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Foreword: *Moore* Kinship

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SYMPOSIUM
MOORE KINSHIP
FOREWORD

R.A. Lenhardt & Clare Huntington***

Forty years ago, Mrs. Inez Moore, a widowed black mother and grandmother of little means, secured a victory that likely seemed improbable to many. Without any money, but with the assistance of a team of dedicated Legal Aid attorneys,¹ she took her lawsuit challenging an East Cleveland, Ohio, zoning ordinance that made it a crime for her to live with her grandson all the way to the U.S. Supreme Court and won.² The ordinance permitted certain extended family configurations to reside together within the city's limits, but it prohibited Inez's family arrangement.³ Just by bringing her infant grandson John Jr., upon his mother's death, to live in the home in which she already resided with her son, Dale Sr., and his minor son, Dale Jr., Inez ran afoul of a housing code provision that local officials vigorously enforced.⁴ For her refusal to heed their demands that she basically evict John Jr. from the only home he had ever known, Inez faced not only a criminal fine but jail time as well.⁵

Moore v. City of East Cleveland,⁶ the Supreme Court decision vindicating Inez's right to raise her grandson in her home has become a mainstay in all major family law casebooks. Indeed, it stands as one of the most important family law judgments ever rendered by the Court. In finding that East Cleveland's ordinance violated the Fourteenth Amendment's Due Process Clause, the Court affirmed the constitutional importance of families and decision making pertaining to issues such as

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1. See CAROL POH MILLER, *A PASSION FOR JUSTICE: A HISTORY OF THE LEGAL AID SOCIETY OF CLEVELAND 1905–2005*, at 62–63 (2006); Peggy Cooper Davis, *Moore v. East Cleveland: Constructing the Suburban Family*, in *FAMILY LAW STORIES* 77, 78 (Carol Sanger ed., 2008).

2. See generally *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

3. See *id.* at 495–96.

4. See *id.* at 496–97.

5. See *id.* at 497.

6. 431 U.S. 494 (1977).

marriage and childrearing.⁷ Justice Lewis Powell, who wrote the plurality opinion in *Moore*, concluded that the ordinance simply “slic[ed] [too] deeply into the family itself.”⁸ Justice Powell explained that due process protections for family relationships are not limited to nuclear families.⁹ Instead, such protections encompass extended families, which Justice Powell and those who joined him recognized as having a long “tradition” in the United States “equally deserving of constitutional recognition.”¹⁰

The *Fordham Law Review* elected to mark the fortieth anniversary of the decision in *Moore* by convening a group of family law scholars to reflect on both what *Moore* meant for families and family law at the time it was decided and what it means today. *Moore*’s treatment of extended families ensures its mention in most conversations about alternative family forms. Yet, there are many ways in which *Moore*, notwithstanding its broad endorsement of familial privacy and protection, represents a missed opportunity. It makes no mention, for example, of family structures less rooted in tradition, such as those involving nonmarital unions and childrearing. Nor does it address the race and socioeconomic issues that seem to have informed the City of East Cleveland’s actions. The challenged ordinance was designed to stave off white flight and manage an influx of African American residents,¹¹ but archival documents relevant to the decision make it clear that Justice Powell was determined to avoid any mention of race in rendering the Court’s judgment.¹² Indeed, *Moore* studiously avoids grappling with any of the hard issues pertaining to race, equality, and family formation.¹³

The Court’s decision, which has largely been overlooked as a subject of scholarly examination, offers an important starting point for a deeper examination of the role of the law in both supporting and, too often, undermining families, especially families of color. In 2017, more families than ever do not fit the traditional model of a married man and woman

7. *See id.* at 504–06.

8. *Id.* at 498.

9. *Id.* at 504.

10. *Id.*

11. *See* Davis, *supra* note 1, at 84.

12. *See* Moore v. City of East Cleveland, No. 75-6289, draft op. at 1 (U.S. Feb. 14, 1977) (Brennan, J., dissenting) (containing, in the margin of Justice Brennan’s then-dissenting opinion, a handwritten note from Justice Powell stating, “I see no racial overtones here”). By contrast, Justice William Brennan’s concurrence, joined by Justice Thurgood Marshall, does acknowledge this element of the case. *See Moore*, 431 U.S. at 508–10 (Brennan, J., concurring) (“In today’s America, the ‘nuclear family’ is the pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia’s preference in patterns of family living. . . . The ‘extended’ form is especially familiar among black families. . . . [T]he prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the ‘extended family’ pattern remains a vital tenet of our society.” (citation and footnote omitted)).

