that protections that emerge in this way are necessarily limited. As Robin Lenhardt has argued, marriage equality often appears contingent on the ability of gay and lesbian couples to present themselves as good stewards of traditional marriage.[291] Access to marriage without acceptance of the underlying sexual choices made by gays and lesbians may well lead to a narrow and unpredictable set of protections, just as has been the case with abortion rights and illegitimacy protections. An equality that must be earned in spite of alternative intimate decisions is fragile indeed.

VI. Conclusion

The emergence of the sex gap in the 1960s and 1970s reveals that the struggle for sexual liberty is inextricably linked to concerns about equal treatment. Progressives have long gestured toward the harms produced by illicit sex in an effort to secure broader legal protections. These strategies have left less and less space for sex and sexuality outside the control of the State.

The history of the sex gap offers a glimpse into the dangers facing

290. *See* June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 Hofstra L. Rev. 859, 861 (2011) (detailing the "emergence of marriage as a marker of class").

291. *See* R.A. Lenhardt, *Integrating Equal Marriage*, 81 Fordham L. Rev. 761, 761–62 (2012).

the modern marriage equality movement. If we are to make marriage a more egalitarian institution, we must clearly understand its relationship to sexual liberty. This Article has suggested that proceeding too cautiously in remaking our intimate order has tradeoffs of its own. By demanding too little, activists risk creating obstacles to the cause they have endorsed.