THE LAW OF LEGITIMACY: AN INSTRUMENT OF PROCREATIVE POWER

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I. INTRODUCTION

The purpose of this Article is to explore how inheritance law, through its reliance on the laws regarding legitimacy, affects the construction of sexuality and procreative power[1] in our society. The crucial importance of female monogamy in a private property regime is well-recognized.[2] It is the only means by which a man can assure himself that his wealth will be inherited by his offspring. The enforcement of female monogamy by men enhances a man's procreative power because it provides the basis for his claim of paternity.[3]

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[1] As used in this Article, the term procreative power refers to the construction of human reproduction through biology, law and other cultural norms and values.

[2] See Frederich Engels, 22 Works of Marxism-Leninism, The Origin of the Family, Private Property and the State 119–43 (Marxist Libr. ed., 1942); Catharine A. MacKinnon, Toward a Feminist Theory of the State 29–30 (1989).

[3] See Adrienne Rich, Of Woman Born: Motherhood as Experience and Institution 119 (10th Ann. ed. 1986). Enforcement of female monogamy, i.e., ensuring that a woman has only one male partner for life, or at least at any one time, takes many forms and operates in complex and interlocking ways across abilities, class and race/ethnicity. Cultural norms that prize female virginity and motherhood, romanticize marriage and assail women in prostitution are some of the means by which society polices women's sexuality and men control women's sexuality for the purpose of reinforcing hierarchical differences based on abilities, class, gender, race/ethnicity and sexual orientation. Although the cultural norms may be shared across a broad range of the society, that does not mean that they do not reflect the interests of those persons in dominant positions within the society. Evidence of the domination is found in the answer to the question: For whose benefit do the cultural norms operate?

Economic discrimination in the public workplace, along with the sexual harassment women are forced to endure in that workplace, is another way that female monogamy is enforced. Workplace discrimination effectively encourages women to marry and to stay married because marriage appears to be the means by which women are able to

This Article extends this analysis by considering the particular manner by which the law implements the legitimacy/illegitimacy dichotomy. It first investigates the common law presumption that a child born to a married woman is the child of her husband and the evidentiary rule that prevents either the husband or the wife from providing testimonial evidence to rebut the presumption. This Article then examines the Uniform Parentage Act (UPA), which codifies the presumption and retains vestiges of the evidentiary rule. These investigations consider the differential impact these laws have had on both African-American and white women and men.

It is my thesis that the marital presumption, the evidentiary rule, and the UPA all transfer procreative power to white men while simultaneously minimizing and denying the procreative power of African-American women and, in different ways, of white women. Demonstrating how the law of legitimacy and its traditional justifications may appear benign, but in fact take on a virulent cast when analyzed in terms of gender and racial hierarchies, may seem like a modest task. However, its importance lies in its promise of undermining these hierarchies by exposing the means by which they are enforced and reinforced.[4]

Exposing how the law creates and reflects the view of African-American families as deviant, of African-American women as bad mothers and of white women as untrustworthy seductresses is a crucial first step in extricating those stereotypes from our legal and cultural consciousness. Moreover, understanding that the legal tradition magnifies white fatherhood while it undermines motherhood for both African-American and white women will help us articulate and discern the crosscurrents of thoughts surrounding women's sexuality.

Part II of this Article first describes the eighteenth-century development of the common law marital presumption and the related evidentiary rule and

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obtain some measure of physical and economic security. For further elaboration of cultural norms and their connection to male control of women and women's sexuality, see Andrea Dworkin, Women in the Public Domain: Sexual Harassment and Date Rape, in Sexual Harassment: Women Speak Out 1, 1–5 (Amber Coverdale Sumrall & Dena Taylor eds., 1992); Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 47–49 (1985).

[4] Linda Gordon urges us to pursue this task when, in a discussion of reproductive freedom, she says:

> We must begin by rejecting the myth of a prehistorical epoch of sexual freedom. In every known human society sexual activity has been controlled and limited; since we do not know human life outside of society, we do not know human life without some degree of sexual repression. In considering the reproduction issue, we must look at the historical *forms* of sexual repression.

Linda Gordon, The Struggle for Reproductive Freedom: Three Stages of Feminism, in Capitalist Patriarchy and the Case for Socialist Feminism 107, 108 (Zillah R. Eisenstein ed., 1979).

explores how they both were, and continue to be, justified as serving the welfare of the child. It then demonstrates how the nineteenth-century courts allowed the marital presumption to be rebutted in a manner that reinforced race boundaries and white supremacy. It further demonstrates how other laws in the eighteenth and nineteenth centuries might have operated to keep the presumption and rule from being used to strengthen the ties between African-American children and their parents. Finally, it shows how the marital presumption and the evidentiary rule might have allowed a white man to avoid his paternal responsibilities when the mother of his child was a married African-American woman. This discussion reveals that the consequences of the marital presumption and the evidentiary rule were greatly affected by slavery and anti-miscegenation laws. Although the correspondence between slavery and African Americans was not exact, whites primarily built the institution of slavery by enslaving African Americans.[5] It is also true that prohibitions of marriage between races were not always limited to marriages between African Americans and whites, but the primary purpose of these statutes was to assert white supremacy over African Americans.[6] Therefore, the legitimacy/illegitimacy dichotomy has particular relevance to African Americans and whites and they are the exclusive focus of my analysis.

Part III of the Article examines how the marital presumption and the related evidentiary rule operated during the nineteenth and early twentieth centuries with respect to white children in the United States. It shows how the presumption and rule reinforced the traditional western view that wives of white men should be under the control of their husbands and how both contributed to the construction of white women as untrustworthy with minimal procreative power.

Part IV of the Article examines the UPA, which was promulgated in 1973 and has since been adopted by one-third of the states.[7] It first describes the UPA's codification of the marital presumption and explores how the UPA's design also has been justified as serving the welfare of the child. It then explains how the UPA plays upon stereotypical conceptions of the African-American family and of African-American women and how that perspective contributes to a statutory scheme regarding the marital

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[5] See A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia, 77 Geo. L.J. 1967, 1970–75 (1989); see also Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709, 1717 (1993) ("The dominant paradigm of social relations, however, was that, although not all Africans were slaves, virtually all slaves were not white.").

[6] See Paul A. Lombardo, Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia, 21 U.C. Davis L. Rev. 421, 432 (1988).

[7] See Unif. Parentage Act, 9B U.L.A. 287 (1973).

presumption that may fail to meet the needs of African-American children.[8] Finally, it shows how the UPA, most apparently through its statute of limitations, contains vestiges of the evidentiary rule and thereby continues the common law tradition of using the law to confer fatherhood upon white men.

II. THE MARITAL PRESUMPTION, THE LORD MANSFIELD RULE AND THE AFRICAN-AMERICAN CHILD

A fundamental issue in inheritance law is who is a legal heir of a married man.[9] Suits to determine "heirship" frequently depend on identification of the decedent's, or an ancestor of the decedent's, legal issue; the law of legitimacy plays a crucial role in this process.[10] The issue of paternity also was, and remains, important for the purpose of imposing child support obligations.[11] A finding that a child is the legal heir of a married man means that the man is legally responsible for the child's support during minority.

The common law established the presumption that a child born to the wife of a married man was his child unless evidence showed that he had not had access to his wife throughout the relevant period of gestation or that he was sterile or impotent.[12] Supporting the marital presumption was Lord Mansfield's rule of evidence stated in dicta in the 1777 case of *Goodright v. Moss*.[13] Lord Mansfield stated that, although others could testify, the

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[8] The legislative history of contemporary law reflected in the UPA, which focused exclusively on African Americans and whites, see infra note 80 and accompanying text, provides a supplemental reason for limiting my study of legitimacy to African Americans and whites.

[9] See Gordon, supra note 4, at 109 (connecting the emergence of the agricultural economy, the accumulation of private property and inheritance law to the suppression of birth control as the means by which men enforced monogamy of women to assure men that a child of a married woman was the biological child of her husband).

[10] From the sixteenth century in England, the determination of legitimacy not only affected inheritance rights but also determined access to trade guilds and the like. See 1 Ivy Pinchbeck & Margaret Hewitt, Children in English Society: From Tudor Times to the Eighteenth Century 202 (1969).

[11] These suits could be brought on behalf of the child or on behalf of the state seeking to recover welfare payments. Although the proceedings for these suits have changed dramatically between the eighteenth century and the twentieth century, the purpose of the suits remains the same — to determine paternity for the purpose of imposing support obligations.

[12] See The King v. Luffe, 103 Eng. Rep. 316 (K.B. 1807).

[13] 98 Eng. Rep. 1257 (K.B. 1777). *Goodright* was an ejectment action. The basis of the plaintiff's claim was that the lessor of the plaintiff was the cousin and heir at law of the woman who had died seized of the premises. The only question before the court

declarations by the husband or wife regarding lack of access should not be admitted.[14] The evidentiary rule stated by Lord Mansfield was widely adopted in the United States in the eighteenth and nineteenth centuries.[15]

The marital presumption and the evidentiary rule currently are understood to have served the welfare of the child at the expense of a husband who was married to an adulteress. For example, a leading hornbook on wills and trusts justifies the presumption and the rule by focusing on the welfare of the child as follows:

> If a married woman gave birth to a child, her husband was held to be the child's father despite any evidence to the contrary. When a husband went abroad for three years and returned to find his wife with a month-old daughter, the law deemed the daughter to be the husband's child because "the privity between a man and his wife cannot be known." This presumption of paternity by the mother's husband served to legitimate many children who were the fruit of adultery, but avoided difficult problems of proof.[16]

Concern for the welfare of the child obviously played some role in the English development of the presumption and the evidentiary rule. As Lord Mansfield wrote in *Goodright*:

> It is a rule, founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious; *more especially the mother, who is the offending party.*[17]

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was whether the lessor of the plaintiff was the legitimate son of a married couple and qualified as heir of the deceased.

[14] Id. at 1258.

[15] See 7 John Henry Wigmore, Evidence in Trials at Common Law § 2063 (James H. Chadbourn rev., 1978); Richard R. Burgee, Comment, The "Lord Mansfield Rule" and the Presumption of Legitimacy, 16 Md. L. Rev. 336, 337 (1956). Several states abandoned the Lord Mansfield Rule in the early twentieth century. See, e.g., Evans v. State, 75 N.E. 651 (Ind. 1905).

The Rule was abrogated in England, by statute, in 1949. Law Reform (Miscellaneous Provisions) Act, 1949, 12, 13 & 14 Geo. 6, ch. 100, § 7, repealed by Matrimonial Causes Act, 1950, 14 Geo. 6, ch. 25, § 32.

Today, the UPA and other similar statutes continue to use the presumption and include other procedures that reflect vestiges of the Lord Mansfield Rule. See infra notes 77–79, 82, 106–122 and accompanying text.

[16] William M. McGovern, Jr. et al., Wills, Trusts, and Estates Including Taxation and Future Interests 34–35 (1988) (footnote omitted).

[17] 98 Eng. Rep. at 1258 (emphasis added).

The "best interests of the child" doctrine was not yet developed at the time Lord Mansfield wrote his opinion in *Goodright*. Yet, it is interesting to note Lord Mansfield's ruling in The King v. Delaval, 97 Eng. Rep. 913 (K.B. 1763), which was a dispute over the custody of a seduced eighteen-year-old female apprentice. He ruled

The remaining portion of part II and part IIIA investigates the justification of the presumption and the rule as serving the welfare of the child. Whatever validity there might be to the claim that the presumption and the rule reflected concern for the welfare of the child, this claim surely was never intended to have included the welfare of an African-American child.