13. For an article discussing the problems inherent in case law and scholarship that fail to attend to the operation of race in the family context, see R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. (forthcoming 2017).

raising biological or adoptive children. Today, far fewer adults marry.¹⁴ Approximately forty percent of children are born to unmarried parents,¹⁵ the majority of whom will not marry.¹⁶ Same-sex couples abound and are raising children together.¹⁷ And familial roles and caretaking norms are increasingly fluid, with men providing significant amounts of care and women acting as the sole or primary breadwinner.¹⁸

As at the time of *Moore*, family structure in 2017 differs by race and class. The marriage rate has declined for all groups, but it has dropped disproportionately for adults of color.¹⁹ All racial and economic groups have children outside of marriage, but nonmarital children are disproportionately of color.²⁰ LGBT couples of all races raise children, but these families are disproportionately of color.²¹ And income inequality is not equal. The median wealth of white households is thirteen times the median wealth of black households and ten times the median wealth of Latino households.²²

The symposium on *Moore* that the *Law Review* hosted and that Fordham's new Center on Race, Law, and Justice cosponsored was designed to grapple with these and other issues facing modern families. It began with a keynote address by Anne Williams-Isom, chief executive

14. See PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 1 (2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [<http://perma.cc/DD83-6PHG>].

15. See BRADY E. HAMILTON ET AL., CTRES. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., BIRTHS: PRELIMINARY DATA FOR 2015, at 4 (2016), https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_03.pdf [<https://perma.cc/Q8V8-7TW7>].

16. See Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 142, 147 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

17. See GARY J. GATES, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES 1 (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf> ("An estimated 3 million LGBT Americans have had a child and as many as 6 million American children and adults have an LGBT parent.") [<https://perma.cc/RZK5-GM6K>].

18. See KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 1 (2013), http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf (describing this trend) [<https://perma.cc/6J78-WHDX>]; WENDY WANG ET AL., PEW RESEARCH CTR., BREADWINNER MOMS: MOTHERS ARE THE SOLE OR PRIMARY PROVIDER IN FOUR-IN-TEN HOUSEHOLDS WITH CHILDREN; PUBLIC CONFLICTED ABOUT THE GROWING TREND 20 (2013), http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf [<https://perma.cc/RF4C-6Y68>].

19. See R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1345–46 (2015).

20. See HAMILTON ET AL., *supra* note 15, at 4.

21. See GATES, *supra* note 17, at 1 ("An estimated 39% of individuals in same-sex couples who have children under age 18 in the home are people of color, compared to 36% of those in different-sex couples who are non-White. Among children under 18 living with same-sex couples, half (50%) are non-White compared to 41% of children living with different-sex couples.")

22. See Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR.: FACT TANK (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [<https://perma.cc/3TCC-8J3B>].

officer of the Harlem Children's Zone. Williams-Isom described how she saw grandmothers working, as Inez Moore did, to strengthen their extended families.²³ Referring to the Harlem Children's Zone, Williams-Isom described how extended family is what they do—it's who they are.²⁴ But she also talked about the need to support these families and the many ways the government often fails to do so.²⁵ Her appreciation for both the strengths of extended families, as well as the significant challenges they face, is reflected throughout the symposium articles.

Later, in a series of roundtables, the participants explored the meaning of *Moore*—what was won and what was lost—talked about where we stand now, and debated how to move toward a more inclusive family law, by both setting objectives and also identifying constraints and possibilities. Out of these roundtables, many participants chose to write articles for this issue.²⁶ Together, these articles help to deepen the scholarly analysis of *Moore* and to explicate the kinds of issues and concerns that are—or should be—at the heart of research concerning the family today.

Unsurprisingly, given the circumstances that gave rise to the *Moore* case, as well as the national conversation about race and inequality that has unfolded in the wake of the tragic deaths in Baltimore, New York City, and elsewhere,²⁷ a number of the articles included here focus on issues of race and the effects of structural inequality on families of color in particular. In addition to the article by Anne Williams-Isom, which underscores the themes outlined in her keynote, several articles look to interrogate the systems and structures that account for the aforementioned racial disparities in the lives and functioning of families today. For example, Angela Onwuachi-Willig looks at the operation of race in Justice William Brennan's oft-celebrated concurrence in *Moore* that, unlike Justice Powell's opinion, at least acknowledges how race informs African American kinship structures.²⁸ She argues that, despite this acknowledgement, Justice Brennan's concurrence works to stigmatize black extended families like Inez Moore's as a second-best alternative.²⁹ Thus, Onwuachi-Willig urges an alternate approach, one that regards extended families as a truly

23. See Anne Williams-Isom, *Introduction: Moore v. City of East Cleveland: How One Grandmother Helped a Nation Redefine Family*, 85 FORDHAM L. REV. 2559, 2559 (2017).

