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ILLEGITIMATE CHILDREN AND MILITARY BENEFITS

A Thesis
Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, the United States Army, or any other governmental agency.

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ELIGIBILITY OF ILLEGITIMATE CHILDREN FOR MILITARY BENEFITS

by Captain David B. Howlett

ABSTRACT: This thesis examines the constitutionality of military benefit statutes and regulations as they relate to illegitimate children. The thesis describes the United States Supreme Court's analysis of illegitimacy and then applies this analysis to the military benefit statutes and regulations. This thesis concludes that these statutes and regulations unfairly discriminate against illegitimate children and their parents and recommends changes.

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> He is bound to prefer one healthy illegitimate child to ten rickety legitimate ones, and one energetic and capable unmarried couple to a dozen inferior apathetic husbands and wives. If it could be proved that illicit unions produce three children each and marriages only one and a half, he would be bound to encourage illicit unions and discourage and even penalize marriage.
>
> - Shaw, Getting Married

This paper examines the constitutionality of military benefit statutes and regulations as they relate to illegitimate children. The paper begins by briefly describing the history of illegitimacy and its nature and proportions today. It then sets out the Supreme Court's equal protection analysis for laws that discriminate on the basis of legitimacy. The next section describes the requirements illegitimate children and their parents must meet to be eligible for various military benefits. Finally, the paper examines those requirements in light of the Supreme Court's analytic framework, followed by recommendations for appropriate changes in the laws and regulations governing military benefits.

I. INTRODUCTION

A child is legitimate if it is born in wedlock, conceived in wedlock, or generally if its mother was

married at some point during pregnancy.[1] The concept of illegitimacy has existed since Roman times[2] and earlier.[3] Throughout history, societies have subjected illegitimate children to a variety of disabilities. In medieval Europe, illegitimate children had no legal relationship with either parent, could not appear in court as a party or a witness, and were barred from public office.[4] In English common law, the illegitimate child was the child of nobody, or filius nullius. He could not inherit; his parents had no right to his custody; and he could not assert any rights against either parent for his support.[5] Nevertheless, illegitimates in England did not have as harsh a treatment as on the continent, and their practical legal disability related almost entirely to inheritance.[6]

The filius nullius rule had the effect that most illegitimate children were born into severe poverty. Consigned to almshouses, they were sent to work at age four and suffered from an appalling mortality rate.[7] This harshness began to be addressed by social reform legislation in the nineteenth century. At the same time, rights of unwed parents began to improve; in 1883, English courts first recognized an unwed mother's right to custody of her child.[8] As late as the 1960's, however, British medical personnel refused to give anesthesia to unwed mothers in childbirth on the grounds that it would "teach them a lesson."[9]

Consistent with English common law, early American law considered the illegitimate child to have no family. Reform occurred at about the same time as similar measures in Britain,[10] but progressed at different rates

in each state.[11]

Debates continue about the causes of illegitimacy. Early research "proved" the cause to be "immorality, bad companions, and mental deficiency." Research in the 1930's "proved" it was broken homes, poverty, and bad neighborhoods. In the 1940's, researchers considered psychological defects of the mothers. By the late 1950's, they concluded that society itself was sick.[12] Researchers have considered and rejected causes as diverse as relative wealth and comparative climate.[13]

In some sense, illegitimacy has no specific cause, only effects. Its effects include higher mortality, lower IQ, and psychological problems.[14] Its formal cause is the legal regime which generates the distinction between legitimate and illegitimate children. The immediate causes of non-marital children "...are almost as multifarious as human motives and loves and hates."[15]

Virtually all societies in the world today, whether primitive or modern, distinguish between illegitimate children and legitimate children and apply some disabilities or penalties to the former.[16] Rates of illegitimate birth vary from over 70% in Panama and Jamaica to less than 1% for Japan, Israel, Egypt, and Syria.[17] The rate for the United States was less than 3% at the turn of the century. By 1960, it rose to 5% and reached 9.7% in 1968.[18] In the most recent figures, of 3,756,547 children born in 1986, 878,477, or 23.4% were born to unmarried women.[19]

There has been a difference in illegitimacy rates between white and black Americans since the early nineteenth century, with black illegitimacy relatively

higher.[20] The discrepancy has been very high in recent decades, although the rates are coming closer together. In the latest figures, 15.71% of white births are illegitimate, while 61.21% of black births are to unmarried mothers. Some scholars suggest this phenomena may have its roots in slavery.[21]

In illegitimacy, as in many other ways, the military reflects society as a whole. A recent study of Navy enlisted women found that 41% of those who became pregnant during a recent ten-month period were not married.[22] Most of the single pregnant women were young and in the lower enlisted ranks.[23] In the Army, 846 soldiers receive Basic Allowance for Quarters (BAQ) solely on the basis of court-ordered support for illegitimate children, and 3,729 soldiers receive BAQ solely on the basis of voluntary support of illegitimate children.[24] Most of these soldiers are from the lower enlisted ranks.[25] The figures exclude soldiers who support illegitimate children but who draw BAQ on the basis of another dependent such as a wife or parent.

II. THE SUPREME COURT'S ILLEGITIMACY ANALYSIS

The most significant changes in American law with respect to illegitimacy came about as the result of a series of Supreme Court cases. The Court has considered claims of unconstitutional discrimination against illegitimate children or their parents in twenty-three major cases since 1968. Over this period, the Court's standards for measuring the legality of laws that

differentiate on the basis of legitimacy developed.

The Court first struggled to formulate an appropriate level of review for statutes discriminating on the basis of legitimacy. In doing so, the Court had to consider the validity of various governmental goals put forward to justify differentiation between legitimate and illegitimate children. The Court also gave guidance on how statutes could be drafted to pass constitutional muster yet still treat people differently on the basis of legitimacy. Finally, the decisions began to define the rights of unwed parents.

A. THE MAJOR ILLEGITIMACY CASES

The first two illegitimacy cases decided in 1968 involved Louisiana's wrongful death statute. In Levy v. Louisiana,[26] the Supreme Court held the operation of the statute unconstitutional because it denied illegitimate children the right to recover for the death of their mother while it allowed legitimate children to do so. Writing for the majority, Justice Douglas stated that the right to sue for the wrongful death of a mother "involve[s] the intimate familial relationship between a child and his own mother."[27] Rather than being "nonpersons," the court said illegitimate children were "clearly `persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[28] Douglas compared the right involved in this case to the right to vote, to marry, and to have offspring. In reversing the decision of the Louisiana court, the Court called the discrimination against illegitimate children

invidious.[29] Seen in the context of later opinions, Levy places unusual emphasis on the legal or procedural right of the illegitimate child which is affected, as opposed to the fact of discrimination itself.

In Glona v. American Guarantee and Liability Ins. Co.,[30] a mother whose illegitimate child was killed in an auto accident was prevented from suing by the same Louisiana statute. The Court again held that this discrimination based on legitimacy was unconstitutional. It found no rational basis for distinguishing between married and unmarried mothers. Justice Douglas, writing again for the majority, stated "[a] law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors."[31]

Dissenting in both Levy and Glona,[32] Justice Harlan felt that it was just as rational to base recovery on legal relationships as on biological relationships. In addition, he believed that it was appropriate for the state to use this approach to promote legitimate family relationships.[33] The majority responded that it was irrational to assume that women having illegitimate children would be deterred from having illicit sexual relations because of the wrongful death statute of their state.[34]

Three years later, a new majority upheld another Louisiana statute against an illegitimacy equal protection challenge in Labine v. Vincent.[35] Justice Black, writing for the majority, denied that "a state can never treat an illegitimate child differently from legitimate offspring."[36] The Louisiana intestate succession statute worked to deny an inheritance to an

illegitimate daughter where the father had legally acknowledged her but left no will.

Unlike Levy, the state did not create an insurmountable barrier to illegitimate children since the father could have left a will.[37] The majority felt that the power to regulate disposition of property at death was constitutionally committed to states.[38] Finally, the Court acknowledged a state interest in promoting [legal] family relationships.[39]

Justice Brennan wrote for the minority that while the state has the power to regulate property disposition, this power does not authorize discrimination.[40] He also felt that it is not necessary for a law to be an absolute or "insurmountable barrier" to run afoul of the Equal Protection Clause of the Fourteenth Amendment.[41]

With two new Justices,[42] the Court addressed illegitimacy again in Weber v. Aetna Casualty and Surety Co.[43] In Weber, a Louisiana worker lived with four legitimate children and one illegitimate child. After his death, the Louisiana workmen's compensation statute operated to give recovery for damages only to the legitimate children. The statute favored legitimate and acknowledged illegitimate children over unacknowledged illegitimate children. The father could not acknowledge the illegitimate children in this case because he and the mother did not have the capacity to marry at the time of conception.[44]

Writing for the majority, Justice Powell stated that where sensitive and fundamental personal rights are involved, the court will use a dual inquiry: "What legitimate state interest does the classification

promote? What fundamental personal rights might the classification endanger?"[45] The majority concluded that the classification involved "no legitimate state interest,"[46] and should be struck down as denying equal protection to illegitimate children who were in fact dependent on decedents. Answering the first inquiry in the negative, the Court did not go on to consider whether the rights involved were fundamental. Nevertheless, Justice Powell wrote:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth....[47]

The Court distinguished Labine by saying that case involved a strong state interest in regulating disposition at death of property within its borders.[48]

Justice Blackmun concurred, but he wanted to limit the Court's decision to cases where the father could not acknowledge the child. He left open the possibility that a father's ability to voluntarily acknowledge the child might save the statute as the father's ability to include the child in a will had in Labine.

In the same year the Court decided Weber, it handed down a major case involving the interests of unwed fathers, Stanley v. Illinois.[49] Stanley had three illegitimate children with whom he lived. When the children's mother died, Stanley lost custody of the children.[50] Illinois law declared children of unwed fathers wards of the state without a hearing on the father's fitness as a parent. For cases involving children of wed parents, divorced parents, or unwed mothers, the law required a hearing on fitness and proof of neglect before children could be made wards of the state.

The Court held that the presumption of unfitness of unwed fathers denied Stanley equal protection of the laws.[51] The analysis, however, relied on the Due Process Clause of the Fourteenth Amendment. The Court balanced the government function against the private interest involved.[52] The Court determined that Stanley had a substantial interest in the care, custody, and management of his children.[53] In the face of the state's de minimis interest in caring for the children of fit parents, Stanley was entitled to a fitness hearing.[54]

Following Stanley, the Court issued the per curium opinion of Gomez v. Perez.[55] In Gomez, the Court struck down a Texas law which granted legitimate children a judicially enforceable right to financial support from their fathers, but denied this right to illegitimate children. The Court held that once a state posits a right to support from fathers, its denial of that right to illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment.

In a second 1973 per curium opinion,[56] the Court struck down a statute which had the effect of denying welfare benefits to illegitimate children. The Court dismissed as illogical the state's justification that the welfare scheme was necessary to "preserve and strengthen traditional family life."[57] The benefits extended under the program were just as indispensable to the health and well-being of illegitimate children as to legitimate children.[58]

The Court first applied illegitimacy equal protection analysis to a federal statute in Jimenez v. Weinberger.[59] The Social Security Act's benefit scheme[60] conclusively denied benefits to illegitimate children born after the onset of the insured's disability. Illegitimate children born prior to the insured's disability were entitled to benefits. Legitimate children received benefits regardless of when they were born.

The government argued that the group of after-born illegitimate children was unlikely to have the requisite economic dependency on the wage earner and that its exclusion was necessary to avoid spurious claims.[61] The Court held that blanket exclusion of a class of illegitimate children was not reasonably related to the government goal.[62] The conclusive denial of rights to after-born illegitimate children violated the Equal Protection Clause of the Fourteenth Amendment.[63]

In 1976, the Court ruled against illegitimate children applying for Social Security benefits in Mathews v. Lucas.[64] The challenged statute deemed children to be eligible beneficiaries if they were

legitimate, and it also deemed illegitimate children eligible under a variety of circumstances.[65] The statute also deemed as eligible those children whom the insured individual was living with or for whom he contributed support, at the time of his death.[66]

The Court applied the Weber two-part test and measured the "character of the discrimination and its relation to legitimate legislative aims."[67] The government explained that the purpose of the scheme was to determine which children were dependent on the insured when he died.[68] The scheme also sought "to avoid the burden and expense of specific case by case determination in the large number of cases where dependency is objectively probable."[69] In accepting this argument, the Court stated that "the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be `scientifically substantiated.'"[70] It concluded that the statutory classifications were reasonable empirical judgments as related to the likelihood of dependency at death.[71]

In his dissent, Justice Stevens could see no difference between this case and Jimenez.[72] The majority distinguished Jimenez because of its broad conclusive denial of benefits to illegitimate children. Instead, the statute in Lucas "does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations."[73]

The Court went on to describe how these alternative criteria were indicative of actual dependency, quoting the Maryland District court in a similar case:

> It is clearly rational to presume the overwhelming number of legitimate children are actually dependent upon their parents for support....When an order of support is entered by a court, it is reasonable to assume compliance occurred. A paternity decree, while not necessarily ordering support, would almost as strongly suggest support was subsequently obtained. Conceding that a written acknowledgment lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child unless the child is theirs and a man who has acknowledged a child is more likely to provide it support than one who does not.[74]

The Court added: "[W]e think, where state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death."[75] The dissent criticized this reasoning at length, calling it "tenuous" and "nebulous."[76]

Although the Mathews v. Lucas Court stated that the review of classifications involving illegitimacy should not be "toothless,"[77] it concludes by describing its role as "simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions....and we have no basis to question their detail beyond the evident consistency and substantiality."[78]

Mathews v. Lucas represented a height of confusion and ambiguity over the degree of scrutiny courts should give to cases involving legitimacy classifications. In its review of socio-economic legislation, the Supreme

Court has simply required that there be a rational relationship between a legitimate public purpose and the means used to attain it.[79] The Court replaces this "minimum rationality" test with strict scrutiny when the legislation involves fundamental rights or discriminates on the basis of race or national origin.[80] Beginning in the late 1960's, the Court dealt with efforts to expand the suspect classes of race and national origin to include gender, legitimacy, and alienage.[81]

The Court's position on legitimacy was slow in evolving. The state schemes in Levy and Glona had been irrational and the Court did not need to consider them with greater scrutiny. In Justice Brennan's dissent in Labine, he specifically declined to reach the question of whether illegitimacy was a suspect classification requiring greater scrutiny.[82] Although the Weber Court did not reach the question of whether stricter scrutiny was required, it contained language which described the unfairness of discrimination against illegitimate children. Chief Justice Burger's opinion in Jimenez quotes this language from Weber, but again does not reach the suspect classification argument.[83] Although calling for more than a "toothless" review, Mathews v. Lucas contains language which describes the historic discrimination against women and blacks as far greater than the disabilities suffered by illegitimate children. In particular, illegitimacy is not visibly obvious like race or gender, so it does not require special protection from the "majoritarian political process."[84] The Court tied together the various strands of these cases in the next major illegitimacy case.