A. Maintaining Racial Boundaries

If a child who had African-American features was born to a woman who was believed to be of the white race and whose husband was also believed to be of the white race, the nineteenth-century courts refused to apply the marital presumption. The courts held that the presumption could be rebutted by "evidence which clearly and conclusively shows that the procreation by the husband was impossible; and that, . . . according to the course of nature, the husband could not be the father of the child . . . ."[18] They found repugnant the notion that the presumption inherited from the common law could be used to legitimate an African-American child and make her or him the child of a white father. As the court in *Watkins v. Carlton*[19] reasoned:

> The *essence* of the rule is, that if it be *impossible* that the husband can be the father, the child is a bastard. The cases of the husband being beyond sea, imprisoned, impotent, and the

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that a writ of habeas corpus bound the courts "ex debito justitiae, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." Id. at 914. This decision was relied upon in the early nineteenth century when judges exercised their discretionary power to settle custody disputes by looking to the child's welfare. See Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 209–10, 237–43 (1985).

[18] Bullock v. Knox, 11 So. 339, 340 (Ala. 1891); accord, e.g., Watkins v. Carlton, 37 Va. 560 (1840); see also Wright v. Hicks, 12 Ga. 155 (1852) (dictum); Cross v. Cross, 3 Paige Ch. 139 (N.Y. Ch. 1832) (dictum).

In particular, several California decisions set forth, in dicta, a "racial difference exception" to the marital presumption. See In re Walker's Estate, 180 Cal. 478, 491 (1919); In re McNamara's Estate, 181 Cal. 82, 96 (1919); see also John J.O. Bois, Sr., Comment, California's Conclusive Presumption of Legitimacy — Its Legal Effect and Its Questionable Constitutionality, 35 S. Cal. L. Rev. 437, 446–48 (1962). This "racial difference exception" has since been repudiated. See Hess v. Whitsitt, 257 Cal. App. 2d 552, 555 (1967) (holding that the dicta in *Walker* and *McNamara* were not sound law); County of San Diego v. Brown, 80 Cal. App. 3d 297, 302 (1978) (upholding the statutory presumption of paternity despite an African-American husband's claim that it was "racially impossible" for him to have fathered his white wife's child).

[19] 37 Va. (10 Leigh) 560 (1840).

> like, are but instances of the application of the rule. . . . How, then, if the impossibility rests upon the laws of nature itself? Shall it be less regarded? Shall the *white* child of a *white* couple be bastardized, upon questionable proof that the husband was rendered impotent by disease; and shall we legitimate a *negro* because he was born in wedlock?[20]

The implications of these holdings go beyond demonstrating that the welfare of African-American children was not at stake when the marital presumption and the accompanying evidentiary rule were applied in the United States. A study of the laws of racial purity and interracial sex in pre-Civil War Virginia by Judge A. Leon Higginbotham, Jr. and Barbara K. Kopytoff provides critical background for appreciating the racial meanings of these holdings.[21] First, the holdings must be understood as part of an effort by the courts and the legislatures to "maintain the purity of the white race and to preserve it from visible 'darkening.'"[22] Application of the presumption would mean that a child with African-American features would gain the status of being white. That result would provide corporeal evidence against the idea of "white racial purity." Thus, allowing the presumption to be rebutted based on physical appearance served to assist the law in maintaining racial boundaries.[23]

Second, these holdings provide evidence that the law had little concern about preserving the African-American race from "lightening."[24] The finding in these cases that a child born to a white woman and an African-American man was illegitimate was implicitly a finding that the child was African American. The courts' lack of concern about the fact that a child's mother was white and that this meant that an African American had white blood indicates that racial purity was uni-directional — racial purity of the

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[20] Id. at 575 (emphasis added).

[21] See Higginbotham & Kopytoff, supra note 5.

[22] See id. at 1983.

[23] See id. at 1985; see also Marilyn Frye, White Woman Feminist 1983–1992, in Willful Virgin 147, 149–51 (1992) (describing how race has been socially constructed on behalf of whites and how it has been constructed as inescapable) Cheryl Harris has made the following observations:

> The possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness . . . . The courts played an active role in enforcing this right to exclude — determining who was or was not white enough to enjoy the privileges accompanying whiteness. . . .
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> . . . [A]s it emerged, the concept of whiteness was premised on white supremacy rather than mere difference. "White" was defined and constructed in ways that increased its value by reinforcing its exclusivity.

Harris, supra note 5, at 1736-37

[24] See Higginbotham & Kopytoff, supra note 5, at 1983, 1997.

white race was the exclusive focus. Only within a context of racial hierarchy — white supremacy — could concern for "darkening" of the white race coexist within a system that was indifferent to the implications of white blood in those persons treated as African Americans.[25]

Third, these holdings further the myth of white racial purity by failing to consider the possibility that both, or either, a white husband or a white wife might have African-American ancestry.[26] Their interests in maintaining racial hegemony required courts to attribute adultery to white women rather than permit any implicit or explicit challenge to a white supremacist racial classification system. In the antebellum South, recognition of racial mixing would have undermined the logic of a race-based system of slavery and the laws supporting it.[27]

Fourth, the law's tolerance for judicial error created by the presumption must be understood as circumscribed by race. The common law adoption of the marital presumption allowed for the possibility that a child who was not biologically related to a man would become his heir. The court's desire to avoid the administrative burdens of unnecessary litigation justified the potential for error. Thus, judicial error was tolerated when it meant that a white child, unrelated by blood, would be made a white man's legal heir. An African-American child becoming a white man's legal heir, however, was unacceptable. Faced with this situation, the court essentially suspended application of the presumption.[28]

Fifth, and finally, these court holdings are consistent with, and should be seen as complementing, legislative efforts to deter white women from having sexually intimate relations with African-American men.[29] Denying a white woman the benefit of the presumption and treating her child as illegitimate based on her or his racial features would parallel the various statutory enactments promulgated by the states. One reason these harsh laws were promulgated is that a white woman giving birth to a mixed-race child was a direct assault on racial purity because, unlike an African-American

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[25] See id. at 1969; see also Loving v. Virginia, 388 U.S. 1, 11 (1967) (The Court rejected racial purity justification for antimiscegenation statute finding that "[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

[26] See Higginbotham & Kopytoff, supra note 5, at 1998–2000 (exploring the *Watkins* case and genealogical possibilities).

[27] See id. at 2000.

[28] See Watkins, 37 Va. 560.

[29] Higginbotham and Kopytoff demonstrate how the Virginia legislature had particular concern about and meted out severe punishments to white women who married African-American or mixed-race men or gave birth to mixed-race children outside of marriage. See Higginbotham & Kopytoff, supra note 5, at 1994–97.

woman, she had the opportunity to give birth to a white child.[30] Thus, a white woman and an African-American man who chose to have sexual relations effectively destabilized a regime designed to produce heirs for white men.

In summary, the unwillingness of nineteenth-century courts to apply the marital presumption when they believed that it would make an African-American child an heir of a white man should be understood as one aspect of a legal and social system designed to preserve white supremacy. The cases also provide evidence that the question of fatherhood had little to do with the welfare of the child but a lot to do with white men's claim of white children as their heirs. Recognizing that the presumption served white males leaves open the further question of whether the presumption and the related evidentiary rule could have been used by and on behalf of African-American families. This question is the subject of the next section.

B. Practical Consequences of the Marital Presumption and the Lord Mansfield Rule

This section investigates the role that the presumption of legitimacy and the accompanying evidentiary rule might have played on behalf of African-American families in the nineteenth century. This type of study, which explores how the laws affected the lives of free African Americans before and after the Civil War, is fraught with uncertainty and speculation because even a rule or doctrine that appeared to be available for use by free African Americans in a state in fact may not have been applied on their behalf.[31]

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[30] See Higginbotham & Kopytoff, supra note 5, at 1997.

[31] For example, consider the experience in the probate courts of Boston, Massachusetts of Maria W. Stewart, who was the first American-born woman to have given public speeches. See Giddings, supra note 3, at 49–50. Her husband James W. Stewart, a ship's outfitter, died in 1829 after having executed his will naming his wife as beneficiary. See Maria W. Stewart, America's First Black Woman Political Writer: Essays and Speeches 7 (Marilyn Richardson ed., 1987). She never received his estate because various legal maneuvers thwarted his legal right to make a will.

> Left a widow after barely three years of marriage, Maria Stewart found herself . . . deceived and victimized by a group of white businessmen intent on profiting from her husband's death. As a result of a series of legal maneuvers so blatant and shameless that even the presiding judge found them hard to stomach — at one point a mystery woman was put forth as a competing widow — Stewart, after more than two years of litigation, ended up effectively stripped of what should have amounted to a substantial inheritance.

Id. David Walker, an African-American man who was southern-born and the son of a free black mother and a slave father, published a book earlier that year suggesting that this was not an uncommon occurrence. Id. at 5. David Walker was a shop owner and

However, one can draw some tentative conclusions based on statutory and court-made law.

One conclusion is that the common law presumption and rule were sometimes rendered inapplicable by other laws of the state. For example, general limitations on African-Americans' right to testify before Reconstruction would have made the Lord Mansfield evidentiary rule irrelevant.[32]

The marital presumption itself had no significance when legal recognition of marriages entered into by African Americans was denied depending on the status and race of the woman and man. For example, in Virginia a marriage between a slave and a free black was not legally recognized.[33] If the mother was a slave, the child of the marriage became a slave.[34] If the mother was free, the child was considered illegitimate and subject to being hired out by the overseer of the poor.[35] Prohibitions on interracial marriages also limited the applicability of the presumption and the evidentiary rule.[36] Within this system of laws, there clearly was no place for the marital presumption's concepts of fatherhood, motherhood, or the welfare of the child to operate.

In some states, during some or all of the nineteenth century, legal marriages between African-American women and men were possible. In those states the presumption and evidentiary rule might operate. The social system infected and affected by the slavery regime, however, might have prevented the presumption and rule from playing a meaningful role for

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writer in Boston. In his book, he wrote, "when a man of color dies, if he owned any real estate it most generally falls into the hands of some white person. The wife and children of the deceased may weep and lament if they please, but the estate will be kept snug enough by its white possessor." Walker's Appeal, In Four Articles: Together With A Preamble, To The Coloured Citizens of the World, But In Particular, And Very Expressly, To Those Of The United States Of America 12 (1829). These bits of evidence suggest that legal tactics could easily turn the nineteenth-century rights of African Americans into empty promises.

[32] See A. Leon Higginbotham, Jr. & Anne F. Jacobs, The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia, 70 N.C. L. Rev. 969, 994–96 (1992) (detailing the succession of laws in Virginia that at first prohibited all African Americans, slave or free, from giving evidence under oath, then permitted some testimony, but only against slaves accused of capital offenses, and finally permitted free Christian African Americans to testify against or between other African Americans, slave or free; it was not until 1867 that African Americans had the unrestricted right to testify in Virginia).

[33] See A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather than the Free": Free Blacks in Colonial and Antebellum Virginia, 26 Harv. C.R.-C.L. L. Rev. 17, 53 (1991).