24. *Id.*

25. See *id.* at 2561–62.

26. The family law scholars who participated in the symposium were Tonya Brito, Naomi Cahn, Ann Cammett, June Carbone, Nancy Dowd, Maxine Eichner, Elizabeth Emens, Serena Mayeri, Camille Gear Rich, Clare Huntington, Holning Lau, Robin Lenhardt, Kevin Nobel Maillard, Solangel Maldonado, Angela Onwuachi-Willig, Amber Shanahan-Fricke, and Anne Williams-Isom.

27. See Lenhardt, *supra* note 13, at 5–8; see also Lydia Polgreen, *From Ferguson to Charleston and Beyond, Anguish About Race Keeps Building*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/from-ferguson-to-charleston-and-beyond-anguish-about-race-keeps-building.html> [https://perma.cc/E23P-C2RM].

28. See Angela Onwuachi-Willig, *Extending the Normativity of the Extended Family: Reflections on Moore v. City of East Cleveland*, 85 FORDHAM L. REV. 2655 (2017); see also *supra* note 12.

29. See Onwuachi-Willig, *supra* note 28, at 2656.

exemplary family form, providing family members with tremendous social and economic support as well as a deep-seated sense of belonging.³⁰

Similarly, Solangel Maldonado and Ann Cammett urge greater attentiveness to processes and policies that lock families of color into inequality³¹ and compromise the capacity of their members to flourish.³² Maldonado emphasizes that, notwithstanding the outcome in *Moore*, local zoning ordinances continue to structure community life in ways that exclude and greatly disadvantage extended families.³³ She urges greater attention to local provisions that limit two-family homes as a way of controlling noise and overcrowding, among other things.³⁴ Such regulations, Maldonado explains, have a disparate and stigmatizing effect on immigrants and families of color, as they are more likely than their nonimmigrant and white counterparts to reside in such homes and to reside in extended family households.³⁵

Ann Cammett, for her part, considers the challenges that women like Inez Moore face today if they try to offer housing to family members with a criminal record.³⁶ Today, renters in this context face certain restrictions,³⁷ and families in public housing typically face a bar on housing family members with criminal records.³⁸ Cammett argues that, in these and other ways, the government makes it harder for low-income families, especially low-income African Americans, who are disproportionately burdened by the criminal justice system, to be together as a family.³⁹ Her article demonstrates that the civil collateral consequences of criminal convictions place constraints on family integrity that should not be overlooked.

Other contributions to this symposium consider the particular framing deployed in *Moore*, asking whether an alternative way of conceptualizing the issues presented in the case would better reflect the realities of family life or surface issues otherwise obscured by standard accounts of familial rights. June Carbone and Naomi Cahn lament the *Moore* plurality opinion's focus on tradition rather than autonomy, arguing that it provides an inadequate basis for recognizing other nontraditional family forms.⁴⁰ They also note that the opinion offers no foundation for a vision of family

30. *See id.* at 2661.

31. *See generally* DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014) (exploring the concepts of locked-in segregation and inequality).

32. *See generally* CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

33. *See* Solangel Maldonado, *Sharing a House but Not a Household: Extended Families and Exclusionary Zoning Forty Years After Moore*, 85 *FORDHAM L. REV.* 2641, 2645 (2017).

34. *See id.* at 2647–48.

35. *See id.* at 2648–49.

36. *See* Ann Cammett, *Reflections on the Challenge of Inez Moore: Family Integrity in the Wake of Mass Incarceration*, 85 *FORDHAM L. REV.* 2579, 2579–80 (2017).

37. *See id.* at 2583–84.

38. *See id.* at 2585–87.

39. *See id.* at 2580.

40. *See* June Carbone & Naomi Cahn, *Moore's Potential*, 85 *FORDHAM L. REV.* 2589, 2590 (2017).

life that involves state support for families.⁴¹ *Moore*, they argue, casts Inez Moore as a worthy individual but does not analyze or open an avenue for addressing the economic, social, and racialized structures that created the need for this grandmother to take in her grandchildren in the first place.⁴²

Nancy Dowd similarly maintains that the *Moore* Court missed an opportunity in conceptualizing the issues at the heart of the case. Describing John Jr.'s rich connections to his grandmother Inez and other family members, Dowd asks how the legal analysis in *Moore* would look if the Court had taken children's rights seriously.⁴³ In doing so, she tells the story of *Moore* from John Jr.'s perspective, delineating the potential constitutional claims available to him.⁴⁴ Further, she offers an alternative strategy for addressing the race, gender, and economic inequalities that children face that embraces structuralism and intersectionality.⁴⁵ Dowd persuasively argues that securing the developmental support and equality necessary for children to thrive requires greater attention to the systems and structures that inform the families, neighborhoods, and communities in which they are embedded.⁴⁶