In Trimble v. Gordon[85] the Court reviewed the constitutionality of the Illinois intestate succession law which allowed illegitimate children to inherit only from their mothers while legitimate children could inherit from both parents. Following Weber and Lucas, the Court compared the character of the discrimination and its relation to legitimate legislative aims.[86] In doing so, the Court used something less than strict scrutiny, but required "more than the mere incantation of a proper state purpose."[87]

In Trimble, an Illinois court ordered an unwed father to support his illegitimate daughter, and he did so. On his death, the Illinois Probate Act operated to deny heirship to the daughter in favor of the father's parents. Had the daughter been legitimate, she would have inherited the entire estate.[88]

The Court found that the statute was not "carefully tuned to alternative considerations" as the Mathews v. Lucas statute had been. Specifically, the state ignored "the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity."[89] To the state's purported interest in the promotion of legitimate family relationships, the Court responded that it had "expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."[90] Despite the state's assertion of its interests in orderly disposition of property at death and avoiding spurious claims, the Court held that the statute denied illegitimate children equal protection.

Explaining a contrary result with a very similar statute in Labine the majority noted: "[I]t is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in Labine."[91]

Also in 1977, the Court upheld the constitutionality of the treatment of illegitimates under the Immigration and Naturalization Act of 1952.[92] The Act[93] had the effect of excluding the relationship between an illegitimate child and its father from the preference normally given the parents or children of United States citizens. One of the appellants was a United States citizen who wanted to bring his illegitimate son to the United States from the French West Indies. The appellant registered as the boy's father, had his name on the birth certificate, and supported and maintained him since birth. Nevertheless, the boy was denied special immigration preference since he was not a "child" under the statute.

The appellants challenged what they saw as "double-barrelled" discrimination, based on both sex and illegitimacy. Justice Powell, writing for the majority, stated that the Act involved a "broad congressional policy choice" encompassing "the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interest."[94] The Act was subject to very little review at all, the area of immigration being "solely for the responsibility of Congress and wholly outside the power of this Court to control."[95] The Court speculated that denial of preference to illegitimate children and their natural fathers was "perhaps because

of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof which usually lurk in paternity determinations."[96] The Court concluded "[i]n any event, it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."[97]

The opinion prompted a vigorous dissent from Justices Brennan and Marshall.[98] They argued that the government failed to consider alternative considerations and the middle ground between case-by-case determination and complete exclusion.

Ultimately, in 1986, Congress acted to include natural fathers and illegitimate children when the father has or had a bona fide parent-child relationship with the child.[99]

The following year, the Court continued the confusing trend of illegitimacy cases by upholding the constitutionality of the New York intestate succession statute which required illegitimate children to obtain a judicial paternity order during the father's lifetime in order to inherit from him. In Lalli v. Lalli,[100] the New York courts denied two illegitimate children inheritance even though their father acknowledged them during his lifetime. Originally, the Supreme Court remanded the case to the New York Court of Appeals to permit further consideration in light of Trimble.[101] The state court adhered to its original disposition, however, and the case returned to the Supreme Court.

Justice Powell, writing for a plurality of three, held that the requirement to obtain a judicial declaration of paternity met the test of bearing an

"evident and substantial relation" to the important state interest it was designed to serve.[102] The primary goal of the statute was to provide for the just and orderly disposition of property at death and it was designed "to mitigate serious difficulties in the administration of estates...."[103] The statute placed problems of proof before a court at a time when the putative father was in a position to respond. The four dissenters thought the state could have used less drastic means to prevent spurious claims. For example, the state could place a time limit on claims by unknown illegitimate children which would keep estates from being tied up for long periods. Justice Brennan noted that fathers who acknowledged or voluntarily supported illegitimate children are unlikely to have paternity suits filed against them, either by the children or by social welfare agencies. Illegitimate children would avoid filing suit to gain an inheritance for fear of disrupting the voluntary support they were receiving.[104] In its scheme to avoid claims by previously unknown illegitimate children, the New York statute excluded a substantial group of acknowledged illegitimate children. The dissent felt the case was controlled by Trimble.

The plurality responded by saying that unwed fathers could waive their defenses in a paternity proceeding or even institute such proceedings themselves.[105] In addition, the New York statute did not present an insurmountable obstacle to inheritance by illegitimate children as the Illinois intestate succession statute did in Trimble.[106] Justice Powell noted that the appellant in Trimble would have been a

distributee of her father's estate if the New York statute had applied.[107] In addition, the New York Court of Appeals specifically disclaimed the fostering of legitimate family relationships or upholding morality as purposes of the statute.[108]

But the simpler explanation of the differing results in Lalli and Trimble is that in Lalli, the plurality did not subject the New York statute to especially strict scrutiny.[109] Justice Stevens offered a new formulation: that the "procedural demands ...[placed] on illegitimate children must bear an evident and substantial relation to the particular state interests [the] statute is designed to serve."[110] While offering this standard, the plurality went on to follow Mathews v. Lucas and declined to consider the statute beyond its evident consistency. Justice Powell explained, "Our inquiry under the Equal Protection Clause does not focus on the abstract `fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks rationality contemplated by the Fourteenth Amendment."[111]

The Court handed down another case involving the rights of unwed fathers in 1978. In Quilloin v. Walcott,[112] the Court rendered its first unanimous illegitimacy decision, upholding a Georgia ruling which prevented an unwed father from blocking the adoption of his child by the mother's new husband. Georgia law required the permission of both parents for the adoption of legitimate children but of only the mother for illegitimate children.

The Court began by setting out the standard established by Stanley that the unwed father's interest in the care and custody of his children outweighs the state's de minimis interest when the father is a fit parent.[113] But the Court went on to distinguish Stanley on the facts. The father in Quilloin had provided only sporadic support to the child over an 11 year period, and the mother considered his visits disruptive. The child wanted to be adopted, and the Georgia court had found that the stepfather was a family member. On these facts, the Court determined that "[w]hatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption...[was] in the `best interest of the child.'"[114] This state interest superceded the father's rights even though the Georgia courts did not find him to be an unfit father.

Finally, the Georgia statute did not represent an `insurmountable barrier' to an unwed father who wanted to assert his rights soon after the birth of his child. Quilloin could have gained a veto right over the adoption by legitimating the child, but he failed to do this until after the stepfather sought adoption.

The Court decided in favor of the unwed father the following year in Caban v. Mohammed.[115] In Caban, the unwed father[116] lived with the mother and their two illegitimate children for several years. After the couple separated, he lived with the children for two months, against the wishes of the mother. A court awarded temporary custody to the mother and her new husband with visiting rights for the natural father and

his new wife. The mother and her husband then petitioned to adopt the child, as did the father.

The court granted the adoption petition of the mother and her new husband since the mother was a fit parent and since without her permission, no one could adopt the children. The New York adoption law required the permission of both parents for legitimate children and of only the mother for illegitimate children.

New York justified the gender-based distinction between wed fathers and unwed fathers in two ways. First it said that the scheme encouraged the adoption of illegitimate children. It also asserted that a mother bears a closer relationship with a child than a father does. The Supreme Court agreed that there was an important government interest, but nevertheless found that the gender-based distinctions of the New York law were not substantially related to the governmental goal.[117] The Court held that unwed fathers were denied equal protection of the laws and struck down the statute.

The Court stressed that its decision was limited to cases where the father had established a substantial relationship with the child. It added that "where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of the child."[118] The majority thus answered the argument of Justice Stewart's dissent that parental rights should not spring full-blown simply from the biological connection between parent and child.[119] The father must first establish a

substantial relationship with the child.

The Court treated the adoption statute's classifications as gender-based distinctions subject to intermediate scrutiny under Craig v. Boren[120] and Reed v. Reed.[121] Since the Court concluded that the distinction between unwed mothers and unwed fathers violated the Equal Protection Clause, it did not reach the issue of whether the statute unconstitutionally discriminated between married and unmarried fathers.[122] The Court also did not consider the disparate impact the statute had on illegitimate children, both in their ability to be adopted and to maintain relationships with their natural fathers.[123] The best interests of the illegitimate child, however, was the focus of Justice Steven's dissent.[124] Finally, the Court did not reach the argument that the father had been denied substantive due process under the analysis of Stanley v. Illinois.[125] The competing interests between parents, children, and the state thus offer a variety of ways to analyze the same statute, and the outcome may depend on which method of analysis the Court chooses.

The Supreme Court demonstrated further ambivalence about the appropriate level of scrutiny for illegitimacy cases[126] in Parham v. Hughes[127], decided the same day as Caban. In Parham, the Court upheld the constitutionality of a Georgia statute which permitted a mother of an illegitimate child to sue for the child's wrongful death, but denied that right to the father unless he had previously legitimated the child.

Here, the father sued after a car accident in which both his illegitimate son and the child's natural mother

were killed. Although he had not legitimated the child, his name was on the birth certificate, and he regularly visited the child and contributed to his support.

In support of its denial of recovery to the unwed father, the state said it was promoting morality and legitimate family units. The state also cited an interest in avoiding problems of proof of paternity in wrongful death actions.[128] The plurality only considered the latter interest in reaching its decision.[129] It considered the interest in avoiding fraudulent claims of paternity in wrongful death suits to be of the same magnitude as the strong state interest in efficiently disposing of property at death recognized in Lalli and Labine.[130]

The plurality declined to apply the stricter scrutiny of Weber and Trimble stating "[t]he justifications for judicial sensitivity to the constitutionality of differing legislative treatment of legitimate and illegitimate children are simply absent when a classification affects only the fathers of deceased illegitimate children."[131] The plurality also declined to apply the scrutiny required for gender-based discrimination, saying that mothers and fathers of illegitimate children are not similarly situated.[132] Fathers of illegitimate children are often unknown, while the identity of the mother is rarely in doubt. In addition, only fathers could voluntarily legitimate their illegitimate children under Georgia law. The plurality viewed the statute as merely distinguishing between fathers who have legitimated their children and those who have not.[133]

The plurality found that the statute was not irrational and added that "it is constitutionally irrelevant that the [father] may have been able to prove paternity in another manner."[134]

Justice Powell, the swing vote, analyzed the statute as a gender-based distinction, but found it "substantially related" to the State's goal of avoiding difficult problems of proof.[135] Both Justice Powell and the plurality found it significant that the father could voluntarily remove himself from the reach of the statute by legitimizing the child.[136] This lack of an insurmountable barrier distinguished Parham from Caban.[137]

In another 1979 case, Califano v. Boles,[138] an unwed mother challenged the constitutionality of the Social Security Act[139] which gives "mother's insurance benefits" only to widows and divorced wives of wage earners. The mother in this case lived with Norman Boles for three years, and he acknowledged paternity of their son born during this period.

Justice Rehnquist wrote the majority opinion upholding the statute. He described the Congressional purpose of easing the economic dislocation suffered by those dependent on a wage earner. These dependents are likely to be confronted with the choice between employment or the assumption of child care responsibilities.[140] The Court said that it was rational for Congress to conclude that a woman never married to a man is far less likely to be dependent on him at the time of his death.[141]

The Court also held that the legislation had only an incidental, speculative impact on illegitimate

children, and that the real beneficiaries were unwed mothers.[142] The Court concluded that "the legislation in this case does not have the impact on illegitimates necessary to warrant further inquiry...."[143] The Court noted that it had previously upheld the Act's requirement of at least nine months of marriage for eligibility, based on the need to prevent the use of sham marriages to gain benefits.[144]

Justice Marshall wrote for four Justices in dissent. He called for the use of the scrutiny required for classifications involving legitimacy.[145] He argued that since the purpose of the Act is to enable mothers to stay home and take care of children, its effect on the children involved is quite direct.[146]

In early 1980, the Court had the opportunity to examine the constitutionality of the benefit classification scheme of the Civil Service Retirement Act[147] in United States v. Clark.[148] The Act provided survivors' annuities to all legitimate children but gave the same benefits to illegitimate children only if they "lived with the employee...in a regular parent-child relationship."[149] The Civil Service Commission interpreted this to mean that illegitimate children would only be eligible if they lived with the employee at the time of his death.[150]

The children in this case had lived with the father for several years. Later, a Montana court declared him to be the father and ordered support payments, which the father consistently made. The children did not live with their father at the time of his death, and the Civil Service Commission denied them benefits.