[34] Id. at 54.

[35] Id.

[36] See Higginbotham & Kopytoff, supra note 5, at 2006, 2021–25.

African-American women and men. Without the panoply of legal, economic or social privileges enjoyed by white men, many African-American men were unable to exercise control over their families in a traditional patriarchal manner. Since the marital presumption is both produced by and reflective of white patriarchal power, it is unlikely that it would have had a significant effect on African-American families. Consider the following narrative from an African American from Georgia who describes his life during the last decade of the nineteenth century:

> I lived in that camp, as a peon, for nearly three years. My wife fared better than I did, as did the wives of some of the other negroes, because the white men about the camp used these unfortunate creatures as their mistresses. When I was first put into the stockade my wife was still kept for a while in the "Big House," but my little boy, who was only nine years old, was given away to a negro family across the river . . . . When I left the camp my wife had had two children by some of the white bosses, and she was living in fairly good shape in a little house off to herself.
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> . . . .
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> But I didn't tell you how I got out. I didn't get out — they put me out. . . . [W]hen I had served for nearly three years, one of the bosses came to me and said that my time was up. He happened to be the one who was said to be living with my wife.[37]

This narrative reveals how utterly irrelevant the marital presumption could be in creating and maintaining this African-American family. Instead, the presumption served as a shield for the "white bosses" against any claim of support by the children born to the narrator's wife. The issue for the African-American couple was not whether the wife's two children would be part of their household. Rather, the narrator and his wife were denied each other's company and support altogether and were left not knowing whether they would ever see their own child again. The marital presumption,

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[37] The Life Story of a Negro Peon, in Black Women in White America: A Documentary History 151, 153–55 (Gerda Lerner ed., 1973) (originally published as The Life Story of a Negro Peon, Obtained from an Interview with a Georgia Negro, in Hamilton Holt, The Life Stories of Undistinguished Americans, As Told by Themselves (1906); based on an interview originally published in the *Independent* (1901)). The husband's assumption that his wife was "living in fairly good shape" reflected the traditional stereotype of African-American women "choosing" multiple sexual partners and benefiting economically from those choices. The stereotype not only prevented the husband from understanding the sexual violence that his wife likely endured, but it also allowed the white bosses to perpetrate that violence with impunity. See Melton A. McLaurin, Celia, A Slave (1991) (tells the story of a young girl whose white master enslaved and sexually exploited her for five years; she was convicted and executed for her white master's murder when he refused to stop coming to her cabin to rape her).

premised on a husband having control over his wife's sexuality,[38] has little relevance where the social and economic deprivation exacted by white men made control of another person unimaginable and personal survival all consuming.[39]

This narrative suggests the problematic nature of the legal concepts of fatherhood, motherhood, and welfare of the child when applied to African Americans who did not and were not allowed to participate in the patriarchal European tradition. It is important not to leave the impression, however, that the white bosses destroyed the family. This narrative contains a story of resistance. In the end, the narrator's wife uses what power she had to live "in fairly good shape in a little house off to herself" and to free her husband from peonage.[40] A different set of rules and presumptions operated for this family — ones that Lord Mansfield could not even begin to imagine.

It is thus unlikely that the presumption and the related evidentiary rule could have been used by and on behalf of African-American families. Other laws made the marital presumption and the evidentiary rule irrelevant in many instances before the Civil War. Although some of those laws were inapplicable to free African Americans before the Civil War or were rescinded after the Civil War brought an end to the legal regime of slavery, the marital presumption probably played no significant role. The marital presumption is part of a white patriarchal family tradition that gains its power through economic, social and legal institutions. The benefits of these institutions were not available to African-American men and, without

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[38] Whether ownership and control over a wife were part of African traditions is debatable. bell hooks makes the following argument:

> An examination of many traditional African societies' attitudes toward women reveals that African men were not taught to see themselves as the protectors of all women. They were taught to assume responsibility for the particular women of their tribe or community. The socialization of African men to see themselves as the "owners" of all black women and to regard them as property they should protect occurred after the long years of slavery and as the result of bonding on the basis of color rather than shared tribal connection or language.

bell hooks, Ain't I a Woman: Black Women and Feminism 34–35 (1981).

[39] See id. at 35 (instincts of the African-American men were toward self-preservation in the face of the brutal assaults against African-American women).

[40] Angela Davis argues that the conditions of slavery engendered resistance by African-American women:

> This was one of the greatest ironies of the slave system, for in subjecting women to the most ruthless exploitation conceivable, exploitation which knew no sex distinctions, the groundwork was created not only for Black women to assert their equality through their social relations, but also to express it through their acts of resistance.

Angela Davis, Women, Race & Class 23 (1981).

them, the marital presumption had little positive effect on the lives of the men or their families.

The analysis of the marital presumption and the Lord Mansfield rule with regard to the African-American child permits us to see how the marital presumption operated in the nineteenth century to reinforce white supremacy and patriarchal power. Part III will provide further evidence of the patriarchal significance of the presumption and the rule when it considers the operation of both during the nineteenth and early twentieth centuries with regard to the white child.

III. THE MARITAL PRESUMPTION, THE LORD MANSFIELD RULE AND THE WHITE CHILD

A. Welfare of the Child

Part II raised serious questions about the claim that the marital presumption and Lord Mansfield's evidentiary rule served the welfare of the African-American child. I will now explore whether the claim regarding the welfare of the child has any validity for a white child born to white parents during the nineteenth or early twentieth centuries.

If preventing the white child from becoming legally illegitimate was the court's central concern, then why would the court allow anyone to testify that the husband had not had access to his wife? Based on this testimony, a white child would be stigmatized and lose potentially significant economic rights, including the right of support against the mother's husband, the right to inherit from him and the right of admission to trade guilds and the like.[41] Admission of any testimony of nonaccess demonstrates that the welfare of the child was subordinate to the law's interest in protecting the husband from obligations to support a white child that was not his by blood and in protecting the husband and the husband's family from having any of their property pass by succession to a white child who was not genetically related.[42]

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[41] See 1 Pinchbeck & Hewitt, supra note 10, at 202.

[42] The courts sometimes expressed disdain for the idea of allowing a man's property to pass to a child who was not genetically his:

> The law says it is presumptively his child; still he may show by whatever proof he may command, that he has been made the innocent victim of fraud and artifice. . . . It is repugnant to the feelings of every man, that his property, upon his demise, should descend through channels where his blood did not flow; channels too, tainted and corrupted by the grossest impurity.

The law's failure to consider alternatives to the legitimate/illegitimate dichotomy, such as dual paternity, demonstrates the inadequacy of the child-welfare justification. I could find no evidence that dual paternity was even imagined by the common law courts, which itself suggests that they were not focused on the child's needs and concerns. The law could have prevented illegitimatization of the child by treating the mother's husband as the legitimate father while at the same time permitting proof of paternity by another man. Dual paternity remains an unfamiliar and virtually undebated idea today, except in Louisiana.[43]

Perhaps, the absence of any consideration of dual paternity is attributable to some notion that the best interests of a child are served when only one man answers to the name father. There are two other equally plausible explanations, however, for the dismissal of the idea of dual paternity. One is that dual paternity destroys the husband's power, accorded to him through the marital presumption, to prevent the biological father from interfering in the husband's relationship with his white legitimate child. Moreover, it would represent a public and legal acknowledgment that a husband had "lost" control of his wife to another man. In that sense, the concept of dual paternity is wholly inconsistent with the marital presumption, which is based on the premise that husbands have the power to control their wives.

At the same time dual paternity thwarts a biological father who wants to use the marital presumption as a shield to avoid paternal responsibilities.

Wright v. Hicks, 12 Ga. 155 (1852) (heirship case in which grandson claimed an interest in the estate of his grandfather).

[43] See Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (Scalia, J.) ("California law, like nature itself, makes no provision for dual fatherhood."). But see Smith v. Cole, 553 So. 2d 847 (La. 1989) (holding that a statute that treated a child as the legitimate child of the mother's husband did not preclude a finding that the child's biological father had an obligation to provide support for his child); Smith v. Jones, 566 So. 2d 408 (La. Ct. App. 1990) (the putative father was permitted to establish paternity where he had been prevented from forming an actual relationship by the mother and he instituted action within a reasonable time of the child's birth; the legitimate father's status was unaffected by this action); Pamela S. Nagy, Case Comment, *Smith v. Cole*: Triumph in Family Court, 40 Case W. Res. L. Rev. 1157 (1990); Jerry Speir, Casenote, *Smith v. Cole*: Biological Fathers Owe Support to Their Children Despite the Mother's Marriage to Another and the Civil Code's "Strongest Presumption," 36 Loy. L. Rev. 225 (1990). Dual paternity raises other issues, such as: Are both fathers responsible for support?; Will a child with two fathers be required to support both?; Once the biological father is required to tender support for his child, does that support then imply other substantive rights, such as visitation rights, custody rights, rights to participate in decisions about the child's education and the like? The *Smith* court suggests that, when confronted with these issues, it will base its decision on equity, the capacity of the biological father to provide support and the best interest of the child. See Smith, 553 So. 2d at 855 n.8. It also suggests that the biological father should obtain substantive rights. See id. at 854.

Thus, dual paternity would have increased the risk of forced fatherhood outside of marriage. It also would have increased the possibility that a white man would be thrust into fatherhood of an African-American child. Both of these explanations have little to do with children's welfare. Both have a good deal to do with the law helping the men who benefit from patriarchy and white supremacy achieve comfortable circumstances for themselves.

The court's willingness to base a finding of illegitimacy on the testimony of persons other than the married couple and the total absence of consideration of the concept of dual paternity make suspect the claim that the marital presumption and the Lord Mansfield rule are designed to further the welfare of the white child. Showing that the proffered welfare-of-the-child explanation fails is not proof that welfare of white men is the explanation. That explanation is reasonable only once other possible neutral rationales are explored and found unconvincing. In search of other persuasive reasons for the presumption and the evidentiary rule, the next section investigates whether they can be defended on efficiency grounds.

B. Efficiency

Although the courts in the eighteenth, nineteenth and early twentieth centuries did not explicitly raise issues regarding efficiency when developing or applying the marital presumption and the Lord Mansfield evidentiary rule, it seems to hold some explanatory promise. Whenever title to property depended upon succession, the presumption of legitimacy avoided the administrative burdens of providing positive proof of genetic kinship between the white husband and his wife's white child.[44] Common law judges likely would have concluded that the cost of error caused by the presumption was outweighed by the burdens of litigating this issue. Moreover, it avoided the cost of erroneously finding that the wife's child was not the husband's in the circumstances when the proponent for legitimacy might be unable to meet her or his burden of proof in the absence of a marital presumption. On the other hand, the admission of testimony by persons other than the husband and wife, including the testimony of the putative father, is consistent with an efficiency explanation. By admitting testimony by others regarding nonaccess by the husband, the courts reduced the cost of error caused by the presumption.