Finally, the remaining articles in this symposium build out from *Moore* to ask what it suggests for family forms that have become more prevalent in the forty years since it was decided. In her article, Tonya Brito describes the failure of our current legal system to acknowledge complex families. As she explains, the dominant family form in low-income communities today is that each parent has children by multiple partners—what demographers call multiple-partner fertility.⁴⁷ Noting how much such families differ from Inez Moore's family, Brito counsels against "pathologizing" such families or "prodding them into conforming to prescribed societal norms."⁴⁸ Instead, she urges legal approaches and solutions that help to reduce, rather than exacerbate, inequality in this context.⁴⁹ In particular, Brito outlines potential changes in policies pertaining to matters such as child support, assistance provided through programs such as Temporary Assistance to Needy Families, and the Earned Income Tax Credit that better respond to the realities of complex families.⁵⁰

Holning Lau and Kevin Maillard each explore transformations in family structure, diversity, and rights affecting the LGBT community. Lau offers a comparative analysis of the different approaches that the United States and

41. *See id.*

42. *See id.* at 2591.

43. *See* Nancy E. Dowd, *John Moore Jr.: Moore v. City of East Cleveland and Children's Constitutional Arguments*, 85 FORDHAM L. REV. 2603, 2603 (2017).

44. *See id.* at 2605–11.

45. *See id.* at 2604.

46. *Id.*

47. *See* Tonya L. Brito, *Complex Kinship Networks in Fragile Families*, 85 FORDHAM L. REV. 2567, 2572–74 (2017).

48. *Id.* at 2577.

49. *See id.*

50. *See id.* at 2574–77.

South Africa have taken to same-sex marriage.⁵¹ While supportive of the outcome in the Supreme Court's 2015 decision in *Obergefell v. Hodges*,⁵² he sees significant strengths in the judicial reasoning applied in the Constitutional Court of South Africa's decision in *Minister of Home Affairs v. Fourie*.⁵³ Lau argues that *Fourie*'s emphasis on the dignity inherent not in the marriage itself but in choosing whether to enter into that institution offers a more useful frame than the one provided in *Obergefell*.⁵⁴ He also notes that the South African system offers a range of options for relationship recognition and, in so doing, points to productive solutions that other countries debating relationship recognition measures, including the United States, could explore.⁵⁵

Last, in his article, Kevin Maillard considers the meaning of maternal rights in a world in which assisted reproductive technologies make it possible for lesbian partners to each claim the status of mother.⁵⁶ Upon examining judicial decisions and statutory provisions addressing multiple maternity and the rights of former partners to a child or children to whom both have made significant contributions—whether through birth, genetics, or caregiving—he observes that the definitions of parenthood, and maternity in particular, have not kept pace with transformations in family structure and diversity.⁵⁷ To address this problem and the negative impact that it has on nonbiological mothers in custody disputes, he imagines an alternative approach to the “troubling gap between the assertion of fundamental rights and equitable claims to parenthood” that arises in this area.⁵⁸ Rather than using a model of parental rights that prioritizes genetic connection, he advocates legal changes that better respond to the concerns of such “newly normative families.”⁵⁹

Together, the articles assembled in this symposium underscore the value of *Moore* as a subject of study for family law scholars and others concerned about the functioning of modern families. The judgment that Inez Moore won to protect her grandson forty years ago was, in many ways, the tip of the iceberg. It raises important questions about the mechanisms and support necessary to secure effective family functioning, while also surfacing issues that have either too often been overlooked in family law scholarship or that have only just emerged with recent changes in family form and diversity. We hope that these articles convince readers of this issue of the need for even “*Moore* kinship” studies.

51. See Holning Lau, *Marriage Equality and Family Diversity: Comparative Perspectives from the United States and South Africa*, 85 *FORDHAM L. REV.* 2615, 2615 (2017).

52. 135 S. Ct. 2584 (2015).

53. 2006 (1) SA 524 (CC) (S. Afr.); see Lau, *supra* note 51, at 2617.

54. See Lau, *supra* note 51, at 2617.

55. See *id.* at 2622–24.

56. See Kevin Maillard, *Other Mothers*, 85 *FORDHAM L. REV.* 2629, 2631 (2017).

57. See *id.* at 2631–2639.

58. *Id.* at 2632.

59. *Id.* at 2640.