Justice Marshall, writing for the majority, first set out the Lalli standard, that classifications based on illegitimacy must bear an evident and substantial relationship to the state interests they are designed to serve.[151] He said that the government's justification for the classification of administrative convenience was open to constitutional question since legitimate children did not have to meet the requirements.[152]

Having done this, Justice Marshall then declined to reach the constitutional issue by construing the statute to allow the childrens' claim. Examining the history of the statute, he concluded that the "lived with" requirement was satisfied if the child lived with the deceased employee in a "regular parent-child relationship," regardless of whether the child was living with the employee when he died.[153] The Court did not reach the issue of whether the statute unconstitutionally discriminated against illegitimate children who had never lived with the deceased employee-father.

Throughout the rest of the 1980's, the Supreme Court's illegitimacy cases fell for the most part into two major categories: cases involving the parental rights of unwed fathers; and those involving state statutes of limitations for paternity cases. The first of these cases was Mills v. Habluetzel,[154] which examined the Texas statute of limitations for paternity suits.

Texas had grudgingly allowed illegitimate children to sue for support from their fathers as a result of the Gomez v. Perez decision.[155] But suits for parental support by illegitimate children had a one year statute

of limitations while legitimate children could sue their fathers for support throughout their minority. The state's interest was in precluding stale or fraudulent claims,[156] but this was one of the only civil causes of action which Texas did not toll during a plaintiff's minority.[157]

Justice Rehnquist wrote the Court's opinion, in which three other Justices joined and four concurred. The Court noted that "[i]t would hardly satisfy the demands of equal protection and the holding of Gomez to remove an `impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively."[158] The Court struck down the Texas statute of limitations in question using the Lalli standard that restrictions on illegitimate children "will [only] survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest."[159] The state can only limit these claims for the purpose of avoiding stale or fraudulent claims when there is "a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims."[160] The Court also required that laws provide a reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf.[161] The Court concluded that the "unrealistically short time limitation" in Mills was not substantially related to the State's interest, and that it therefore denied illegitimate children equal protection.[162]

Justice O'Connor, joined by three other Justices, concurred in a separate opinion. Since the litigation began, Texas had passed a new four year statute of

limitations for paternity suits. Justice O'Connor wanted to be sure that the Court's opinion would not be misinterpreted as approving this new longer limitation.[163] She noted that the new period represented many of the same constitutional and practical problems to illegitimate children and their mothers.[164]

The Court considered the Tennessee statute of limitations for paternity actions the next year in Pickett v. Brown.[165] In Pickett, a mother's suit on behalf of a ten year-old illegitimate child was barred by the state's two-year statute of limitations for paternity actions. As in Mills, legitimate children could sue for parental support throughout their minority. The Tennessee statute provided exceptions for situations where the father had acknowledged paternity or furnished support. It also allowed the state to sue throughout a child's minority in cases where the child was, or was liable to become, a public charge.[166]

Justice Brennan, writing for a unanimous Court, first reviewed the illegitimacy cases decided since 1968 and concluded that the Court subjected illegitimacy classifications to a "heightened level of scrutiny."[167] Applying the Mills test, Justice Brennan wrote for a unanimous Court in striking down the Tennessee statute of limitations. The law did not provide illegitimate children with an adequate opportunity to obtain parental support,[168] and it was not justified by the problems of proof surrounding paternity suits.[169] The Court found that the exception allowing a longer period for the state to sue on behalf of illegitimate children undermined its concern about problems of proof. These

same problems would be present in suits where the state represented the children.[170]

The federal Child Support Enforcement Amendments of 1984[171] required all States participating in the federal child support program to have procedures to establish the paternity of any child under eighteen years old. The Supreme Court had to consider the issue of a shorter statute of limitations for paternity actions again, however, in Clark v. Jeter.[172]

Cherlyn Clark sued for support on behalf of her ten year old illegitimate daughter. Blood tests showed a 99.3% probability that the respondent, Gene Jeter, was the father. The court dismissed the suit, however, on the basis of Pennsylvania's six year statute of limitations for paternity actions. Although Pennsylvania had enacted the new eighteen-year statute of limitations required by federal law, the appellate court refused to apply it retroactively.

Justice O'Connor, writing for a unanimous Court, did not decide the case based on pre-emption of the federal law requiring longer periods.[173] Rather, she analyzed the constitutionality of the six-year statute of limitations. The Court applied the Mills framework for the evaluation of paternity statutes of limitations and observed that "[e]ven six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child."[174] Applying the second part of the Mills test, the Court concluded that the statute of limitations was "not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims."[175] The fact that

Pennsylvania tolled most other actions during a child's minority cast doubt on the State's purported interest, as it did in Mills and Pickett.[176] The Pennsylvania Legislature also undermined this interest when it passed the eighteen-year statute of limitations (even though it did so under the threat of loss of federal funds).[177]

Ultimately, the Court concluded that the six-year statute of limitations could not withstand "heightened scrutiny" under the Equal Protection Clause of the Fourteenth Amendment.[178]

In 1986, the Supreme Court had the opportunity to decide whether the holding in Trimble v. Gordon[179] would apply retroactively. In Reed v. Campbell[180], a deceased father left five legitimate children and one illegitimate child. The Texas law in effect at the time the father died prohibited illegitimate children from inheriting from their fathers unless the parents married each other subsequent to the birth of the children. The father died four months before the decision in Trimble, which invalidated the Texas statute. Although the estate was still open after the Trimble decision, the Texas courts refused to apply that case retroactively.[181]

The Court declined to rule on the retroactivity of Trimble.[182] Rather, Justice Stevens wrote for a unanimous Court that Trimble applied since the estate was still open after that decision.[183] The state interest in ensuring the finality of estates was not present in this case since the estate had not been closed at the time the illegitimate daughter made her claim.[184] The Court concluded that "...the interest in avoiding unjustified discrimination against children born out of

wedlock...should therefore have been given controlling effect. That interest requires the [daughter's] claim to a share in her father's estate be protected by the applicability of Trimble to her claim."[185]

In 1983, the Court considered another major case involving the rights of unwed fathers. In Lehr v. Robertson,[186] the New York courts prevented an unwed father (Lehr) from blocking the adoption of his daughter. The adoption petition was filed by the mother (Robertson) and her new husband, whom she had married after the birth of the child.

The New York adoption statute required notice be given to putative fathers in a variety of circumstances, including to those fathers who had simply filed their names with the state's "putative father registry." Although Lehr had not filed with the registry, he had filed a filiation proceeding while Robertson's adoption petition was pending. Finding that no notice to Lehr was necessary, the New York courts granted the adoption petition and dismissed Lehr's filiation suit. The appellate courts affirmed these actions, holding that the Family Court did not abuse its discretion and that Caban did not apply retroactively.[187]

Lehr invoked the jurisdiction of the Supreme Court on two grounds. First, he claimed that his liberty interest in his relationship with his child was destroyed without due process of law. Second, he claimed that by granting more rights to the mother of the child, the adoption statute violated the Equal Protection Clause of the Fourteenth Amendment.

Writing for the majority, Justice Stevens first

rejected the due process claim. While noting that the relationship of a recognized family unit is a liberty interest entitled to constitutional protection,[188] the Court did not find such a relationship in this case. The opinion stressed the difference between the existence of a mere biological link and a situation when "an unwed father demonstrates a full commitment to the responsibilities of parenthood...."[189] The Court added: "The institution of marriage has played a critical role both in defining the legal entitlement of family members and in developing the decentralized structure of our democratic society."[190] The significance of the biological link between the father and his illegitimate child is that it offers him an opportunity to develop a relationship with his offspring.[191] Under the New York scheme, Lehr had an absolute ability to take advantage of that opportunity by using the putative father registry. According to the Court, New York had not terminated a developed, constitutionally protectable relationship between Lehr and his daughter. Finding that the New York statutes adequately protected Lehr's opportunity to establish a relationship, the Court could find no constitutional violation in the Family Court's strict compliance with the notice provisions of the adoption statute.[192]

The Court was quicker to dispose of Lehr's equal protection claim. It concluded that the parents were not similarly situated. "If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause

does not prevent a state from according the two parents different legal rights."[193]

Justice White's dissent pointed out that Lehr had tried in numerous ways to establish a relationship with his daughter. He visited the baby every day in the hospital after she was born, but soon after, the mother began to conceal the child's whereabouts from him. After finding the daughter with the help of a detective agency, Lehr offered to provide her financial assistance either directly or through a trust fund. The mother refused this offer, and Lehr retained an attorney who threatened legal action to gain visitation rights.[194] Nevertheless, Lehr did nothing which would have entitled him to notification of the adoption hearing.

Ultimately, the majority did not subject the New York adoption notification scheme to particularly close scrutiny. It concluded by simply saying that the scheme was not arbitrary.[195] The result is that unwed fathers must carefully comply with all state requirements in order to have a protectable relationship with their illegitimate children.

For several years in the 1980's, an unwed father waged a battle in the California courts in an effort to gain custody of his daughter after the natural mother gave the child up for adoption to third parties.[196] Although the California courts eventually decided that the father had a right to custody, they terminated this right because of the strength of the relationship the girl had developed with her adoptive parents through six years of litigation.[197] The Supreme Court, which had docketed the case, later dismissed it for want of a

properly presented federal question.[198]

In 1989, however, the Supreme Court decided another California unwed father case, Michael H. v. Gerald D.[199] In a case whose facts the Court hoped were "extraordinary,"[200] a married woman bore a child (Victoria) through an adulterous affair with her neighbor (Michael H.). Michael lived with Victoria and her mother on and off for three years, but then the mother reconciled with her husband, Gerald D. Soon after, Michael and Victoria (through her guardian ad litem) sought visitation rights for Michael. Gerald intervened and the Superior Court granted his motion for summary judgment based on the California Evidence Code Section 621.[201] Section 621(a) provides that "the issue of a wife cohabiting with her husband...is conclusively presumed to be a child of the marriage."[202]

Writing the plurality opinion of the Court, Justice Scalia held that Michael did not have a fundamental liberty interest in his relationship with Victoria. To receive protection, an interest must be one "traditionally protected by our society."[203] The Court went further to say that Michael must also show that society traditionally accords the specific parental rights or prerogatives (such as visitation) that he seeks.[204] The unwed father's opportunity to establish a relationship with the child (described in Lehr) is countered by a similar opportunity on the part of the husband. According to the Court, "it is not unconstitutional for the State to give categorical preference to the latter."[205]

Justice Scalia gave short shrift to the daughter's

claim for visitation rights, holding that her due process claim for a filial relationship with her natural father was the obverse of Michael's and failed for the same reason. Her claim of a right to maintain a relationship with both Michael and Gerald did not have the required basis in tradition, and therefore it did not enjoy constitutional protection. Victoria's equal protection challenge was not entitled to stricter scrutiny since she was not illegitimate under California law. Applying the rational relationship test, the Court found that the state interest in preserving an otherwise peaceful marriage against the claims of one of its children was not a denial of equal protection.

Justices O'Connor and Kennedy concurred in part but declined to endorse Justice Scalia's mode of historic analysis.[206] Justice Stevens concurred in the judgment since the California courts gave Michael a chance to gain visitation rights as an interested "other person" even though Section 621 barred him from proving paternity.[207] Justice Stevens also refused to foreclose "the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabitating with another man at the time of the child's conception and birth."[208]

The two dissenting opinions[209] agreed that Michael had a liberty interest in his relationship with Victoria. Justice Brennan wrote that the focus should not be on "the relationship the unwed father seeks to disrupt, rather...the one he seeks to preserve...."[210] The plurality replied that the logical extension of this

position would be that Michael's liberty interest would have been unaffected even if he had begotten Victoria by rape.[211]

B. SUMMARY AND FUTURE TRENDS

The process of examining the constitutionality of a statutory classification involving illegitimate children must begin with the extraction of a method of analysis from the Supreme Court cases. The distillation starts with the dual inquiry of Weber as to the character of the State interest and the fundamental personal rights involved. These lead to further questions about the degree of accuracy of that classification and the level of scrutiny with which the Court will examine it. Finally, it is important to determine whose interests are involved, those of the illegitimate child or those of the parents.

Generally, the government proponent of the classification has sought to advance one or more of four major objectives through statutes involving illegitimates: (a) to preserve the institution of marriage and discourage immorality; (b) to ease administration of government benefits; (c) to achieve finality in actions involving property rights at death; and (d) to avoid fraud and problems of proof.