The refusal to admit the testimony of the white husband and wife regarding nonaccess, however, would seem inconsistent with reducing the

[44] By positive proof I mean testimonial or circumstantial evidence relating to the possibility and probability of sexual relations between the husband and the wife.

cost of error produced by the presumption and cannot be otherwise justified by general rules of the day regarding disqualification of testimony by interested parties or of spouses testifying for or against the other. Professor Wigmore, in his treatise entitled *Evidence in Trials at Common Law*, shows how this rule was not supported by the legal precedent of the time. Before *Goodright*, the only objection made was that of the disqualification of wife or husband to testify for or against the other and this objection was usually held not applicable on the facts of the case.[45]

What then can explain the common law's sometime concern for the child's welfare, sometime preference for a child created by blood, and sometime preference for a child created by marriage, and the common law's abhorrence of the couple's testimony, especially the wife's, regarding nonaccess of the husband? The answer, set forth in the next section, is found by focusing on the relationship of white men to their property and procreative power.

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[45] See 7 Wigmore, supra note 15, § 2063, at 469. Professor Wigmore identifies a rule unique to filiation cases that arose about the middle of the 1700s. The courts held that, in proceedings charging a putative father with the support of a child, "the order of support should not be made against the defendant on the *sole* and uncorroborated *testimony* of the *mother*, if a married woman . . . ." Id. Wigmore explains this rule in the following way:

> In the first place, it was limited strictly to filiation proceedings; it had no status as a rule of general application, for its reason had no such bearings. In the next place, the ground of the objection was that of interest, i.e., the wife was testifying to discharge the husband of the child's support; yet the objection did not in strictness apply (since the husband was not a party), and furthermore the exception of necessity . . . would in any event allow her testimony to intercourse with the other man. Her testimony to nonaccess, however, being only technically admissible within the rule of disqualification by interest, some additional corroboration was thought essential in order to found an order . . . .
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> The important feature of this rule is thus the bearing of the wife's disqualification by interest; and, when the question first comes up in the United States, the same objection is the one that occupies judicial attention — a principle which, of course, today in most of our jurisdictions is outlawed (partly or entirely) by statute . . . . That the testimony is to the fact of nonaccess is therefore of no importance at all in this rule . . . , except so far as the necessity exception to the rule of disqualification by interest might not apply to that fact while it might apply to others. That the fact of nonaccess, of itself, was a thing not properly to be testified to, either on moral or on sentimental grounds, or that parents could not testify to illegitimacy, never for a moment occurred to these judicial expounders of the common law; and this is seen clearly enough in rulings throughout the 1700s, in other kinds of litigation, where the objection based on disqualification by interest did not arise as it did for the case of filiation proceedings.

Id. § 2063 at 470–71 (footnotes omitted).

Professor Wigmore's primary objection to the Lord Mansfield rule "is that he had no authority whatever for his utterance." Id. § 2063 at 471.

C. White Male Procreative Power

As Adrienne Rich, in her book *Of Woman Born: Motherhood as Experience and Institution*, writes:

> At the core of patriarchy is the individual family unit which originated with the idea of property and the desire to see one's property transmitted to one's biological descendants. . . . A crucial moment in human consciousness . . . arrives when man discovers that it is he himself . . . who impregnates the woman; that the child she carries and gives birth to is *his* child, who can make *him* immortal . . . .[46]

The problem for this white man, however, is how to know with certainty that his wife's child is his child.

> If he is to know "his" children, he must have control over their reproduction, which means he must possess their mother exclusively. The question of "legitimacy" probably goes deeper than even the desire to hand on one's possession to one's own blood-line; it cuts back to the male need to say: "I, too, have the power of procreation — these are *my* seed, *my* own begotten children, *my* proof of elemental power."[47]

In the instances where the presumption made a difference, something critically wrong had occurred: a white husband had lost exclusive sexual possession of his wife and thereby lost procreative power. Seeing the problem in this way allows us to recognize the possibility that the common law, as developed in the eighteenth, nineteenth and early twentieth centuries, might have been used to ameliorate this painful fact. Wrapped in the rhetoric of the welfare of the child, the common law can be understood to have moved to preserve the remnants of the husband's procreative power by presuming he had sexual intercourse with his wife and that it was his seed that begot the child.[48] This perspective also provides some insight into how the presumption and the Lord Mansfield rule might have operated.

Within the context of a European culture that gave men nearly exclusive control over their household, the presumption left the husband with the power to decide how to constitute his family. If he personally believed the child was his or if he decided that he wanted this child to be

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[46] Rich, supra note 3, at 60.

[47] Id. at 119.

[48] Moreover it provided him some compensation for treating the child as his. For example, the birth of issue to the marriage assured him his tenure of curtesy in his wife's property. See, e.g., Hunter v. Whitworth, 9 Ala. 965 (1846).

his, he was free to play the role of father.[49] If he believed the child was another man's, he could meet his support obligations at minimal financial costs and disinherit the child by writing a will.

Consider, for example, the acts of the husband in the 1857 Pennsylvania case of *Dennison v. Page*,[50] which was a case contesting the legitimacy of an heir to the husband's estate. The husband married and, three or four months afterwards, his wife gave birth to a daughter. The facts recited in the case indicate that the husband "instantly disclaimed being the father of the child, and she was almost immediately removed to her grandfather's, by whom she was raised . . . ."[51] The husband apparently failed to write a will to assure that his "legal" daughter did not inherit his property,[52] but he certainly had the power to do so.

The evidentiary rule that allows the presumption to be rebutted by testimony of nonaccess by persons other than the husband and wife can also be understood as serving the harmed husband. If he decided to pursue a public remedy, the husband had the right to present testimony by others regarding nonaccess for the purpose of rebutting the presumption and avoiding fatherhood.[53]

For example, in the 1832 New York case of *Cross v. Cross*,[54] the husband sued his wife for a divorce upon the ground of adultery. The court held that adultery had been proved sufficiently and focused only on the question of the legitimacy of the child born to the wife. It held that the testimony of the husband's mother, who lived with her son during the relevant time of gestation, was sufficient to prove nonaccess.

The evidentiary rule serves the harmed husband. Giving the wife the right to speak about her husband's nonaccess would have required the common law to acknowledge her power to know *her* child with certainty and also to know who could or could not be the child's father. It would lay bare the truth that could otherwise remain obscure: women have a unique and elemental power to procreate. To give her the power to testify to nonaccess would mean that her husband would lose his power, provided to

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[49] There was some risk that the biological father could claim the child if he could prove nonaccess of the husband by the testimony of persons other than the husband and wife.

[50] 29 Pa. 420 (1857).

[51] Id. at 421.

[52] It was alleged in the case that the deceased husband had stated that his wife's daughter should not inherit any of his estate. Id. at 424.

[53] The wife also could present testimony by others of nonaccess. See infra note 72 for a discussion of how this might be useful to her.

[54] 3 Paige Ch. 139 (N.Y. Ch. 1832).

him through the marital presumption, to choose fatherhood and to control the harm caused by having lost exclusive sexual possession of his wife.

Beyond an unwillingness to acknowledge the wife's procreative power, another reason for silencing the wife could have been that allowing her to testify to nonaccess would give her the power to speak falsehoods about her sexual relations with her husband. Justice Melvin's dissent in *In re McNamara's Estate*[55] provides evidence that the uncorrobative nature of the wife's testimony was a substantial factor supporting the Lord Mansfield's rule. In this case, the majority made inroads into the Rule by holding admissible the wife's testimony regarding nonaccess by the husband. It admitted her testimony because it pertained to the time period when she had separated from her husband and not to the time when they cohabited. Justice Melvin dissented from this holding:

> To allow cohabiting married people thus to impeach the legitimacy of children born in wedlock would be, as well stated in the opinion in *Estate of Mills*, "to allow evidence which shocks every sense of decency and propriety." Yet in the case at bar evidence quite as shocking was permitted, namely, the statement of . . . [the wife] regarding her alleged menstrual periods. This is the sort of testimony which may be manufactured with out [sic] fear of contradiction. Its admission puts a premium upon perjury.[56]

Woman as untrustworthy speaker is a theme that continually winds its way through eighteenth- and nineteenth-century law and has continuing vitality even today. Lord Mansfield's rule reinforces that theme.

If we accept that the silencing of the eighteenth-, nineteenth- and early twentieth-century wife regarding her sexual relations with her husband served her husband, how do we explain the concomitant silencing of the husband regarding his sexual relations with his wife? Why is he not given the power to say he did not have sexual intercourse with his wife during the period of conception?

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[55] 183 P. 552 (Cal. 1919).

[56] Id. at 560–61 (Melvin, J., dissenting).

The "manufactured" testimony concern expressed by Justice Melvin presumably would extend to testimony of a woman regarding when she used birth control. Some have attempted to introduce such evidence in paternity actions. See, e.g., B.P. v. G.P., 536 A.2d 271 (N.J. Super. Ct. 1987) (following a judgment for divorce resolving child custody and support issues, the former wife filed a complaint alleging that a man other than her divorced husband was the child's father; the complaint detailed her use of birth control; the probative value of that evidence was not tested because the court held the divorced wife was precluded from filing the complaint following the judgment for divorce).

The Virginia Supreme Court reasoned in the 1811 case of *Bowles v. Bingham*[57] that the husband is not allowed to testify because:

> Our law wisely throws a veil over acts of incontinency . . . and, certainly, will not, without necessity, and in a spirit of departure from the wise rule of public economy . . . , inundate our Courts with indecent inquiries, whether this or that man, whether the husband or another, committed a given act of immorality and fornication. It will, *at least*, emphatically, interdict the HUSBAND from giving evidence in such case, for the reasons so luminously assigned, in . . . *Goodright* . . . . It is even better that a *particular* grievance should exist, than a scene of this sort be opened, without necessity, in a country in which public decorum is a part of its law, to contaminate and destroy the morals and peace of our country.[58]

Of course, preventing the husband from speaking regarding the issue of access did not keep decorum in the courtroom. Consider, for example, *Cross v. Cross*,[59] the 1832 New York case discussed earlier, which determined paternity after a suit for divorce against the wife based on adultery. Although the court refused to hear the testimony of either the husband or the wife regarding nonaccess, it nevertheless lifted the "veil" and pursued "indecent inquiries:"

> The wife had become perfectly abandoned and worthless . . . . [F]or 18 months before the birth of the child, the [wife] had lived in another town, and had not even been to the [husband's] house to visit her children during that time . . . . It also satisfactorily appears that the [wife] had sexual intercourse with several persons after her separation from her husband, and with two of them about nine months previous to the birth of the child; and with the one who is supposed to be the father, repeatedly.[60]

Perhaps one reason why the common law denied the husband the power to speak was for the purpose of convincing wives that the law accords them the same treatment as it accords their husbands.[61] It would have been

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[57] 16 Va. (2 Munf.) 442, 17 Va. (3 Munf.) 599 (1811).

[58] 17 Va. at 602–03. This case was brought by the administrator under a bill of interpleader against the father and maternal relations of the deceased, Harriet Bowles, a deceased infant. The court held that the father was her heir at law based on the presumption that he was her legal father.

[59] 3 Paige Ch. 139 (N.Y. Ch. 1832).

[60] Id. at 141.