The state goal of discouraging out-of-wedlock births through schemes which punished the children was criticized in the earliest cases, such as Levy and Glona. The Weber Court called this type of scheme illogical and unjust. By 1978, the Lalli Court

favorably noted the absence of this goal in upholding the New York intestate succession law. On the other hand, the Court found in Parham that it was permissible to punish unwed fathers for their actions regarding an illegitimate child. And in Michael H. v. Gerald D., the Court supported a state goal of preserving marriages in some circumstances.

The goal of easing administration of government benefits finds its clearest endorsement in Mathews v. Lucas. A government agency can avoid the burden of case-by-case determinations if its regulatory scheme is carefully tuned to alternative considerations, such as allowing individual determinations in certain situations. In establishing a regulatory scheme, a governmental entity must consider the middle ground between exclusion and case-by-case determinations. The Court saw the Social Security statute in Mathews v. Lucas as denying a presumption of dependency to many illegitimate children. By granting that presumption to legitimate children who might not be dependent, the statute was over-inclusive. But it was not under-inclusive since otherwise eligible illegitimate children could qualify for benefits by showing actual dependency.[212]

Nevertheless, the Mathews v. Lucas Court endorsed as reasonable the complete exclusion of illegitimate children who were only potentially dependent. This could include children who had been supported by the wage earner some time before his death or children who had a right of action for support against the wage earner. Thus some illegitimate children can still be

conclusively excluded by a statute that purportedly gives adequate concern to alternative considerations. This occurred in Lalli where the Court approved of a scheme which conclusively excluded certain illegitimate children without giving them an opportunity to show independent proof of their relationship. Once a scheme reaches a fairly high threshold of rationality, illegitimate children need not be given an opportunity to prove their eligibility independent of the statutory criteria.

The Court has consistently expressed disapproval of statutes which present an insurmountable barrier to illegitimate children or their parents. The absence of an insurmountable barrier was crucial in Labine; the father could have named the daughter in a will. In Lehr, the Court found it significant that the father could easily have secured the notice he sought through use of the New York putative father registry. In other cases, however, the Court has held that the lack of an insurmountable barrier will not save an otherwise discriminatory statute.[213] An administrative procedure by which the unwed parent can avoid harsh treatment under a statute will not operate to save that statute if the procedure is too expensive. For example, the father in Stanley could have adopted his children, but the procedure would have been too expensive.[214]

Although the cases are inconsistent in this respect, a crucial element of a valid statutory scheme will be one which unilaterally and easily allows unwed parents to qualify their children for benefits. At the same time, statutes must give illegitimate children a

reasonable opportunity to obtain support from their parents, as seen in Mills, Pickett, and Clark.

The strongest state goal in illegitimacy jurisprudence has been the interest in regulating the disposition of property at death. This state interest outweighed the interests of illegitimate children in Labine, Lalli, and to some extent in Parham. The problem addressed by states is that of the unknown illegitimate child upsetting the distribution of property or later clouding its title. To some extent, this interest is tied together with concerns about problems of proof involving illegitimate children who only assert their claims after the father has died. Without these evidentiary concerns, the state could insure titles against unknown claimants by simply limiting the time period during which such persons can assert their claims.

The Court has frequently validated the state goal of avoiding collusive suits and spurious claims. Problems of proof are especially important in cases where the father is not available to defend himself against a charge of paternity.[215] On the other hand, there is a possibility of fraud in almost any scheme likely to withstand judicial scrutiny.[216] The Court has invalidated numerous statutes which denied benefits or rights to illegitimate children in the name of preventing spurious actions. The Court has also stated in recent years that this state interest has become attenuated because of scientific advances in paternity testing.[217]

Another state interest which is strongly endorsed

by the Court is the "best interests of the child," although the interest usually identified in the statute in question. The Court gave deference to this interest in Quilloin, Lehr, and most recently in Michael H. v. Gerald D. The best interests of the child will probably operate to deny almost any right to unwed fathers, since courts generally consider the welfare of the child as more important than parental rights. The child's best interests will often result in protection of adoptive parents' interests as well.

States also have a countervailing interest in allowing illegitimate children to bring suits for support against unwed fathers. First advanced in Pickett, this interest is designed to keep illegitimate children from being public charges. Justice O'Connor recognized this goal in Clark v. Jeter. The existence of this interest will probably undermine the rationality of any scheme that inhibits illegitimate children from getting support or an inheritance from their natural parents.

The fundamental rights of illegitimate children include the rights to government benefits, to maintain suits against parents for support, and to inherit property. The fundamental rights of parents include the care, custody, maintenance, and education of their children. Although children may have a right to establish a relationship with their fathers, that right is limited when to do so may disrupt an otherwise peaceful marriage, such as in Michael H. v. Gerald D.

With Michael H. v. Gerald D., the decade of the 1980's ended on an uncertain note for the rights of

unwed fathers. From the cases, though, we can extract some general principals.[218] First, an unwed father must establish a substantial or significant relationship with his child before he will gain a voice in its custody and upbringing. The father can do this either through monetary support or through contact with the child. Second, the unwed father who complies with state-created procedures to identify himself as such will be entitled to notice before a state can terminate his parental rights. Finally, if a relationship is entitled to constitutional protection, the state court must focus on the father's fitness as a parent before eliminating or denying him parental rights.

The level of scrutiny applied to illegitimacy issues is crucial, and this factor can explain the results of almost all the principal cases.[219] The earliest illegitimacy decisions did not address the level of scrutiny required since the schemes involved were irrational. Throughout the 1970's, the Court did not specify an appropriate level of review, but it did express concern about laws which discriminated against illegitimate children because of the status of their birth.[220] At the same time, the Court placed its level of scrutiny below the most strict since illegitimate children do not have the same obvious badge of opprobrium that members of minority races do. The level of scrutiny was to be "less than the strictest" but not "toothless."[221]

By the 1980's, the Court produced unanimous opinions which endorsed and described an intermediate level of scrutiny. Even Justice Rehnquist, who had

rejected intermediate scrutiny in his Weber dissent,[222] joined the Pickett opinion calling for a heightened level of scrutiny.[223] By 1988, the unanimous Court stated: "Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or legitimacy."[224]

The analytical framework which the Court applies in reviewing a statute is important. A law is less likely to survive judicial review if it discriminates directly against illegitimate children. When the effects of the statute on illegitimate children are only indirect, unwed mothers (Califano v. Boles) and unwed fathers (Caban, Parham) will find their claims given considerably less judicial consideration. An unwed parent's claim will more likely be successful if it is considered as a due process claim rather than as a denial of equal protection (Stanley). At the same time, an unwed parent's claim may be successful if it is based on a denial of equal protection according to gender, such as between unwed mothers and unwed fathers. Most recently, Michael H. v. Gerald D. makes doubtful the future success of claims alleging discrimination between wed and unwed persons.

Change in the Supreme Court's treatment of illegitimacy may occur for a variety of reasons. Many commentators trace changes in illegitimacy jurisprudence to changes in the Court's membership. For instance, the Court showed growing deference to state statutes involving illegitimacy as the Warren Court transformed

into the Burger Court of the 1970's.[225] Although few would dispute that the Court has become more conservative, the trend could also be explained by states showing more concern for illegitimate children when drafting statutes. At the same time, the Court has been less deferential to state statutes through the 1980's.[226] In addition, there are no Justices who consistently vote against the interests advanced by illegitimate children.[227] Despite changes in the Supreme Court's membership, it does not seem that there will be a dramatic reversal in jurisprudence involving illegitimate children or their parents.

Justice Scalia's emphasis on the necessity for traditional recognition of rights and relationships in Michael H. v. Gerald D. represents a change. But this analysis has precursors in legitimacy jurisprudence as far back as the Labine opinion in 1971. In that case, both the dissent and Justice Harlan's concurring opinion consider the status of illegitimate children at the time of passage of the Fourteenth Amendment.[228] Although the Court may use this traditional approach more frequently in the future, its special reliance on it in Michael H. v. Gerald D. may have been caused by the peculiar facts in that case.

In one area, changes in technology are likely to result in a change in the value the Court gives to the state interest in problems of proof. The Court has suggested that interests in preventing litigation of stale or fraudulent claims has become more attenuated as scientific advances in blood testing have alleviated the problems of proof in paternity actions.[229] Admissibility

of genetic and blood group testing was in doubt at the beginning of the 1980's.[230] Ten years later, every state but South Dakota has a statute providing for the admission of at least some genetic tests in paternity suits.[231] Eight states allow scientific evidence of inclusion of a defendant-putative father to create a presumption of paternity.[232] Since the most recent Supreme Court review of paternity testing in Clark v. Jeter,[233] genetic testing has become even more advanced. New DNA tests come much closer to a positive identification of a person as the father of a child, in addition to excluding the possibility of his parenthood. With the new generation of tests, the odds of false identification can be as low as one in thirty billion.[234] Ultimately, we can expect the Court to be even less receptive in the future to rules which restrict paternity actions or other actions involving the issue of paternity simply for the sake of avoiding stale or fraudulent claims.

Although the Court has settled on the intermediate level of scrutiny as appropriate for legitimacy classifications, plaintiffs may try to frame those classifications so that they receive stricter scrutiny. Statutes which discriminate on the basis of race receive strict scrutiny, and a proportionately greater number of illegitimate children are black. The Supreme Court specifically declined to consider whether the Illinois intestate succession statute in Trimble discriminated on the basis of race because of its disproportionate impact on black people.[235] Nevertheless, any statute which affects illegitimate children will have a

disproportionate impact on minority children.

The Court has held that disparate impact on an acknowledged suspect class, without more, required judicial review under only the rational basis standard.[236] To invoke stricter scrutiny, the invidious quality of the law must be traced to a racially discriminatory purpose.[237] On the other hand, the racially motivated actor can be someone from the remote past.[238] Given the historical persistence of the disparity of the illegitimacy rates between whites and minorities, the discriminatory purpose may be easy to infer, if not easy to find. In common law, segregation of rich and poor was one of the purposes of rules on legitimacy. An important function of the filius nullius rule in England was to insure that the children of nobleman and serfs did not ever inherit land.[239] These factors, combined with the fact that illegitimate children are in a disadvantaged class themselves, may eventually cause the Court to consider the disparate impact of an illegitimacy classification independent of any overt racially discriminatory purpose.

Finally, the Court's illegitimacy jurisprudence may evolve as a result of the changing moral structure of American society. The illegitimacy rate continues to rise and is no longer confined to unwanted teenage pregnancies as it might once have been. For instance, older single women are now having children without prospect of marriage because they want to do so while they are still biologically able.[240] The institution of marriage itself is changing as well. The Court may face more frequently in the future fact situations such as it

saw in Michael H. v. Gerald D. These situations may become more common as marriages disintegrate in great proportions and children seek to maintain relationships with multiple sets of parents. Non-traditional relationships outside of marriage will produce children who are at least nominally illegitimate; in turn, these children and their parents will assert greater rights in the courts.

III. THE MILITARY BENEFIT STRUCTURE AND ILLEGITIMATE CHILDREN

A variety of military programs offer benefits to illegitimate children and their parents. Some have done so for many years while others have only included illegitimate children as a result of judicial intervention. The various programs are not coordinated as they affect illegitimate children; each has its own definition of what children are qualified for benefits.

The programs have three different measures of determining eligibility for benefits, and most of these are tied to a requirement that the beneficiary be a "dependent." The first is the existence of a legal family relationship. The second measure is the amount of financial support a service member provides to the child in question. Finally, some definitions require a child to live in a household provided by the military sponsor in order to qualify for military-related benefits.

Many programs combine two or more of these definitions. In each case, illegitimate children are

treated differently than legitimate children. This paper sets out the various criteria in the major benefit programs and then questions whether the differentiation involving illegitimate children is justified and constitutionally permissible.

A. QUARTERS ALLOWANCE

Congress first authorized Basic Allowance for Quarters (BAQ) at the "with dependents" rate[241] on behalf of illegitimate children in 1973 when it revised the definition of dependents in 37 U.S.C. § 401.[242] The change was in reaction to a decision by a United States District Court which forbade denial of medical benefits to an illegitimate child of a service member.[243] The law changed the definition of dependent unmarried children to include illegitimate children whose member-father has been judicially decreed to be the father of the child or judicially ordered to contribute to the child's support; or whose parentage has been admitted in writing by the member-father.[244] The law affected only pay and allowances and did not cover medical care eligibility.

The Department of Defense Pay and Allowances Entitlement Manual[245] (Pay Manual) adds several guidelines which condition eligibility for "with dependents" BAQ on behalf of illegitimate children. First, the Pay Manual explains that both member-fathers and member-mothers must admit parentage in the absence of a judicial decree.[246] The Pay Manual then establishes two separate categories of member-parents with different requirements for BAQ entitlement. When the member is assigned single

type government quarters and the child is in custody of another person, the member must show he or she is providing support equal to BAQ at the "with-dependents" rate for the member's pay grade.[247] Member parents who are not assigned government quarters must show that they are providing monthly support in an amount which is the greater of one-half the child's actual support requirement or the difference between the applicable BAQ at the "with-dependents" rate and the "without-dependents" rate.[248]

The Pay Manual requires documentary proof that the member has provided the illegitimate child support in at least these amounts before the member is entitled to receive BAQ.[249] This requirement apparently is designed to ensure that the member intends to provide continued support to the child after he or she begins receiving BAQ. Although the origin of this requirement is not clear, its purpose may be to deter fraudulent applicants on the assumption that such applicants would not pay any support without first receiving entitlement to the allowance. In any case, the Pay Manual requires annual recertification of dependency and proof that the member provided support at the required level.[250]

The Pay Manual states that a child will be considered legitimate if the parents subsequently marry.[251] It also states that BAQ will not be authorized to the natural mother or father once the illegitimate child is adopted by another person.[252] The member may also claim the illegitimate child of a spouse as a dependent even though the member is not the natural parent.[253]

Army Regulation 37-104-3[254] (AR 37-104-3) sets out

the system for processing applications for BAQ. While the local Finance and Accounting Officer (FAO) can approve most applications, the Commander, United States Army Finance and Accounting Center (USAFAC), must review applications for illegitimate children.[255] The local FAO can authorize interim BAQ if the illegitimate child is in custody of the member-parent.[256] Otherwise, the soldier must await approval from USAFAC before receiving BAQ, although he will receive it retroactive to the date of his application if it is approved. For illegitimate children in custody of someone other than the claimant, the application must include a statement by the child's custodian detailing the financial support sent by the soldier and the expenses the child incurs.[257]

The Pay Manual simply requires proof of relationship to authorize BAQ for spouses and legitimate children.[258] There is no requirement that the soldier show that he or she is providing support prior to authorization of BAQ. For illegitimate children, adopted children, and stepchildren, the BAQ applicant must show that the child is actually dependent.[259] The Army regulation speaks of a dependency determination in all cases, but for spouses and legitimate children, this amounts to little more than presentation of a marriage or birth certificate.[260] The local FAO will make a dependency determination for adopted children and stepchildren, but the support requirements are less stringent than those for illegitimate children. A soldier with adopted children or step-children must show that he provides that child with 30% of its support. The parent of an illegitimate child must show that he

provides at least 50% of the child's support.[261]

On its face, 37 U.S.C. § 401 would easily pass constitutional muster. An unwed father can draw BAQ on behalf of a child simply by acknowledging paternity in writing. The statute is over-inclusive in that it presumes legitimate children to be dependent. But this type of over-inclusiveness is allowed under the logic of Mathews v. Lucas because the parent of an illegitimate children can easily qualify his or her child through written acknowledgment.

As the statute is implemented by the Pay Manual, however, unwed parents are faced with an additional hurdle of having to prove a specified level of support before the government will authorize BAQ. Compared to soldiers with legitimate children, this places at a disadvantage those who cannot provide their illegitimate children with one-half of their necessary support. Disadvantaged soldiers would include those with illegitimate children who live with mothers who earn more than the soldier-fathers or who live with other relatives such as grandparents. The requirement especially affects soldiers in the lower enlisted ranks whose pay rate will be relatively low when compared to the financial needs of their children. It might dissuade young unwed fathers already in the work force from joining the Army, with an initial drop in pay, if they see themselves as being at a disadvantage compared to similarly situated young men with legitimate children.

It is questionable whether Congress envisioned this sort of barrier to the support of illegitimate children

when it revised 37 U.S.C. § 401. At the same time Congress acted to include illegitimate children as dependents, it let lapse the requirement for mandatory dependent allotments for junior enlisted personnel.[262] Congress felt that by ending this requirement, it would reduce administrative costs, improve morale, and recognize that soldiers who could be trusted with expensive equipment should also be permitted to be responsible for their own families.[263] It is ironic that the Department of Defense established a similar mandatory support requirement for parents of illegitimate children as an outgrowth of the same Congressional action.

The scheme under which the local FAO makes most eligibility determinations while cases involving illegitimate children are made by the Commander, USAFAC, probably originated as a measure to prevent fraud. This is because the lack of a legal relationship between the parent and the illegitimate child makes it easier for a soldier to fraudulently claim a dependency relationship with a child with whom he has no biological relationship. More stringent review may be required for the financial data which the parent must submit. Review at USAFAC also ensures that the decisions on illegitimate children are consistent throughout the Army. If the system did no more than subject applications on behalf of illegitimate children to greater scrutiny, it would be constitutionally acceptable. But in several respects, it operates unfairly as it affects illegitimate children.

The differing percentage of support required for

adopted and step-children contained in the Pay Manual has no rational explanation. This rule allows adopted or step-children to receive up to 70% of their support from sources other than the soldier. The same children, if illegitimate, would have to receive 50% of their support from the soldier in order for the member to qualify for BAQ. This disparity is neither rational nor fair. It probably would not pass constitutional muster if it were challenged by the parent of an illegitimate child who received 30% of his support from an otherwise eligible soldier.

The government could argue, as it did in Califano v. Boles, that this benefit goes to the unwed parent and only indirectly benefits the illegitimate child. But this argument fails when one considers that the soldier is required to pay the full amount of BAQ to the child and will lose the allowance if he does not.

Perhaps the least fair aspect of the BAQ authorization system is the difficulty which unwed fathers face in getting BAQ. Again, problems of proof may justify having USAFAC make the decision instead of the local FAO. But unlike parents of legitimate children, the parent of an illegitimate child must show proof of paying the required amounts before being authorized BAQ. This will be especially difficult for new soldiers living in the barracks, because they must show that they are paying the full amount of BAQ to their illegitimate child for at least a month before they actually begin to receive BAQ.[264] These soldiers receive so little pay that after deductions for educational benefits, taxes, and initial equipment

expenses, they may be unable to pay the child the full BAQ amount for some time. The problem is especially severe for soldiers in Initial Entry Training who are unable to communicate with the custodians of their illegitimate children to get required information on expenses and other income of the children.[265]

A tragic example of a soldier in this predicament can be seen in Norton v. Mathews,[266] a companion case of Mathews v. Lucas. Norton was a suit for Social Security benefits by an illegitimate child similarly situated to the plaintiff in Lucas, and the benefits were denied on the same grounds as in Lucas as well.[267] When the child was born, the unwed father was sixteen years old. He contributed money and clothing for the child, but being so young, he was never able to assume actual support. When he entered military service, the father attempted to get the dependent support allowance on behalf of the child. He failed to complete the required procedures before being killed in Vietnam in 1966.[268]

The current system for BAQ authorization would allow this tragic situation to recur. If the requirement is meant to prevent fraud and to ensure that the soldier actually provides the BAQ to the child, this could be accomplished in a less drastic way. Since the member's application for BAQ is given individual attention already, USAFAC could just as easily determine whether the soldier was supporting the child to the best of his ability before entering active duty. The Social Security administration frequently makes this kind of determination of dependency.[269] The test is whether the insured was supporting his child commensurate with his

ability and whether these payments were important in meeting the child's needs.[270]

Since unwed mothers rarely have their "maternity" decreed by a court, 37 U.S.C. § 401 requires those who have joined the Armed Forces to admit parentage of their illegitimate children in writing in order to establish eligibility for BAQ. The Department of Defense considers this treatment of unwed mothers unnecessary and will recommend it be eliminated in the 1991 appropriations bill.[271]

In one sense, illegitimate children fair better than legitimate children of divorced parents. A parent of an illegitimate child must pay the full amount of BAQ to the child in order to receive BAQ. The parent of a child who lives with a former spouse must simply pay the amount required by any court order which requires support. Thus an unwed father and a divorced father who each have a $125 per month support order are treated differently; the divorced father can pocket the difference between the amount of BAQ and the amount required by the court order. The otherwise eligible illegitimate child fares better than a legitimate child and receives the full amount of BAQ.

B. VETERAN'S BENEFITS

A variety of benefits are available to illegitimate children of deceased soldiers and veterans.

Veteran's legislation includes illegitimate children in its definition of children.[272] It includes all illegitimate children of a female veteran,[273] and sets

out four types of eligible illegitimate children of male veterans. An illegitimate child is qualified:

> as to the alleged father, only if acknowledged in writing signed by him, or if he has been judicially ordered to contribute to the child's support or has been, before his death, judicially decreed to be the father of such child, or if he is otherwise shown by evidence satisfactory to the Administrator to be the father of such child.[274]

The definition of "child" in the list of beneficiaries under the Servicemen's Group Life Insurance (SGLI) statute is somewhat different. The definition specifically includes all illegitimate children of female decedents.[275] It replicates 38 U.S.C. § 101 by including acknowledged children, judicially decreed children, and those the father has been judicially ordered to support.[276] Rather than providing a catchall category of those whose relation is demonstrated to the satisfaction of the administrator, however, the SGLI statute creates two new categories. These include a child, where (as to the father):

> proof of paternity is established by a certified copy of the public record of birth or church record of baptism showing that the insured was the informant and was named as father of the child; or...proof of paternity is established from service department or other public records, such as school or welfare agencies, which show that with his knowledge the insured was named as father of the child.[277]

This addition has the effect of eliminating informally acknowledged illegitimate children as beneficiaries. Nevertheless, almost any written acknowledgment is sufficient. In Prudential Insurance

Company of America v. Jack,[278] a Marine admitted in letters to his fiancee that the child she was expecting was his and promised to marry her when he completed basic training. He died, however, just before he completed training. The court held that the letters constituted sufficient acknowledgment. The illegitimate daughter in Labine v. Vincent qualified for veteran's benefits because of her father's acknowledgment, even though the state's intestate succession law properly denied her an inheritance.[279]

There is a federal statutory order of precedence for the distribution of SGLI proceeds in 38 U.S.C. § 770:

> First, to the beneficiary or beneficiaries as the member...may have designated [in writing];
>
> Second, if there be no such beneficiary, to the widow or widower of such member...;
>
> Third, if none of the above, to the child or children of such member...and the descendants of deceased children by representation;
>
> Fourth, if none of the above, to the parents of such member...or the survivor of them;
>
> Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such member...;
>
> Sixth, if none of the above, to other next of kin of such member...entitled under the laws of domicile of such member...at the time of his death.[280]

Although parents of veteran's generally are included as a category of statutory beneficiaries, unwed fathers of decedents are only allowed as beneficiaries when their relationship is established under one of the same criteria used for illegitimate children.[281] In

addition, "[n]o person who abandoned or willfully failed to support a child during the child's minority, or consented to the child's adoption may be recognized as a parent...."[282] In an interpretation of this provision, a divorced mother was held not to have abandoned her son in Locano v. Prudential Insurance Company.[283] Prior to the service member's death on active duty in 1980, the mother wrote numerous letters to her children and frequently attempted to enforce her visitation rights. She also paid child support, although she was in arrears when her son died. Another case held that both parents had abandoned the deceased soldier before his death and ordered the proceeds paid to unrelated administrators of the estate under the order of precedence in 38 U.S.C. § 770(a).[284]

Except in the event that proceeds would go to a next of kin rather than to a specifically enumerated beneficiary, the federal scheme is wholly independent of the intestate succession laws of any state. Thus it does not matter if an illegitimate child cannot take from its father under state law.[285] The SGLI statute differs in this respect from the Social Security eligibility statute. The latter statute includes as beneficiaries those children who would take personal property from the insured individual under the law of intestate succession of the state in which the insured became disabled or died.[286] This rule has spawned a tremendous amount of litigation[287] and results in different treatment of children that has nothing to do with the relationship between the insured and the child. For instance, a child from California will receive

benefits that would be denied if he lived in Texas.[288] Since neither the Department of Veterans' Affairs nor the active duty benefits statutes rely on state intestate succession law, they avoid controversies such as these.

On the other hand, state intestate succession schemes typically give a share to both a spouse and surviving children.[289] Because 38 U.S.C. § 770 gives spouses benefits to the exclusion of children, the system is less fair than the typical intestate succession scheme. An illegitimate child is most likely to suffer. A surviving spouse, for instance, will likely share benefits with his or her own children while ignoring the needs of the deceased spouse's illegitimate children.

A soldier is free to designate an otherwise ineligible illegitimate child as his SGLI beneficiary. The child will receive the proceeds even though a Survivor Assistance Officer may have initially notified the soldier's parents that they were the beneficiaries.[290] Some soldiers, however, may designate payment of proceeds "by law" thinking that this election would cover their illegitimate children, when in fact it would not.

Dependent and Indemnity Compensation (DIC) is authorized for deceased veteran's children providing the veteran does not leave a surviving spouse.[291] The DIC is paid in equal shares to the children. Legitimate and illegitimate children share the benefits equally.[292] If a spouse survives, children receive no direct payment and illegitimate children probably receive no indirect

support either. The DIC statute authorizes payments to children under some circumstances even when there is a surviving spouse.[293] This would include illegitimate children as defined in 38 U.S.C. § 101.

A death gratuity is authorized for payment to children of members who die on active duty, provided there is no surviving spouse.[294] The payment is made to all children in equal shares and includes all illegitimate children of female decedents.[295] For male decedents, eligibility of illegitimate children is conditioned on the same criteria as veteran's benefits,[296] although the criteria are listed in a different order.[297]

By eliminating the catchall category of 38 U.S.C. § 101 for children whose parentage is shown to the satisfaction of the Administrator, the SGLI statute eliminates from eligibility a large number of informally acknowledged illegitimate children. The categories listed in 38 U.S.C. § 765 may have been meant to simply show two types of evidence that would be satisfactory to show dependency. The statute would be more fair if it contained a catchall category which would include children of fathers who provided financial support and yet never acknowledged parentage in writing.