[61] Some limited evidence supporting the speculation that judges would be concerned about the appearance of equality of treatment between white husbands and wives comes from a series of lectures and articles written in 1839 and 1840 by Simon Greenleaf, a professor of law at Harvard University. See Dianne Avery & Alfred S. Konefsky, The

difficult for Lord Mansfield to justify the rule in terms of the child's welfare unless the husband's freedom to speak was limited along with the wife's. If the rule is to be based on a concern for the illegitimatization of a child, the testimony of a husband to prove nonaccess would be as offensive as the testimony of a wife. It is well to note, however, that Lord Mansfield suggested that the testimony of the wife was more offensive when he especially singled her out as "the offending party."[62] Surely Lord Mansfield could have convinced himself and other judges applying his dicta that white children would have been sufficiently protected by refusing to admit the testimony of the wife, the offending party, and that there was no need to refuse to admit the husband's testimony. My argument, however, is that by extending the evidentiary rule to husbands, Lord Mansfield allowed for the appearance of equal treatment of wives and husbands under the law.[63] Moreover, to provide for equal treatment in this particular instance was relatively costless, because the white husband as family head had a range of legal and extralegal remedies to deal with the possibility that another man's child was in his household.[64]

Daughters of Job: Property Rights and Women's Lives in Mid-Nineteenth-Century Massachusetts, 10 Law & Hist. Rev. 323 (1992). He argued that women were treated equally with men under the law and with regard to married women specifically he described marriage as "a partnership, on terms of equality; — a community of interests, — a union of wills and minds; — a surrender . . . a mutual pledge." Simon Greenleaf, 5 Christian Rev. 269, 278 (1840).

[62] 98 Eng. Rep. 1257, 1258 (K.B. 1777).

[63] Cf. Douglas Hay, Property Authority and the Criminal Law, in Albion's Fatal Tree: Crime and Society in Eighteenth-Century England 17 (Douglas Hay et al. eds., 1975), in which the author demonstrates how in eighteenth-century England the ruling class organized its power in the state effectively and with legitimacy through the criminal law. He writes: "In considering the criminal law as an ideological system, we must look at how it combined imagery and force, ideals and practice, and try to see how it manifested itself to the mass of unpropertied Englishmen." Id. at 26. This argument has relevance to the paternity context, because it allows us to see that the marital presumption and evidentiary rule were a part of an "ideological system" that "combined imagery and force, ideals and practice" in a manner that allowed white, married, propertied men to manipulate it to their advantage.

[64] A similar argument had been made to rebut the claim that married women and men exchanged different but equivalent burdens and benefits in the nineteenth century. One of the burdens of marriage undertaken by men that was frequently mentioned was that upon marriage he became responsible for paying all of his wife's debts. See Avery & Konefsky, supra note 57, at 336. The argument is that the responsibility of a wife's debt was a burden that made up for the benefit that a husband gained by having access to her wealth. The debt burden, however, apparently was illusory. Historical evidence suggests that women avoided debt and did not frequently marry with debt. See id. at 343; Susan Lebsock, The Free Women of Petersburg: Status and Culture in a Southern Town, 1784–1860, at 126, 127 (1984). Thus, once the legal rules are contextualized and historicized, we can see that what might otherwise appear to be equivalent treatment between husbands and wives in fact is not.

The rule also could have served the purpose of convincing white men, who controlled lawmaking, that the law was just and not merely a manifestation of their brute force.[65] By attributing the silencing of the wife to the child's welfare, Lord Mansfield provided evidence of the common law's interest in relieving hardship and doing positive good for those persons who have no means of protecting themselves. The fact that neither Lord Mansfield nor any other lawmakers reconsidered the law's general harshness toward illegitimate children demonstrates how limited their concern was. Nevertheless, once they had convinced (deceived) themselves that the rule was not made in their own self-interest of preserving the laws regarding fatherhood for the benefit of fathers, then logic led them ineluctably to extend the silencing rule to fathers.

The final purpose that might have been served by the eighteenth-century rule of refusing to hear the testimony of both husbands and wives is that of allowing men to deny that they feared and envied women's procreative power and knowledge. By silencing themselves along with their wives, husbands were able to avoid admitting that they did not have equal or greater access to procreation.[66]

Feminist scholars have spent a good deal of time documenting how man has laid claim to the procreative process. For example, Simone de Beauvoir writes:

> With the advent of patriarchal institutions, the male laid eager claim to his posterity. It was still necessary to grant the mother a part in procreation, but it was conceded only that she carried and nourished the living seed, created by the father alone. Aristotle fancied that the fetus arose from the union of sperm and menstrual blood, woman furnishing only passive matter while the male principle contributed force, activity, movement, life. Hippocrates held to a similar doctrine, recognizing two kinds of seed, the weak or female and the strong or male. The theory of Aristotle survived through the Middle Ages and into modern times.
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> At the end of the seventeenth century . . . , "spermatic animalcules" were discovered and it was proved that they penetrated into the uterus of the female; but it was supposed that they were simply nourished therein and that the coming

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[65] See generally E.P. Thompson, Whigs and Hunters: The Origin of the Black Act 219–69 (1975) (arguing that "[t]he oligarchs and the great gentry were content to be subject to the rule of law only because this law was serviceable and afforded to their hegemony the rhetoric of legitimacy" Id. at 269).

[66] Cf. Sherry F. Colb, Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?, 72 B.U. L. Rev. 101, 111, 114 (1992) (making parallel arguments with regard to the holding in Michael H. v. Gerald D., 491 U.S. 110 (1989), discussed supra note 43 and infra note 122).

> individual was preformed in them. . . . Under these imaginative hypotheses, woman was restricted to the nourishment of an active, living principle already preformed in perfection. These notions were not universally accepted, and they were argued into the nineteenth century. [Even after] the use of the microscope . . . [led to the egg being] recognized as an active principle, men still tried to make a point of its quiescence as contrasted with the lively movements of the sperm.[67]

Allowing a wife to speak to access would be wholly inconsistent with white men's struggle to control the procreative process. Silencing only the wife regarding access would also operate as an admission that she possessed special knowledge regarding her own maternity and her husband's paternity. Faced with the conundrum that to admit her testimony would be an admission of her procreative power and that to single her out as the only one not able to testify would also be an admission of her greater uncorrobated knowledge, the rule silencing both wife and husband permitted the greatest possibility of maintaining the male claim to equal or greater contribution to the procreative process.[68]

The judicial opinions themselves provide support for the proposition that the marital presumption and the related evidentiary rules represent the law's struggle to wrest procreative power from a woman. Consider the court's language in *In re McNamara's Estate*,[69] regarding the presumption:

> [T]he process of conception is a hidden one, and the organs perform their appropriate functions without the volition of the female and without her being conscious that the process is going on. Where she has had intercourse with more than one man at about the same time, and a child has resulted, neither she nor any one else can say with reasonable certainty which is the father.[70]

By minimizing her role in reproduction and by denying any possibility she could say with certainty who the father of her child is, the courts denigrated the women's procreative power and thereby created the possibility for men to control fatherhood. The silencing along with the marital presumption

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[67] Simone de Beauvoir, The Second Sex 8–9 (H. M. Parshley trans. & ed., 1989).

[68] Professor Reva Siegel makes a parallel argument regarding abortion-restrictive regulation: "If one analyzes the incidence and structure of fetal-protective regulation, it is possible to see that such regulation reflects social judgments about women's roles, and not simply solicitude for the welfare of the unborn." Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 266 (1992).

[69] 183 P. 552 (Cal. 1919) (determining heir for intestacy purposes).

[70] Id. at 557.

itself, in effect, accomplished for the husband what science was denying him: procreative power.[71]

Parts IIIA and IIIB examined the question whether the marital presumption and the Lord Mansfield Rule could be justified either on the basis of the welfare of the white child or on the basis of efficiency. They concluded that neither rationale for the presumption and the evidentiary rule was persuasive. Part IIIC then showed how the presumption and rule could be satisfactorily explained in terms of procreative power. The legal doctrines gave white husbands the means to constitute their families. At the same time (and relatedly) the legal doctrines served to undermine female procreative power. They did this first by allowing persons other than the wife and the husband to testify regarding her adulterous acts. Thus these doctrines were one of the means by which white women's sexuality was policed and monogamy was enforced. Second, they undermined female procreative power by silencing women. By not allowing her to testify with regard to information about which she had unique knowledge, such as her menstrual periods, the law denied recognition of that unique knowledge. The fact that it could not be corroborated was a reason to silence her rather than a reason to require her critical testimony. Finally, the doctrines undermined female procreative power by silencing the husband, which

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[71] It is interesting to note that Elaine Showalter has identified a similar reproductive-envy theme in literature at the same time that the presumption and related evidentiary rules were being applied. Describing the response of male fiction writers to George Eliot's literary legacy, she writes:

> [T]here may have been psychological reasons why men, especially young men, needed to express superiority to Eliot and contempt for her work. . . . One defense against the mother's reign is to appropriate her power by repressing the maternal role in procreation and creation, and replacing it with a fantasy of self-fathering. Indeed, the replacement of heterosexual procreation and maternity by "the asexual reproduction of fathers on their own" is part of the European literary tradition from Genesis and *Paradise Lost* to Hawthorne's "The Birthmark" and James Watson's *The Double Helix.*
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> While fantasies of male self-creation and envy of the feminine aspects of generation were not new, they reemerged with a peculiar virulence in the 1880s. . . . In the male writing of the *fin de siècle*, celibate male creative generation was valorized, and female powers of creation and reproduction were denigrated. Gerald Manley Hopkins, for example, wrote in 1886 that "the begetting of one's thoughts on paper" is "a kind of male gift," clearly a gift of begetting that requires no female assistance and avoids contact with the maternal body. In numerous texts, male reproduction or self-replication: splitting or cloning, as in *Dr. Jekyll and Mr. Hyde*; reincarnation, as in Rider Haggard's *She*; transfusion, as in *Dracula*; aesthetic duplication, as in *The Picture of Dorian Gray*; or vivisection, as in *The Island of Dr. Moreau.* These enterprises are celibate, yet procreative metaphors for male self-begetting. They reject natural paternity for fantastic versions of fatherhood.

Elaine Showalter, Sexual Anarchy: Gender and Culture at the Fin de Siècle 77–78 (1990).

allowed the husband to avoid admitting the wife's special knowledge. Thus the husband was left with the legal and extralegal remedies to choose fatherhood — to claim paternity when that served his interest and to limit the consequences of, or avoid altogether, paternity when that suited his wishes. Within a society in which cultural, religious, and economic institutions supported the white patriarchal family, the silencing of the husband along with the wife served to accomplish the husband's ultimate goal: the acquisition of exclusive procreative power.

D. Potential Benefits to White Women

One further question to be explored is whether the marital presumption and the accompanying evidentiary rules served some women's interests during the eighteenth, nineteenth, and early twentieth centuries. For working class women who were separated, but not divorced, from their husbands and for whom the modern-day equivalent of a paternity suit against the child's putative father was necessary, the evidentiary rules might prove particularly troubling.[72] Unless others could testify to the husband's nonaccess, the putative father could use the marital presumption to defend against a charge of paternity.

Although she was thus constrained from establishing someone other than her husband as the father, the presumption and the limitations on proof certainly did not assure a woman, regardless of her class, that her child would be treated, in fact, as the legal child of her husband. Within the family unit, her economic and social dependence on her husband might have made it difficult for her to force him to treat her child as his. Consider the Pennsylvania case of *Dennison v. Page*,[73] in which the husband apparently forced the wife to give up her child.[74] This case illustrates that the

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[72] See, e.g., Hall v. State, 5 A.2d 916 (Md. 1939); People v. Overseers of the Poor of Ontario, 15 Barb. 296 (N.Y. 1853).