The ability of a father to include his illegitimate child as an SGLI beneficiary by simply admitting paternity in writing is probably a voluntary administrative mechanism similar to the putative father registry in Lehr v. Robertson. Although it would serve the statute well in judicial review, it would be of little practical advantage to soldiers if they did not know about it. Soldiers should also understand clearly

that illegitimate children will not necessarily be SGLI beneficiaries if they designate "by law" on their SGLI applications.

C. MEDICAL CARE

Through the Dependent's Medical Care Act of 1956,[298] Congress sought "to create and maintain high morale in the uniformed services"[299] by providing medical care to service members, retirees, and their dependents. The Act specifically excluded illegitimate children from eligibility.[300]

Illegitimate children challenged this exclusion in 1972 in Miller v. Laird.[301] The plaintiff in this class action suit was the illegitimate child of a soldier who was then serving in Viet Nam. Although a District of Columbia court had determined the soldier's paternity and ordered weekly support, he was not contributing any support at the time of the suit.[302] The child's mother and grandmother wanted to qualify her for medical care at a local Army hospital in the event of future illness.

The court could find no rational basis in any of the four principal arguments in favor of the exclusion offered by the government. Defendants claimed that the disqualification of illegitimate children served the statutory purpose of "maintaining morale" by "selecting for benefits those children about whom a service member would be most concerned." The court called the notion of a general lack of concern for illegitimate children "sheer speculation." Acknowledging that there were problems of proof involved in determining paternity of

illegitimate children, the court cited several federal statutes which contained safeguards against spurious claims by illegitimate children without a total exclusion.[303] The government then argued that the disqualification tends to preserve the integrity of marriage and promote family relationships. The court could find no basis in logic for the assumption that medical care for potential offspring would be a factor in whether people engaged in illicit relationships. Finally, defendants argued that inclusion of illegitimate children would require them to provide medical care to a large number of children born outside the United States. While noting that this had nothing to do with the statutory purpose of maintaining morale, the court added that the government may not attempt to conserve its fisc by drawing invidious classifications.

Applying the "stricter scrutiny" required by Weber,[304] the court held that the exclusion of illegitimate children denied the plaintiff due process of law in violation of the Fifth Amendment. Although referring to the Weber standard, the court also held that the ban on benefits was "utterly lacking in rational justification" as applied to illegitimate children whose paternity had been judicially established.[305] Accordingly, the court declared the plaintiff and other members of her class eligible for medical care under the Act.[306]

Army Regulation 40-121[307] (AR 40-121) was changed in 1973 to authorize medical care for illegitimate children "whose paternity has been judicially determined."[308] Eligibility was effective as of 31 August, 1972, the

date of the Miller v. Laird decision. The court decision also seems to be the source of the judicial paternity determination requirement in AR 40-121.

The Department of Defense has also authorized medical care for illegitimate children whose paternity is not judicially determined, under narrow circumstances.[309] To qualify, the child must live in a household maintained by or for a member and be dependent on that member for over 50 percent of his or her support.[310] Medical care is authorized for illegitimate children of female service members regardless of where the child lives or the extent to which the mother provides support.[311] Commissary privileges for any illegitimate child requires that the child live in a member's household and be dependent on that sponsor for over 50 percent of his or her support.[312] Illegitimate children have theatre and exchange privileges if they are dependent on a member for over 50 percent of their support, regardless of where they live.[313]

Determination of eligibility for dependent medical care is governed by Army Regulation 640-3.[314] In many ways, it mirrors the Pay Manual and AR 37-104-3 in setting out criteria and process for dependency determinations. For a spouse and legitimate children (including adopted children and step-children), the regulation requires no degree of dependency to establish eligibility for medical care.[315] Illegitimate children of male members for whom paternity has been judicially established have an automatic entitlement to medical care as well.[316]

Other illegitimate children require proof of

dependency. While the local installation personnel officer or identification card issuing officer can verify relationship or dependency for most dependents, applications for illegitimate children without a judicial decree must be sent to the Commander, USAFAC, for approval.[317] Applicants must provide a birth certificate and detailed information about the child's expenses and support.[318]

Although local installation personnel can verify eligibility for illegitimate children of male members where paternity has been judicially determined, the sponsor must provide several important documents. In addition to a birth certificate (also required for legitimate children and illegitimate children of female members), the sponsor must provide a copy of the court decree establishing paternity or ordering support.[319]

The eligibility scheme of AR 40-121 is similar to the one upheld in Mathews v. Lucas. It presumes dependency for legitimate children and illegitimate children whose paternity is judicially determined. The regulation differs, however, in the extent to which it is "carefully tuned to alternative considerations." The Social Security statute in Mathews v. Lucas included as beneficiaries those children with whom the father lived or for whom he contributed support.[320] The regulation requires the illegitimate child to meet both of these criteria and requires support over 50% as well. By doing so, it becomes less carefully tuned than the statute upheld in Mathews v. Lucas. It excludes illegitimate children who are being supported by their father in excess of 50% but who do not live with him.

It also excludes children who may have lived with their father for a significant period of time and whose residence with him was interrupted only by reason of his military service.

The "lived with" requirement is similar to the one in the Civil Service Retirement Act discussed in United States v. Clark.[321] The Supreme Court interpreted that statute as including children who had lived with the deceased federal worker during a period prior to his death. To the extent the statute and AR 40-121 are comparable, the Court's interpretation indicates that medical privileges should be extended to non-judicially decreed illegitimate children who have lived with the soldier at some time in the past.

Congress also revised the statute in United States v. Clark to eliminate its 50% dependency requirement. It did so to avoid discrimination against female civil servants, who frequently did not contribute over 50% of their households' income. The military eliminated the 50% support requirement for female soldiers to receive BAQ on behalf of husbands as a result of Frontiero v. Richardson.[322] Since Congress has not changed 10 U.S.C. § 1072 in response to Miller v. Laird, it may be proper for the Department of Defense to change its requirements in the same way Congress made changes to the Civil Service Retirement Act. A revision could make eligible those illegitimate children with whom the soldier lives or has lived for a significant period. It would also authorize care for illegitimate children for whom the soldier has provided support commensurate with his ability to do so.

The 50% dependency requirement is particularly harsh since children who are ill may have unusually high expenses - thus the soldier would find it very difficult to meet the 50% support requirement. This mechanism would be more fair if it contained a provision such as in the Pay Manual[323] that the support requirement will be met if the soldier pays his BAQ amount, even if this falls below the required percentage.

At a minimum, AR 40-121 should be revised to separate the requirements of residency and support so that a child can qualify under either category.

The present system discriminates between unwed fathers and unwed mothers since the illegitimate children of the latter qualify for medical care regardless of support amount or whether they live with the service member. The validity of this distinction depends on whether the men and women involved are similarly situated. The principle difference for purposes of constitutional analysis is that the identity of unwed mothers is seldom unknown, as seen in Parham v. Hughes. The government's goal is therefore to avoid problems of proof. The regulation is too broad in its furtherance of this goal because it eliminates from eligibility many illegitimate children whose parentage is not in doubt.

The system also discriminates more directly between illegitimate and legitimate children. Legitimate children of divorced parents are eligible for medical care regardless of the percentage of support they receive and whether they live with the soldier.[324] Although this classification is so overbroad as to

include many non-dependent children, the Department of Defense supports its continuation "because there is no potential for abuse by unauthorized persons."[325] This is simply another way of saying that illegitimate children must show actual dependency while legitimate children do not.

The medical care eligibility requirements do not provide the soldier the chance to easily qualify his child by acknowledging it in writing.[326] Requiring a soldier to initiate a formal filiation proceeding in a state court may be too expensive an option to represent a voluntary entitlement mechanism which would bolster the constitutionality of the system. This is especially so given the peculiar disadvantage soldiers have in the conduct of civil action while they are in remote locations.

Both the medical care and BAQ benefit schemes contain a mechanism for case-by-case determinations of dependency by USAFAC. The existence of this mechanism and the fact that all dependents or relationships require periodic recertification all but eliminate a government argument that it is necessary to eliminate broad classes of illegitimate children in order to avoid the expense of case-by-case determinations. This is especially so since Mathews v. Lucas allows a government agency to presume dependency for large numbers of beneficiaries, even if the presumption is overbroad.

D. FAMILY SUPPORT

Army Regulation 608-99[327] (AR 608-99) sets out

minimum requirements for soldiers' support of their family members. It also sets out policy and procedures to process paternity claims against soldiers. The regulation incorporates BAQ amounts, but the actual receipt of BAQ or entitlement to it has no relation to the support requirements.[328]

The regulation requires soldiers to comply with financial support provisions of court orders.[329] Where there is no court order, it requires soldiers to comply with the financial support provisions of a written support agreement.[330] In the absence of a court order and or a written support agreement, AR 608-99 requires minimum support of family members, in most circumstances in an amount equal to the soldier's BAQ at the "with dependents" rate.[331]

The regulation defines "written support agreements" as being between spouses or former spouses.[332] The definition would not include a written support agreement between a mother of an illegitimate child and the child's father, even though the father might be eligible to receive BAQ on the child's behalf because of the existence voluntary support.

For the purposes of interim minimum support,[333] AR 608-99 defines "family member" to include a present spouse and legitimate minor children.[334] The definition also includes minor illegitimate children born to female soldiers and to male soldiers when evidenced by a decree of paternity identifying the soldier as the father and ordering the soldier to pay support.[335] Consequently, the regulation does not require support for illegitimate children in the interim period before a court issues a

support order.

Thus, AR 608-99 only requires male soldiers to support illegitimate children where there is a court order of support. There is no support requirement where there is a court order of filiation without a monetary support provision and the regulation does not enforce the provisions of written agreements between unmarried people. Finally, illegitimate children of male soldiers are not included in the interim requirements even where the soldier has fully acknowledged the child as his.

The effect of these provisions is to deny illegitimate children a right to support which is provided to legitimate children. This is similar to the judicially enforceable right to support which Texas denied to illegitimate children in Gomez v. Perez. The mandatory support provisions of AR 608-99 are similar to judicially enforceable rights, and in some ways they are much more practical. Based on Gomez, the Supreme Court might hold that once the Army posits a right to enforce support from parents, its denial of that right to illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment.

The Family Support regulation is especially vulnerable to constitutional challenge in its refusal to enforce the provisions of written support agreements. There are no problems of proof in this area and the agreement between unmarried persons is no different than an agreement between married, divorced, or separated persons.

Army Regulation 608-99 also gives guidance to commanders on how to inform soldiers of paternity claims

against them and to advise these soldiers of their legal obligations.[336] The commander informs the soldier of the potential consequences of refusing to comply with a court order of support.[337] The commander then gives the soldier the opportunity to sign a statement admitting or denying the claim.[338]

If the soldier does not agree to provide financial support to the child,[339] the commander will notify the claimant or her representative that no action can be taken on the claim in the absence of a court order.[340] The Department of the Army has resisted pressure to require support in cases where the soldier simply admits paternity or voluntarily provides support and then ceases to do so.[341]

If the soldier admits paternity and agrees to provide financial support, the commander will assist the soldier in filing for an allotment, applying for BAQ, and obtaining an Identification Card for the child.[342] The commander will also ask the mother or her representative for a copy of the child's birth certificate.[343] The regulation provides little practical guidance to the commander about the peculiar problems the soldier will face in applying for BAQ and for a Identification Card for the child. At the very least, the commander would want to mention in his correspondence with the claimant the need for information about the child's support requirements and assets.[344] And naturally, the commander would not want to give the soldier misleading information or cause him to be overly optimistic.[345]

It also seems unwise to have the commander ask a

soldier to sign an admission of paternity, unless he is doing so solely to expedite a paternity action. Under the present regulatory system, he might do this to avoid the problems associated with getting benefits for illegitimate children or allowances on their behalf. But the best person to advise the soldier about how to respond to a paternity claim is a legal assistance attorney.

The regulation should also contain guidance for commanders and for military medical facilities about how to respond to requests for blood tests. Again, the involvement of a legal assistance officer is essential to inform the soldier of the significance of the paternity test in the jurisdiction from which it came.

Finally, the legal assistance officer should inform the soldier of the steps he needs to take to assert his parental rights with regard to his child in light of Caban and Lehr.

Under a previous version of AR 608-99,[346] the commander would ask if the soldier was willing to marry the complainant. If he was, the commander would contact the complainant and ask if the mother was willing to marry the soldier.[347]The current regulation removes the commander from the role of marriage broker, but retains a focus on the soldier's "moral" obligation and his "intentions."[348] The new regulation still states that the commander will "[a]llow the soldier to take ordinary leave in order to marry the claimant, if leave is requested for that purpose."[349] Tacit in this language is the idea that the best way to respond to a paternity claim is for the soldier to "do the honorable thing" and

marry the mother. The reduction in the regulation's emphasis on this approach may reflect a growing awareness on the part of its drafters of the changing structure of American family life.

IV. CONCLUSION

Government planners have struggled with the question of how entitlement to military benefits is related to dependency for many years.[350] In part, this is because dependency is defined in different ways and its existence can be difficult to establish.[351] Given dependency as a criteria, at least some dependents must be presumed as such to promote administrative convenience. Inevitably, this presumption is denied to persons who are nevertheless dependent.