In a study of the working class in England in the seventeenth and eighteenth centuries, E.P. Thompson observes that it was easier for a husband to desert his wife and children than for her to desert them. "The man might be able to take with him some trade; once hidden in the city from the pursuit of the overseers of the poor he might set up with a new 'common law' partner." E.P. Thompson, Customs in Common 444 (1991). The practical effect of the presumption in improving the lives of wives and children is thus placed into question. But see id. at 452, 454 (documenting application of the presumption in a family situation where the wife and the husband had separated and established new households; the parties found themselves in court when a dispute arose between the two parishes about the maintenance of the children; cases like this arose because although the law provided for divorce, it was not easily available to the working class).

[73] 29 Pa. 420 (1857).

[74] See supra notes 50–52 and accompanying text.

presumption provided neither mothers nor their children with economic or physical security.

Thus, it is difficult to see how any white woman within the patriarchal family system, whether from a wealthy or a working-class family, was advantaged by the rule. The marital presumption appears to provide her and her children economic protections, but, in operation, those protections are illusory. The husband could either bring in others to testify as to his nonaccess or demand the child be removed from the household. On the one hand, the law assisted him in avoiding paternity and on the other social and economic power assisted him. Regardless of the means, the wife and child had little economic and physical security notwithstanding the presumption. In the end, the rule served only to reinforce the social norm that she should remain silent. At the same time, the evidentiary rule allowed others to portray her as an adulteress. Thus, while simultaneously being denied her procreative power, the claim of her sexual promiscuity was highlighted.

Part IV, which follows, uses the analysis of the common law marital presumption and the evidentiary rule and their application by eighteenth-, nineteenth- and early twentieth-century courts to explain the underpinnings of current law represented by the UPA. It will demonstrate the continuing vitality of the common law doctrines and how the racial and gendered dimensions of the common law persist.

IV. THE UNIFORM PARENTAGE ACT

An analysis that shows how the operation of the common law marital presumption and the Lord Mansfield rule reinforced race boundaries in the nineteenth century may seem to have little relevance to the current law of legitimacy. The same might be said about an historical analysis that shows how the common law doctrines enabled white men to avoid paternal responsibilities for their children born to African-American women. An analysis of eighteenth-, nineteenth- and early twentieth-century cases that shows how in operation the common law marital presumption and the Lord Mansfield rule reinforced white men's control over their wives and contributed to the construction of white women as untrustworthy with minimal procreative power may also seem to have little relevance to the current law of legitimacy. However, such is not the case.

The abolition of slavery and the Supreme Court's decision in *Loving v. Virginia*,[75] which held anti-miscegenation statutes unconstitutional, significantly changed the legal landscape with regard to the law of legitimacy. In addition, the law of legitimacy has been significantly affected

[75] 388 U.S. 1 (1967).

by the availability of reliable blood-typing tests for determining paternity. Moreover, although the traditional family remains the norm by which our society measures family deviancy, it is found less frequently to exist. The increased frequency of nontraditional families seems to have led to significant social, religious and legal tolerance for women and men who engage in nonmarital sex. It also seems to have led the law to accord children born out of wedlock substantial economic rights, including inheritance rights.[76]

I would argue, however, that these changes in the law are not indicative of an enlightened political or societal view of either African-American families or of African-American or white women. On the contrary, the laws have changed, but the construction of African-American families as deviant, of African-American women as sexually available, and white women as untrustworthy with minimal procreative power remains embedded in the law.

Current legislation relies heavily on the common law marital presumption.[77] Indicative of current legislation is the UPA, which the National Conference of Commissioners on Uniform State Laws promulgated in 1973 and which has been enacted in one-third of the states.[78] The

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[76] See Trimble v. Gordon, 430 U.S. 762 (1977) (holding that statutes cannot distinguish between illegitimate and legitimate children for purposes of intestate succession); Levy v. Louisiana, 391 U.S. 68 (1968) (holding that a wrongful death act must allow illegitimate and legitimate children to recover damages on the same basis).

[77] See, e.g., UPA § 4.

[78] See UPA, 9B U.L.A. 287 (1973). The most relevant portions of the UPA are as follows:

§ 4. [Presumption of Paternity]

(a) A man is presumed to be the natural father of a child if:

(1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court . . . .

(b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence . . . .

§ 6. [Determination of Father and Child Relationship; Who May Bring Action; When Action May be Brought]

(a) A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action

(1) at any time for the purpose of declaring the existence of the father and child relationship presumed under

genesis of this influential act was a 1966 article published by Professor Harry D. Krause entitled *Bringing the Bastard into the Great Society: A Proposed Uniform Act on Legitimacy.*[79] Krause became the reporter for the UPA and provides us a good deal of legislative history about the UPA in his book, *Illegitimacy: Law and Social Policy.*[80]

The UPA, like the common law presumption and the accompanying evidentiary rule, was purportedly designed to serve the welfare of the child.

> If the child is to have anything, it must have a *right* to have his paternity ascertained in a fair and efficient manner. Specifically, this means that legislation must recognize that the interest primarily at stake in the paternity action is that of the child. . . . At the minimum, it will be necessary that the child, by his representative, be a party to an action involving his paternity, regardless of other parties (such as the mother) who may assert their own interests in the same action. It is important that the mother not be allowed to represent the child in this matter, as her short-term interests (in avoiding publicity and emotional upset or in accepting a settlement) may conflict with the long-term interests of the child in having his paternity established for support, inheritance and other purposes.[81]

Professor Krause's central concern about the child's welfare is accompanied by a discussion underscoring the inherent conflict between a mother and her child. The underlying assumption of this argument is that the mother cannot be relied upon to consider the child's welfare. This negative view of the mother recalls Lord Mansfield's opinion in which he found it necessary to describe the mother as "the offending party" when discussing the welfare of the child.[82] Although the hostility toward mothers does not seem to have

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> Paragraph (1), (2), or (3) of Section 4(a); or
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> (2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than [five] years after the child's birth. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

[79] Harry D. Krause, Bringing the Bastard into the Great Society: A Proposed Uniform Act on Legitimacy, 44 Tex. L. Rev. 829 (1966).

[80] Harry D. Krause, Illegitimacy: Law and Social Policy (1971).

[81] Id. at 113.

[82] See supra note 17 and accompanying text.

disappeared in the last two hundred years, the question arises whether the UPA, with its marital presumption, at least fulfills its promise of serving the welfare of the child. That question is addressed in the next two sections.

A. The African-American Child

A disturbing aspect of the legislative history regarding the UPA's marital presumption is that there is no evidence that the effect of the marital presumption on African-American children was considered. As I concluded in part II, in the eighteenth and nineteenth centuries, the marital presumption and the evidentiary rule had little positive effect on the welfare of African-American children either because the presumption was held inapplicable or because the legal and social climate made the issue of legitimacy inapposite.[83] In the 1970s when the UPA was promulgated and adopted by many states, the legal and social climates had changed, but the law regarding legitimacy (as opposed to illegitimacy) remained dedicated to a concern about white fathers and their white children. When Professor Krause considered African-American children he did so exclusively in the context of illegitimacy.[84]

The exclusive focus of the UPA on illegitimacy when considering the welfare of African-American children raises two areas of inquiry. First, what accounts for the exclusive focus on illegitimacy for African-American children? Second, would the UPA's marital presumption and its related procedural rules have been configured differently had the drafters considered legitimacy issues with regard to African-American children?

As for the first question, Professor Krause is very clear about why the central focus of his inquiry regarding African-American children was the issue of illegitimacy.[85] In the 1960s, he had detected a clear trend of a growing rate of illegitimacy among African-American children.[86] He interpreted the demographic data as indicating that the denial of economic rights, such as wrongful death and inheritance rights, to illegitimate children operated in a racially discriminatory manner.[87] A primary purpose of his efforts, therefore, was to alleviate the legal consequences of illegitimacy as one of the means to address the problem of poverty facing African-American children.[88]

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[83] See supra Part II.B.

[84] See Krause, supra note 80, at 257–95.

[85] See id. at 257–67.

[86] See id. at 258 n.2.

[87] Id. at 259–60.

[88] See id. at 267.

The fact that illegitimacy was his chief concern, however, does not explain why when drafting a statute that relied on the marital presumption he would not consider its relevance for African-American children. The explanation for that lies in part on the fact that, historically, legal and social circumstances made the marital presumption inapposite to African-American children.[89]

It also lies in part on his reliance on the work of E. Franklin Frazier and on *The Moynihan Report*.[90] In *The Negro Family in the United States*,[91] Professor Frazier concludes that female-headed families developed during the slave period, gained prominence after emancipation, and intensified through the crises of reconstruction and urbanization. *The Moynihan Report*,[92] named after Senator Daniel Patrick Moynihan, argued that Frazier's analysis of black family history had continuing relevance in contemporary society. These studies have been subject to severe criticism as methodologically flawed and distorted in that the observations and conclusions of the studies were a product of the Euro-American traditions of monogamy, nuclearity and patriarchy.[93]

Although much of Professor Krause's own work predated the criticisms of the Frazier study and the Moynihan Report, his reliance on them in drafting the UPA should not be viewed as benign. The findings and conclusions of these studies were widely influential and persuasive because they reflected the pervasive stereotypes of African-American family structures as deviant and of African-American women as women usurping the patriarchy and as welfare mothers.[94] These studies were also well received because they relieved whites of some or all of their responsibilities for the effects of slavery and discrimination. Their ultimate effect was to transform African-American women into "scapegoats, responsible for the psychological emasculation of black men and for the failure of the black community to gain parity with the white community."[95] Professor Krause never questioned how the studies led to victim blaming.

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[89] See supra Part II.B.

[90] See Krause, supra note 80, at 260–65.

[91] E. Franklin Frazier, The Negro Family in the United States (1966).

[92] Office of Policy Planning and Research, U.S. Dep't of Labor, The Negro Family: The Case for National Action (1965).

[93] See, e.g., Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 75 (1990); Bonnie Thornton Dill, The Dialectics of Black Womanhood, 4 Signs 543, 544–51 (1979); Herbert Gutman, Persistent Myths About the Afro-American Family, 6 J. Interdisciplinary Hist. 181 (1975).

[94] See Collins, supra note 93, at 75–76.

[95] Dill, supra note 93, at 548.

On the contrary, his emphasis on the welfare of the African-American child in conjunction with his reliance on the negative, stereotypical images of African-American women became the justification for determining the child's father. To identify the father, however, required in many instances that an African-American woman's sexual life become part of the public domain for inspection and critique.[96] Professor Krause created a conflict of interest between the child and the mother and then resolved that conflict against the mother. That resolution of the issues of poverty and illegitimacy was inevitable once the mother was assigned blame and labelled unworthy.

> The image of the welfare mother provides ideological justifications for interlocking systems of race, gender, and class oppression. African-Americans can be racially stereotyped as being lazy by blaming Black welfare mothers for failing to pass on the work ethic. Moreover, the welfare mother has no male authority figure to assist her. Typically portrayed as an unwed mother, she violates one cardinal tenet of Eurocentric masculinist thought: she is a woman alone. . . . The image of the welfare mother thus provides ideological justification for the dominant group's interest in limiting the fertility of Black mothers who are seen as producing too many economically unproductive children.[97]

Legitimacy laws were irrelevant to the African-American child in the eighteenth, nineteenth and early twentieth centuries because laws and social institutions were established to encourage illegitimacy. Part of an African-American woman's productive value was her ability to reproduce workers for use in the white-dominated economy; illegitimacy served that purpose well. Illegitimate African-American children no longer serve the economy and, in fact, are viewed as a burden upon it. Thus, it is not surprising that while the attention of the laws and social institutions remains centered on issues of illegitimacy, the purpose now is to discourage illegitimacy.