The National Defense Authorization Act for fiscal year 1989 directed the Department of Defense to review the various rights and privileges provided by law to relatives of members of the Uniformed Forces to determine the desirability of providing a more uniform and consistent definition of the term "dependent."[352] Although it recommended minor changes,[353] the Defense Department concluded that valid reasons exist for the differences in definitions and requirements in the various statutes and directives involved.[354]

The review concluded that it would be "impractical and prohibitively costly to attempt to employ a universal definition of dependent to fill all circumstances."[355] In part, this increased cost would result from extending benefits to newly eligible

dependents. It also would reduce many current entitlement which would impair retention.

The review did not approach the various statutes and directives from the point of view of fairness or equity for illegitimate children, nor did Congress intend such a focus. The review points out, however, that "[T]he bottom line of the military pay and benefits package is to recruit and retain military members, not to serve broader societal or welfare functions."[356]

So in examining the military benefits scheme as it affects illegitimate children, we need to look beyond their constitutional validity. In considering how a requirement affects morale and retention, we need to look at how fair the requirement is. In looking at the "fairness" of the support requirements, we examine them more closely than would the Supreme Court.

In this examination, it is proper for us to go beyond constitutional jurisprudence in compensating for such factors as the benefit scheme's disproportionate impact on black soldiers. Such a concern should be even greater since minority members are currently represented in disproportionate numbers in the military. A focus on morale and retention would also require us to take into account the extent to which parents of illegitimate children are found in the lower enlisted ranks.

So we must ask two questions of the military benefit schemes: First, is the scheme's treatment of illegitimates constitutional? And second, do the eligibility criteria adversely affect morale and retention?

In the case of BAQ entitlement, the different

support levels required for illegitimate children compared to those for adopted children or stepchildren appear unjustifiable and unconstitutional. On the other hand, the administrative hurdles placed in the path of parents applying for BAQ on the basis of illegitimate children may be constitutional as a scheme designed to examine applications where problems of proof are expected. But these administrative hurdles are probably bad for morale, especially for lower enlisted soldiers.

In a similar sense, AR 608-99's failure to enforce written support agreements between unmarried parents denies the illegitimate children of those parents equal protection. On the other hand, that regulation's handling of paternity claims is constitutional but should be revised to ease the impact of these claims on the soldiers involved.

There do not seem to be major constitutional defects in the veteran's benefit system. But the system could be made more fair by including a 'catchall' category of eligible children in the SGLI statute. The benefit schemes would also be more fair to illegitimate children if they provided support more frequently for those children in cases where the veteran is survived by a spouse.

The medical benefit scheme should be revised to separate its "lived with" and level of support requirements so that an illegitimate child can qualify under either category. Although constitutional analysis requires this much, morale and retention would be enhanced by making the residency and support requirements more flexible.

An ideal system for determining eligibility for military benefits would require a specific showing of dependency for all dependents, regardless of their legal status. Illegitimate children would qualify as dependents as soon as their parents had taken the minimal steps necessary to establish a significant relationship with them, as required in Stanley and its progeny. But such relationships can be difficult to establish without limiting proof to objective criteria, and case-by-case determinations for all dependents would be too expensive and time consuming to use for the armed forces. Thus we are left with our present system of presumptions which we must carefully tune for alternative considerations.

With the decisions of the Supreme Court as a guide and an additional focus on morale and retention, we can and should revise the benefit scheme for illegitimate children to be more consistent and more fair.

1. J. Teichman, Illegitimacy: A Philosophical Examination, 28 (1982).

2. Id. at 40, 53-54.

3. See Deuteronomy 23.2.

4. H. Krause, Illegitimacy: Law and Social Power, 3 (1971).

5. W. Blackstone, Commentaries, *459, 465-466.

6. See Macfarlane, Illegitimacy and Illegitimates in English History, in Bastardy and Its Comparative History, 71-85 (1980).

7. J. Teichman, supra note 1, at 60-65, 111-112.

8. R. v. Nash, re Carey, 10 Q.B.D. 454 (1883).

9. J. Teichman, supra note 1, at 105.

10. S. Breckinridge, The Family and the State, 415-484 (1972).

11. H. Krause, supra note 4, at 5, 9-58.

12. See C. Vincent, Unmarried Mothers, 17 (1963). Vincent's own theory is that illegitimacy and careless sex are the result of "fun morality" or "the philosophy of fun."

13. See S. Hartley, Illegitimacy, 70, 82 (1975).

14. Id. at 8-12.

15. J. Teichman, supra note 1, at 22.

16. S. Hartley, supra note 13, at 3.

17. Id. at 24-25.

18. Id. at 48-49.

19. U.S. Dep't of Health and Human Services, Vital Statistics of the United States 1986, Vol. 1.1 (table 1-31) (1988).

20. Smith, The Long Cycle in American Illegitimacy and Prenuptial Pregnancy, in Bastardy and Its Comparative History, 373-378 (1980).

21. See Billingsley, Illegitimacy and Patterns of Negro Family Life, in The Unwed Mother 133-157 (1980).

22. N.Y. Times, Feb. 2, 1988, §A, at 17, col. 1. The study occurred at the San Diego Naval Hospital and covered the period July, 1986 through May, 1987. The Navy initially refused to release the results of the study. The figures may be skewed if women from elsewhere in the Pacific are sent to San Diego when they become pregnant.

23. Id.

24. Figures are from the United States Army Finance and Accounting Center, Joint Uniform Military Pay System-Army, Payment Statistics Report, November, 1989.

25. Id. The figures are as follows for November, 1989:

Rank	# of soldiers w/ BAQ for court ordered support of illegitimate children	# of soldiers w/ BAQ for voluntary support of illegitimate children
E-1	6	45
E-2	49	166
E-3	132	620
E-4	374	1734
E-5	178	708
E-6	67	277
E-7	25	92
E-8	2	11
E-9	0	2
Total	833	3655
WO's	1	8
O-1	1	14
O-2	5	22
O-3	4	26
O-4	1	2
O-5	1	1
O-6	0	1
Total	13	74

26. 391 U.S. 68 (1968).

27. Id. at 71.

28. Id. at 70.

29. Id. at 72.

30. 391 U.S. 74 (1968).

31. Id. at 75.

32. Levy v. Louisiana, 391 U.S. 73. The opinion is published separately. Justice Harlan was joined in dissent by Justices Stewart and Black.

33. Id. at 80.

34. Glona v. American Guarantee and Liability Ins. Co., 391 U.S. at 75. The justification might seem even less rational if one considers the extent to which conception of illegitimate children may be entirely accidental.

35. 401 U.S. 532 (1971).

36. Id. at 536.

37. Id. at 539.

38. Id. at 538.

39. Id. at 536.

40. Id. at 549.

41. Id. at 550.

42. Justices Powell and Rehnquist.

43. 406 U.S. 164 (1972).

44. Id. at 171, n.9.

45. Id. at 173.

46. Id. at 176.

47. Id. at 175-176, n.14 (footnote omitted).

48. Id. at 170.

49. 405 U.S. 645 (1972).

50. Stanley initially gave the children to someone else to watch. The dissent charged that he first became concerned about legal custody of the children when he found he would lose welfare payments if the state designated someone else as guardian.

51. Stanley v. Illinois, 405 U.S. at 658.

52. The Court used the due process balancing test of Goldberg v. Kelly, 379 U.S. 254, 263 (1970).

53. Stanley v. Illinois, 405 U.S. at 651-652.

54. Id. at 657-658.

55. 409 U.S. 535 (1973).

56. New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973).

57. Id. at 620, quoting New Jersey Welfare Rights Organization v. Cahill, 349 F.Supp. 491, 496 (D.N.J. 1972).

58. Id. at 621.

59. 417 U.S. 628 (1974).

60. 42 U.S.C. § 416 (1982).

61. Jimenez v. Weinberger, 417 U.S. at 633-634.

62. Id. at 636.

63. Id. at 637.

64. 427 U.S. 495 (1976).

65. See 42 U.S.C. §§ 416(h)(2)(A), 416(h)(3) (1982). The statute included illegitimate children eligible to take the insured's property under state intestate succession law, and those whom the

insured individual had acknowledged or been ordered by a court to support.

66. 42 U.S.C. § 416(h)(3)(C)(ii) (1982).

67. Mathews v. Lucas, 427 U.S. at 503-504.

68. Id. at 507.

69. Id. at 509.

70. Id. at 510, quoting Roth v. United States, 354 U.S. 476, 501 (1957) (punctuation omitted).

71. Mathews v. Lucas, 427 U.S. at 510-511.

72. Id. at 516-518.

73. Id. at 513. Congress intended "to replace the support lost by a child when his father...dies...." Id. at 507, quoting S. Rep.No. 404, 89th Cong., 1st Sess., 110 (1965), U.S. Code Cong. & Admin. News 1965, pp. 1943, 2050. This conceivably could include children whose father supported them intermittently and was not doing so when he died. This was the case with the plaintiff in Mathews v. Lucas.

74. Norton v. Weinberger, 364 F.Supp. 1117, 1128 (D.Md. 1973), vacated and remanded for further proceedings in light of Jimenez, 418 U.S. 902 (1974); adhered to on remand, 390 F.Supp. 1084 (1975); aff'd sub. nom. Norton v. Mathews, 427 U.S. 524 (1976).

75. Mathews v. Lucas, 427 U.S. at 514.

76. Id. at 522-523.

77. Id. at 510.

78. Id. at 516.

79. See L. Tribe, American Constitutional Law, at 1439-1442 (1988).

80. Id. at 1451-1454.

81. Id. at 1553-1565.

82. Labine, 401 U.S. 551, n. 19.

83. Jimenez, 417 U.S. at 631-632.

84. Mathews v. Lucas, 427 U.S. at 505-506.

85. 430 U.S. 762 (1977).

86. See Id. at 769.

87. Id. at 769.

88. Id. at 764. The entire estate consisted of a 1974 Plymouth worth $2,500.

89. Id. at 770-771.

90. Id. at 769.

91. Id. at 776, n.17.

92. Fiallo v. Bell, 430 U.S. 787 (1977).

93. 8 U.S.C. § 1101(b) (1982).

94. Fiallo v. Bell, 430 U.S. at 795.

95. Id. at 799.

96. Id.

97. Id.

98. Justice White dissented without a written opinion.

99. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315, 100 Stat. 3499 (1986).

100. 439 U.S. 259 (1978).

101. Lalli v. Lalli, 431 U.S. 911 (1977).

102. Id. at 268-275.

103. Id. at 268-270.

104. Id. at 270.

105. Id. at 273.

106. Neither Trimble nor Lalli dwell on the fact that the father could have named the illegitimate children in a will. This had been crucial to the result in Labine.

107. Id. at 267.

108. Id. at 267-268, quoting In re Lalli, 43 N.Y.2d 65, 70, 400 N.Y.S.2d 761, 764 (1977).

109. See Note, Illegitimates and Equal Protection: Lalli v. Lalli - A Retreat from Trimble v. Gordon, 57 Denver L. J. 453 (1980).

110. Lalli v. Lalli, 439 U.S. at 268.

111. Id. at 273.

112. 434 U.S. 246 (1978).

113. Id. at 248.

114. Id. at 255.

115. 441 U.S. 380 (1979).

116. Abdiel Caban was actually married to another woman throughout the period he lived with Maria Mohammed and fathered the children involved in the case. I refer to him as an unwed father for convenience.

117. Caban v. Mohammed, 441 U.S. at 391-392.

118. Id. at 392.

119. See Id. at 397.

120. 429 U.S. 190 (1976).

121. 404 U.S. 71 (1971).

122. See Id. at 394, n.16. The appellant raised this argument and the court declined to consider it.

123. This argument was not raised by the appellant.

124. See Id. at 411-414. Justice Stewart agreed with Justice Steven's concerns in his separate dissent. See Id. at 400.

125. Id. at 394, n.16. See supra notes 49-54 and accompanying text.

126. See Zingo, Equal Protection for Illegitimate Children: The Supreme Court's Standard for Discrimination, 3 Antioch L. J. 59, 79 (1985).

127. 441 U.S. 347 (1979).

128. Id. at 350.

129. Id. at 358, n.11.

130. See Id. at 357.

131. Id. at 353.

132. Id. at 355.

133. Id. at 356.

134. Id. at 358.

135. See Id. at 360-361.

136. See Id. at 356, 360.

137. See Id. at 356, n.9.

138. 443 U.S. 282 (1979).

139. 42 U.S.C. § 402 (g)(1) (1982).

140. Califano v. Boles, 433 U.S. at 289.

141. Id. at 289, 293.

142. Id. at 296. The Court does not discuss the extent to which classifications involving unwed mothers deserve stricter scrutiny because of the traditional social opprobrium suffered by this group.

143. Id. at 294. The child in this case was eligible for Social Security benefits in his own right.

144. See Weinberger v. Salfi, 422 U.S. 749 (1975).

145. Id. at 304 (Marshall, J., dissenting).

146. Id. at 298.

147. 5 U.S.C. §§ 8331-8351 (1982).

148. 445 U.S. 23 (1980).

149. 5 U.S.C. § 8341(a)(3)(A) (1982).

150. United States v. Clark, 445 U.S. at 24-25.

151. Id. at 27.

152. Id. at 27.

153. See Id. at 27-34.

154. 456 U.S. 91 (1982).