That does not mean, however, that legitimacy law — i.e., the marital presumption — has no current relevance to African-American children. As shown immediately below, the failure to recognize that relevance turns out to be potentially costly to African-American children.

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[96] See, e.g., 45 C.F.R. § 232.12 (1991) (each applicant for federal assistance required to cooperate in establishing paternity); §§ 232.40–.49 (claiming and determining good cause for noncooperation).

[97] Collins, supra note 93, at 77. See also Lisa C. Ikemoto, The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law, 53 Ohio St. L.J. 1205, 1304–06 (1992) (showing how the label of "Bad Mother" is reserved for women who are assigned to outgroups based on their race, class, culture and sexual orientation).

The UPA's marital presumption and the related procedural rules might have been configured differently had legitimacy issues regarding African-American children been considered. Two critical demographic statistics indicate that the marital presumption as designed under the UPA may not meet the needs of African-American children or their parents. In 1984, fifty-nine percent of the births of African-American children were to unmarried African-American women.[98] If, in 1984, forty-one percent of the births of African-American children were to married African-American women, then one must conclude that the marital presumption might well have consequences for African-American families. The appropriateness of the broad marital presumption rule found in the UPA might be questioned, however, in light of one study which shows that African-American women spend an average of eleven years separated between their first marriage and divorce.[99] During this lengthy time of separation, any children born to the wife will be treated as children of her husband. Situations may develop where the presumption of paternity of the absent husband becomes problematic. In those situations, the statute of limitations, which precludes the wife, husband and child from declaring the non-existence of paternity more than five years after the child's birth, may prove particularly troublesome.[100] It does not seem a sufficient response to say that the UPA is furthering the welfare of the child by presuming the wife's husband to be the father. At stake is not only whether the child's biological father will be held financially responsible, but also whether a man who has neither social nor biological connection to a child will be deemed by law to be the father. A legal presumption that has no basis in reality is seldom helpful.[101]

A mother is unlikely to want any connection with a man who no longer plays a role in her life and has no social or biological connection with her child. Yet, the law deems that man the father of her child and imposes parental obligations on him giving him a legal basis for intruding himself into the lives of the mother and the child in a potentially disruptive and problematic manner. In this situation, the legal rule is not furthering domestic tranquility, but contributing to family strife. Moreover, it is not

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[98] See Reynolds Farley & Suzanne M. Bianchi, The Growing Racial Difference in Marriage and Family Patterns, in Robert Staples, The Black Family: Essays and Studies 6 (Table 1) (4th ed. 1991). Thirteen percent of the births of white children in 1984 were to unmarried women. Id.

[99] Id. at 8. This compares to two years for white women. Id. Without more information regarding relative income levels of African-American and white women, it is difficult to know whether the different family patterns are attributable to race or class, or to both.

[100] UPA § 6(a)(2).

[101] See infra note 122 for a discussion of Clay v. Clay, 397 N.W.2d 571 (Minn. Ct. App. 1986).

enough to say that the child is benefited by the ability to charge some man with support obligations and the right to claim a share of his estate at death. By having someone else presumed to be the father, the biological father may feel less obligation to participate in the rearing and financial support of his child. In effect, the legal rule may have the effect of encouraging the biological father to abandon his child and ignore his child-rearing obligations.

When considering the issues of illegitimacy regarding African-American children, Professor Krause strongly argued against relying exclusively on the formality of marriage for creating a legal relationship between father and child.

> *If the law denies one in four black children a legal relationship with his father, the law must be adapted to the social circumstance that the parents of one in four black children have neglected to comply with a formality.* There are sound methods other than marriage certificates to determine descent — which is a question of fact, not morality. And one long step toward encouraging private responsibility is to impose it.[102]

Professor Krause understood that the absence of a marriage certificate should not deny an African-American child the benefit of a father. Had he been aware of the data regarding marriage and divorce for African-American women, Professor Krause might have more clearly understood that the existence of a marriage certificate and the absence of a divorce decree should not, without more, be sufficient to determine fatherhood.

As shown in parts II and III, the marital presumption is a part of a patriarchal family tradition that gains its power through economic, social and legal institutions. During the eighteenth and nineteenth centuries, the benefits of these institutions were not available to African-American men, and without such institutions the marital presumption has had little positive effect on the lives of the men or their children. This section demonstrates, through recent demographic data, that current African-American family patterns reflect, but do not replicate, the traditional white family. Economic and social stresses produce different family patterns as African-American women live the contradiction of their "historical role[s] as . . . laborer[s] in a society where ideals of femininity emphasize[] domesticity."[103] Unsurprisingly, attention to African-American family patterns leads to the conclusion that the marital presumption, as presently designed in the UPA, inadequately meets the needs of African-American women and their children.

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[102] Krause, supra note 80, at 265.

[103] Dill, supra note 93, at 553.

This section raises serious questions about whether the marital presumption found in the UPA was intended to, and in fact does, serve the welfare of African-American children. The question explored in the next section is whether the claim regarding the welfare of the child has any validity for a child born to white parents.

B. The White Child

Although the UPA's marital presumption was not designed with African-American children in mind, much of what I am saying in the following discussion applies to African-American families. In investigating the purposes and possible explanations for the UPA rules, however, I center this part of the discussion on white families. I do this because white children were the focus of this legislation and because the comparison of the UPA and the common law presumption and evidentiary rule requires a distinction to be made between white and African-American families.

The UPA presumes a husband is the father of his wife's child and continues the common law tradition of precluding dual paternity.[104] By privileging the marital relationship, the UPA would seem to continue the common law tradition of leaving the legal husband with the right to decide to make the white child his own.[105]

Arguably, the growing efforts regarding enforcement of child support orders against fathers would seem to limit severely the choice white men have historically enjoyed regarding fatherhood. The explanation for the widespread acceptance of the presumption within this new legal environment may be attributable to the technological advances in the reliability of blood-

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[104] UPA § 4. The standing rules of the UPA preclude another man from asserting paternity claims if the marital presumption and not the cohabitation presumption is operative. Id. § 6. There has been a good deal of litigation regarding the rights to fatherhood of a man who, through blood-typing tests, is proven to be the biological father. See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989); Presse v. Koenemann, 554 So. 2d 406 (Ala. 1989); In re Melissa G., 261 Cal. Rptr. 894 (1989); John M. v. Paula T., 571 A.2d 1380 (Pa. 1990); Mary Kay Kisthardt, Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D., 65 Tul. L. Rev. 585 (1991); Traci Dallas, Note, Rebutting the Marital Presumption: A Developed Relationship Test, 88 Colum. L. Rev. 369 (1988). See supra note 43 and accompanying text for earlier discussion of dual paternity.

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> The application of the presumption of legitimacy of a child born to a married woman would be in the child's interest in practically all cases. If the mother's husband does not disavow paternity, there is no reason to go after the child's true father.

Krause, supra note 80, at 77.

typing tests to determine paternity.[106] The husband now has the ability to determine with certainty whether a child born to his wife is his. If the blood-typing tests show that the child is not his, under the statute he can avoid fatherhood so long as he disputes paternity within five years of the child's birth.[107] Thus the availability of blood-typing tests makes the burden of child support of little consequence to a husband who decides he does not want to be the child's father and who knows the child is not his.

The fact that a wife can contest her husband's paternity under the UPA and testify to his nonaccess could be viewed as an improvement over the common law.[108] By not silencing the wife, the UPA, contrary to the common law, acknowledges her power to know her child with certainty and also know who the child's father is and who he is not.[109]

On the other hand, the reliability of blood tests would seem to undermine the importance of allowing the wife to testify regarding her sexuality and her reproductivity.[110] The UPA should not be understood

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[106] It is expected that blood test evidence will go far toward stimulating voluntary settlements of actions to determine paternity. In this connection, proposed legislation currently pending in the U.S. Senate should be considered. Senate Bill 2081, 93d Congress, 1st Sess. (June 27, 1973), looks toward the establishment of a national system of federally assisted child support enforcement and provides for an efficient system of blood typing.

UPA § 12, cmt. See also Krause, supra note 80, at 123–37 (describing the reliability of blood tests for exclusion and inclusion purposes).

Since promulgation of the UPA, determination of paternity based on blood testing has improved, providing greater accuracy both for exclusion and inclusion of paternity. See Linda Shoemaker, Comment, Bastardizing the Legitimate Child: The Colorado Supreme Court Invalidates the Uniform Parentage Act Presumption of Legitimacy in *R.McG. v. J.W.*, 59 Denv. L.J. 157, 171 (1981); Vera L. Sterlek & Lee M. Jacobson, Comment, Paternity Testing with the Human Leukocyte Antigen System: A Medicolegal Breakthrough, 20 Santa Clara L. Rev. 511 (1980); Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Fam. L.Q. 247 (1976); see also Herbert F. Polesky, Application of Genetic Marker Typing: Disputed Parentage Cases 12 (1992) (unpublished manuscript, on file with the Columbia Journal of Gender and Law) (predicting that advances in technology may make it feasible in the future to directly examine differences in human chromosomes for the purpose of exclusion and inclusion of paternity).

[107] UPA § 6(a).

[108] Under the UPA, only the biological mother, child or the presumed father may rebut the presumption. See UPA § 6(a).

[109] See supra notes 67–71 and accompanying text.

[110] See Clay v. Clay, 397 N.W.2d 571 (Minn. Ct. App. 1986). In this case, the court held the husband to be the father of the child by dismissing the wife's testimony as proof that a man other than her current husband was the father and treats the blood-typing tests as critical:

to support the proposition that a wife's word is believed more today than it was in the past or that her unique knowledge is recognized. The UPA's willingness to allow the wife to testify is just as easily explained as a harmless concession within the new technological climate. There is no risk in letting a wife speak now that scientific evidence is available to corroborate or impeach her testimony.

The importance of allowing the wife to testify is further undermined by the heightened burden of proof of clear and convincing evidence. If, at the time of a paternity proceeding, neither the husband nor the putative father are available for blood-typing tests, it is not at all clear under the statute whether the wife's testimony alone would be sufficient to meet the clear and convincing standard.[111] In that respect, the UPA is not so different from the common law — better to attribute fatherhood erroneously to the husband than to have to rely on the wife's word.

One further aspect of the UPA undermines the importance of allowing the wife to testify. The wife (as well as the husband and the child) can only bring a suit to declare the non-existence of paternity within five years of the child's birth.[112] The time limitation has not been the subject of much discussion.[113]

> [The alleged father] has, in fact denied paternity in his Answer. He has not participated in any blood test to determine the probability that he is [the child's] father. [The wife] testified that [the alleged father] is the child's father, and [the husband] understandably wishes that the court would treat that claim as an established fact.

Id. at 579–80. See also Lonning v. Leonard, 767 S.W.2d 577 (Mo. Ct. App. 1988) (the wife testified that she had sexual intercourse with the putative father and denied having sexual intercourse with her husband; the husband testified they did have sexual intercourse; the accuracy of results of blood-typing tests, which indicated that the husband was not the father, was contested on cross-examination; the putative father denied paternity at trial; and the court affirmed the trial court's verdict finding paternity of the husband).

[111] Cf. Finkenbinder v. Burton, 477 So. 2d 459 (Ala. Civ. App. 1985) (blood-typing tests placed the probability of the putative father's paternity at 97.1%; the court emphasized that expert testimony showed a possibility that the putative father was not the biological father and that the husband and wife (now divorced) both testified that they had sexual relations during the estimated time of conception; the court held that evidence was directed at proving the putative father was the biological father, but failed to disprove the legal presumption that the husband was the biological father); see also Blake v. Div. of Child Support Enforcement, 525 A.2d 154 (Del. 1987) (wife's and putative father's testimony conflicted, but the presumption that the husband was the father of the child was rebutted and the putative father was found to be the natural father based on blood-typing tests).

[112] UPA § 6(a)(2).

[113] The focus of attention has been the exclusion of the putative father from having standing to rebut the presumption of legitimacy. See supra note 104.

Presumably, one of its purposes is to assure prompt determinations of paternity. The benefit of this is that it avoids problems of proof created by the passing of time. With paternity based for the most part on blood tests, however, potential problems of proof do not seem sufficiently significant. In any case, the higher burden of proof to rebut the presumption would seem to provide sufficient protection to the state and the interested parties.

Second, the time limit provides certainty and finality to the issue of paternity.[114] In this context certainty and finality mean that the legal white family is given protection against interference.[115] If the focus of the legal family is the marital unit, this rationale fails because it is based on the insupportable assumption that just because the marriage is intact at the time of conception and the birth of the child, it will remain intact.[116]

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[114] See Pierce v. Pierce, 374 N.W.2d 450 (Minn. Ct. App. 1985) (husband in divorce action alleged his paternity to his wife's child who was born when the wife was married to another man; the court held that the UPA denied the putative father standing to challenge paternity and, in any case, that he was barred by the UPA's statute of limitations; in explaining the statute of limitations, the court said that the "obvious intent" of the statute of limitations "is to make the presumption of legitimacy conclusive").

[115] The statute also embraces couples who have attempted to marry. See UPA § 4(a)(2)–(3).

Professor Olsen urges us to be skeptical of arguments based on noninterference in family matters.

> The notion of noninterference in the family depends upon some shared conception of proper family roles, and "neutrality" can be understood only with reference to such roles. For example, one of the bases upon which statutes limiting access to contraceptives have been struck down is that such statutes intrude upon the marital relation. Governmental programs providing minors with access to contraceptives, however, are also condemned as state interference in the family. Thus, "interference" is not a simple description of state action or inaction, but rather a way of condemning particular state policies, usually those aimed at changing the status quo. The status quo itself is treated as something natural and not as the responsibility of the state. Actual inequality and domination in the family — as in the free market — are represented as private matters that the state did not bring about, although it could undertake to change them.

Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1506 (1983).

[116] Cf. Krause, supra note 80, at 77–78:

> Society has come to accept impermanent sexual liaisons as proper, if only they are rubber-stamped by Nevada's divorce or marriage clerks in proper sequence. By considering them legitimate, society has given full legal rights to the offspring of such impermanent unions. Why should the argument of "family protection" be more applicable to the offspring of parents who have never been married than to the "sequential polygamists" who are tolerated if not encouraged by our law?

Moreover, it fails to take into account the circumstances in which a wife is likely to find herself if she remains married to her husband. It is unlikely to be in the wife's interest or her child's interest to contest her husband's paternity. Circumstances change, however, and she may find herself silenced by the statute of limitations, against her or her child's interest, in much the same way she was silenced by Lord Mansfield's evidentiary rule.[117]

The finality rationale does have force, however, if we understand that the primary concern of the UPA is the relationship between the white husband and the white child.[118] The five-year rule provides the husband with considerable security regarding his fatherhood.[119] To be sure, that

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This quote is from an extended discussion in which Professor Krause argues that "family protection" is not a sound basis for denying rights to illegitimate children. He was emphasizing the impermanence of legal marriages to show that an illegitimate child is not likely to threaten existing marriages significantly. He does not consider why this same argument should not apply to extend or eliminate the time limitation.

[117] See, e.g., In re Marriage of Ingram, 531 N.E.2d 97 (Ill. App. 1988) (barring wife, due to state's statute of limitations (different from the UPA), from raising a paternity issue in litigation involving the dissolution of marriage and custody of minor child); B.P. v. G.P., 536 A.2d 271 (N.J. Super. 1987) (holding that a divorced wife's failure to file her complaint for paternity at the time of divorce precludes her from filing one after the judgment of divorce, although wife alleged a man other than her divorced husband to be the father). But cf. Simcox ex rel. Dear v. Simcox, 529 N.E.2d 1032 (Ill. App. 1988) (permitting child to pursue a petition to declare paternity even though paternity had been determined in previous divorce action).

[118] See text at supra note 62.

[119] The UPA does not provide the husband complete security of the father-child relationship. § 6(a)(1) provides that under certain of the presumptions enumerated in § 4, a man presumed to be the child's father can bring an action "at any time for the purpose of declaring the existence of the father and child relationship . . . ." One presumption allows a man to bring an action to determine paternity when "after the child's birth, he and the child's natural mother have married, . . . and (i) he has acknowledged his paternity of the child in writing . . . ; (ii) with his consent, he is named as the child's father on the child's birth certificate, or (iii) he is obligated to support the child under a written voluntary promise or by court order." § 4(a)(3). Thus, if the husband and wife divorce and the wife marries the putative father and the putative father acknowledges his paternity and voluntarily promises to support the child, the putative father, at any time, has the right to have his paternity declared. See Markert v. Behm, 394 N.W.2d 239 (Minn. App. 1986) (the court instructed the putative father as to how he could obtain standing under the UPA); see also Finkenbinder v. Burton, 477 So. 2d 459 (Ala. Civ. App. 1985) (the putative father who married the divorced wife of the presumed husband was allowed to intervene in a petition to modify the decree as to custody, visitation rights and support; the court denied the petition to modify); D.S.P. v. R.L.K., 677 P.2d 959 (Colo. App. 1983) (the putative father who received the child into his home and held the child out as his own was treated as an "interested party" and was not subject to the five-year rule even though the marital presumption applied); Simcox, 529 N.E.2d 1032. But see Ex Parte Presse, 554 So. 2d 406 (Ala. 1989) (the court denied the putative father standing to initiate an action to establish a father-child relationship, notwithstanding that he had married the mother and

security comes with the concomitant cost of not being able, in the future, to avoid fatherhood responsibilities, even though his circumstances change and fatherhood proves inconvenient.[120]

The statute of limitations pertaining to the marital presumption carries with it vestiges of the common law presumption and the Lord Mansfield rule. If the white husband chooses fatherhood,[121] the law will use its power to enforce his choice against his wife, his child and the biological father.[122] Legal marriage, legal presumptions and legal procedures work

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that the child lived in his home while a minor).

[120] See, e.g., Clay v. Clay, 397 N.W.2d 571 (Minn. App. 1986) (divorced husband, who stipulated to paternity in dissolution proceeding, could not raise issue of paternity in postdecree motion because the UPA's statute of limitations had run); Watts v. Watts, 337 A.2d 350 (N.H. 1975) (husband attempted to escape a child support order in connection with a divorce proceeding by denying his paternity and moving for an order of blood tests; the court denied his motion saying that "[t]o allow defendant to escape liability for support by using blood tests would be to ignore his lengthy [for over fifteen years], voluntary acceptance of parental responsibilities"); see also In re Marriage of Holland, 730 P.2d 410 (Mont. 1986) (divorced husband was in arrears on child support payments; the court upheld dismissal of a motion by divorced husband requesting a paternity determination on grounds that the issue had been litigated in dissolution action).

[121] Professor Krause consistently emphasizes the husband's choice in his discussion of the marital presumption. See Krause, supra note 80, at 77 ("If the mother's husband does not disavow paternity, there is no reason to go after the child's true father. . . . If, on the other hand, the mother's husband has disavowed paternity, no obstacle lies in the way of pursuing the child's father."); id. at 97 ("In the best interests of the child born illegitimately to a *married* mother, pursuing its true paternity would not be indicated, unless the mother's husband has disavowed paternity. For the same reason (protection of the family) that continues to support the presumption of legitimacy of children born to a married mother, an illegitimate father's claim to his child born 'legitimately' to a married mother should not be heard — unless the mother's husband has disavowed paternity or consented to the legitimation of the child by its actual father." Id. (footnotes omitted)).

[122] See Michael H. v. Gerald D., 491 U.S. 110, 130 (1991) (Scalia, J.) ("If [the biological father] has a 'freedom not to conform' (whatever that means), [the husband] must equivalently have a 'freedom to conform.' One of them will pay a price for asserting that 'freedom' — [the biological father] by being unable to act as father of the child he has adulterously begotten, or [the husband] by being unable to preserve the integrity of the traditional family unit he and [his wife's daughter] have established."); see also Colb, supra note 66, at 108–12 (discussing the certainty aspect of *Michael H*). But see Clay v. Clay, 397 N.W.2d 571 (Minn. App. 1986), in which the husband submitted to blood-typing tests that proved he was not the father of his wife's child; the court held that an action to establish his nonpaternity of the child was barred by the UPA's statute of limitations. In a dissent Judge Randall identifies the mire created by the marital presumption:

> What we have in this case is the legal system handing five-year old T.C. a piece of paper which states that appellant is his father. T.C.'s mother knows that is not true. All the court personnel associated with the case know that is not true. . . . All friends and relatives who have knowledge of the facts know

with the husband to produce a child for him. In other words, the power of the law becomes the equivalent of white male procreative power.

V. CONCLUSION

This Article undertook an examination of how the marital presumption and the related evidentiary rule operated in the United States during the eighteenth, nineteenth and early twentieth centuries. This study revealed that the presumption's and rule's traditional justification, that of promoting the welfare of the child, is the means by which the law masked white male control of procreation. This control was exercised in different ways over, and with different consequences for, African-American women, African-American men and white women. Examination of the widely adopted UPA further showed that the welfare-of-the-child justification continues to mask white male control of procreation.

The central focus of the marital presumption under the UPA is the determination of fatherhood for white males. Although the UPA appears to overrule the Lord Mansfield Rule and to allow the wife to testify regarding the father of her child, her unique knowledge regarding procreation still is not recognized. Blood-typing technologies, a heightened burden of proof and the statute of limitations all operate to undermine the importance of her testimony and, therefore, her procreative power. The UPA, like the common law marital presumption and the Lord Mansfield Rule, continues the legal tradition of wrenching procreative power away from women and usurping it on behalf of white males.

The crucial result of this analysis is the exposure of the means by which the law enforces and reinforces racial and gender hierarchies. A similar analytical approach to other inheritance law doctrines is likely to identify other legal techniques that perpetuate racial and gender hierarchies. If systematically applied to this area of the law, such analysis may destabilize widely accepted principles. More importantly, it may also lay the foundation for transforming the inheritance law from a system that reflects existing dominant values into a system designed to promote and serve the interests of members of traditionally subordinated groups.

> that is not true. The judiciary handing T.C. that piece of paper knows that is not true, and, in a few short years when T.C. can comprehend things, he will know that the court system gave him a piece of paper which is not true.

Id. at 581.