155. Gomez v. Perez, 409 U.S. 535 (1973). The Texas legislature had initially responded only with a legitimation statute but did not provide for a support action against unwilling fathers. The legislature eventually passed the statute under attack in Mills. See O'Brien, Illegitimacy: Suggestion for Reform Following Mills v. Habluetzel, 15 St. Mary's L. J. 79, 101-102 (1983).

156. Mills v. Habluetzel, 456 U.S. at 96.

157. Id. at 104 (O'Connor, J., concurring).

158. Id. at 97.

159. Id. at 99.

160. Id.

161. Id. at 99.

162. Id. at 101.

163. Id. at 102 (O'Connor, J., concurring).

164. Id. at 103-106.

165. 462 U.S. 1 (1983).

166. Id. at 3.

167. See Id. at 7-8.

168. Id. at 9.

169. Id. at 10.

170. Id. at 15.

171. Pub. L. 98-378, § 3(b), 98 Stat. 1306 (1984).

172. 108 S. Ct. 1910 (1988).

173. The appellant had argued that the Child Support Enforcement Amendments of 1984 required retroactive application of the new eighteen-year statutes of limitations. Id. at 1913.

174. Id. at 1915.

175. Id.

176. Id. at 1916.

177. Id.

178. Id. See Note, Clark v. Jeter: Equal Protection versus Statutes of Limitations in Paternity Actions, 15 J. Contemp. L. 119 (1989).

179. 430 U.S. 762 (1977). See supra notes 85-91 and accompanying text.

180. 476 U.S. 90 (1986).

181. Reed v. Campbell, 476 U.S. at 853.

182. For a discussion of the retroactivity issue in Reed, see Note, Inheritance Laws - Non-Marital Children - Fourteenth Amendment Equal Protection, 25 Duq. L. J. 329, 343-344 (1987).

183. Reed v. Campbell, 476 U.S. at 855-856.

184. Id.

185. Reed v. Campbell, 476 U.S. at 856.

186. 463 U.S. 248 (1983).

187. Id. at 254.

188. Id. at 257-258. The Court also discussed Stanley, Caban, and Quilloin.

189. Id. at 261.

190. Id. at 257, quoting Hafen, Marriage, Kinship, and Sexual Privacy, 81 Mich. L. Rev. 463, 479-481 (1983).

191. Lehr v. Robertson, 463 U.S. at 261-262.

192. Id. at 265. The Family Court knew that Lehr had filed a paternity action in another County. This did not entitle him to notice of the pending adoption, however.

193. Id. at 267-268.

194. Id. at 269 (White, J., dissenting).

195. Lehr v. Robertson, 463 U.S. at 264.

196. Court to Decide Parental Rights of Unwed Father in Adoption, N.Y. Times, April 19, 1988, at 22, col. 1.

197. In re Baby Girl M., 236 Cal. Rptr. 660 (Ct. App. 1987).

198. McNamara v. San Diego Dep't of Social Services, 57 U.S.L.W. 3410 (Dec. 13, 1988).

199. 109 S. Ct. 2333 (1989).

200. Id. at 2337.

201. Cal. Evid. Code § 621 (West 1989).

202. Id.

203. Michael H. v. Gerald D., 109 S. Ct. at 2341.

204. Id. at 2344.

205. Id. at 2345.

206. See Id. at 2346-2347 (O'Connor, J., concurring).

207. Id. at 2347-2348 (Stevens, J., concurring).

208. Id. at 2347.

209. Justice Brennan wrote a dissent joined by Justices Marshall and Blackmun. Id. at 2349-2359. Justice White wrote a dissent joined by Justice Brennan. Id. at 2360-2363.

210. Id. at 2353 (Brennan, J., dissenting).

211. Id. at 2342, n.4 (plurality opinion).

212. Mathews v. Lucas, 427 U.S. at 512.

213. See Trimble v. Gordon, 430 U.S. at 774.

214. Stanley v. Illinois, 405 U.S. at 647.

215. See Lalli v. Lalli, 439 U.S. at 271-272.

216. See O'Brien, supra note 155, at 119.

217. See infra note 229 and accompanying text.

218. See Note, A Modern- Day Solomon's Dilema What of the Unwed Father's Rights?, 66 U. Det. L. Rev. 267 (1989).

219. See Zingo, supra note 126, at 88.

220. See Weber v. Aetna, 406 U.S. at 175-176.

221. Mathews v. Lucas, 427 U.S. at 510.

222. Weber v. Aetna, 406 U.S. at 183.

223. Pickett v. Brown, 462 U.S. at 8.

224. Clark v. Jeter, 109 S.Ct. at 1914.

225. See Zingo, supra note 126, at 88-89.

226. See Id. at 91.

227. See Note, Jones v. Schweiker: Illegitimate Children and Social Security Benefits, 16 Ind. L. Rev. 887 (1983). Justices Harlan and Black consistently voted against illegitimate children before they retired; Justice Douglas consistently voted in favor of the claims of illegitimate children. Justice Brennan is the only currently serving Justice with a perfect voting record in favor of the claims of illegitimate children.

228. Id. at 540, 553-554. This colloquy reveals that courts at the time of passage of the Fourteenth Amendment could force parents of illegitimate children to support their offspring.

229. Pickett v. Brown, 462 U.S. at 17.

230. See Ellman and Kay, Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?, 54 N.Y.U. L.Rev. 1131 (1979).

231. See Kaye, Admissibility of Genetic Testing in Paternity Litigation: A Survey of State Statutes, 22 Fam. L.Q. 109 (1988).

232. The states are: Alaska, Florida, Oklahoma, Colorado, Maine, California, Wisconsin, and Texas. See Id. for a complete description of all state statutes on admissibility of scientific tests for paternity.

233. Clark v. Jeter, 108 S. Ct. at 1916.

234. See Haas, From Here to Paternity: Using Blood Analysis to Determine Parentage, 61 Wis. B. Bull. 24, 27 (July, 1988).

235. Trimble v. Gordon, 430 U.S. at 766, n.10.

236. See Tribe, supra note 79, at 1502-1514.

237. Washington v. Davis, 426 U.S. 229, 240 (1976).

238. See Hunter v. Underwood, 471 U.S. 222 (1985). The Court found racial animus for a modern law in the Alabama Constitutional Convention of 1901, which had the avowed purpose of establishing white supremacy.

239. See J. Teichman, supra note 1, at 55-60.

240. See Births Rise for Unwed Women, N.Y. Times, July 30, 1986, § C at 4, col. 6.

241. Soldiers can receive BAQ when they have no dependents at all if they are not living in government-provided quarters. BAQ is paid at a higher rate if the soldier has eligible dependents. Thus BAQ can be at the "without dependents" rate or at the higher "with dependents" rate.

242. Public Law 93-64, 9 July 1973. Prior to this time, 37 U.S.C. § 401 included only legitimate children. In addition to BAQ, the change in definition allowed service members to receive travel allowance and family separation allowance for illegitimate children (providing other criteria were met).

243. Miller v. Laird, 349 F.Supp. 1034 (D.D.C. 1972); S. Rep. No. 235, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Admin. News 1580.

244. 37 U.S.C. § 401(2) (1982). The definition applies to all children who are under 21 years of age, or who are incapable of self-support and are in fact dependent on the member for over one-half of their support.

245. Dep't of Defense, Military Pay and Allowances Entitlements Manual (ch. 15, Aug. 18, 1989) [hereinafter, Pay Manual].

246. Id., para. 30238.

247. Id., para. 30238b. This category would apply most often to soldiers in Initial Entry Training.

248. Id., para. 30238c.(1) and (2). The guideline does not require support under this formula in excess of the applicable BAQ at the "with-dependents" rate.

249. Id., para. 30238c.

250. Id., para. 30238a.

251. Id., para. 30238d. The member can then receive BAQ on the child's behalf under Pay Manual Section 30232.

252. Id., para. 30238e.

253. Id., para. 20238f. The language of this section refers specifically to member-fathers who marry women with illegitimate children. The section is ambivalent enough to include a family situation where the gender roles are reversed.

254. Army Reg. 37-104-3, Military Pay and Allowances Procedures, Joint Uniform Military Pay Systems (JUMPS-Army) (10 Aug. 1988) [hereinafter, AR-37-104-3].

255. Id., para. 2-11. This includes illegitimate children legitimated by court order.

256. Id., para. 21-11h(2). The soldier must provide a birth certificate showing the soldier is the parent of the child and must also indicate that he or she is providing financial support to the child.

257. Id., para. 21-11k(5). The custodian must state how the support funds are actually used and whether the child has any independent sources of income. Similar information is required for application on behalf of adopted children or step-children who do not live with the claimant. But for these claimants, the local FAO can authorize BAQ.

258. Pay Manual, para. 30232.

259. Id., para. 30238, 30239.

260. AR 37-104-3, para. 21-11a. The local FAO will verify this information. If the BAQ is for the child of a former marriage, the applicant must also present a copy of the divorce decree.

261. Under the Pay Manual, the applicant must provide a "substantial" amount of the support for an adopted child or step-child. Para. 30239c. AR 37-104-3 interprets this to require the applicant to provide at least 30% of the child's total support.

262. S. Rep. No. 235, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Admin. News 1588-1589. Prior to this, junior enlisted personnel had to have in place an automatic 'Q Allotment' for their dependents in order to draw BAQ.

263. Id.

264. Approval of the application by USAFAC normally takes two to three months. This estimate is based on telephone conversations with personnel at the United States Army Finance and Accounting Center in December, 1989.

265. I base this observation in part on my experience at the Legal Assistance Office at Fort Leonard Wood, an Initial Entry Training installation.

266. 427 U.S. 524 (1976).

267. The Court also discussed an unrelated jurisdictional issue. Id. at 528-538.

268. Id. at 525-526.

269. The administration makes these determinations pursuant to 42 U.S.C. § 416(h)(3)(C)(ii) (1982).

270. See Hammonds for Green v. Bowen, 652 F.Supp. 491 (S.D.N.Y. 1987). But see Jones v. Schweiker, 668 F.2d 755 (4th Cir. 1981) (support to an illegitimate child from a soldier killed on active duty did not meet the test).

271. Army Times, Easing Up on Unwed Mothers, Nov. 20, 1989, p. 25, col. 1.

272. Illegitimate children were first included as Veteran's compensation beneficiaries in 1934. Pub. L. 73-867, 48 Stat. 1282. Children must also be unmarried and be either under eighteen years old; have become permanently incapable of self-support prior to reaching eighteen years old; or attend a course of instruction at an approved educational institution and be under twenty-three years of age. 38 U.S.C. § 101 (4)(A) (i-iii) (1982).

273. The statute does not specifically mention illegitimate children of female veterans, but simply qualifies those "as to alleged fathers." The Death Gratuity statute (10 U.S.C. § 1477 (1982)) used 38 U.S.C. § 101 as a basis for its definitions. The current version of 10 U.S.C. § 1477 refers specifically to "illegitimate children of a female decedent." 38 U.S.C. § 765 (defining SGLI beneficiaries) also includes all illegitimate children of a mother.

274. 38 U.S.C. § 101 (4)(A) (1982).

275. 38 U.S.C. § 765 (8) (1982).

276. Id.

277. 38 U.S.C. § 765(8)(d-e) (1982).

278. 325 F.Supp. 1194 (W.D.La., 1971).

279. Labine v. Vincent, 401 U.S. at 535, n.3.

280. 38 U.S.C. § 770(a) (1982). In the event the deceased soldier had no next of kin, the insurance proceeds would probably go to the federal government rather than escheat to the state.

281. 38 U.S.C.S. § 765(9) (Law. Co-op. 1981 & Supp. 1989).

282. Id.

283. 544 F.Supp. 306 (E.D. Mich., 1982).

284. Prudential Ins. Co. of America v. Burns, 513 F.Supp. 280 (D. Mass., 1981). The court acknowledged the possibility that under state law, the administrator would have to disburse the proceeds to at least one of the parents.

285. Manning v. Prudential Ins. C. of America, 330 F.Supp. 1198 (D. Md., 1971)(SGLI proceeds ordered to illegitimate daughter even though she could not inherit from the insured under North Carolina intestate succession law).

286. 42 U.S.C. § 416(h)(2)(a) (1982). Illegitimate children can also qualify under several criteria similar to those in 38 U.S.C. § 101 (42 U.S.C. § 416(h)(3)).

287. See, e.g. Adens for Green v. Bowen, 784 F.2d 978 (9th Cir. 1986); Trammel on Behalf of Trammel v. Bowen, 819 F.2d 167 (7th Cir. 1987).

288. Moorehead v. Bowen, 784 F.2d 978 (9th Cir. 1985). Although the decedent lived in Texas, the court determined that Texas choice of law rules would look to California law to see if the child was legitimate.

289. See Unif. Probate Code, § 2-102, 8 U.L.A. 59 (1983).

290. See Decker v. United States, 603 F.Supp. 40 (S.D. Ohio, 1984).

291. 38 U.S.C. § 413 (1982).

292. 38 U.S.C. § 413 relies on 38 U.S.C. § 101 for its definition of children.

293. This includes children over eighteen who became permanently disabled before reaching that age, and children between eighteen and twenty-two who are attending an approved educational institution. 38 U.S.C. §§ 414(b), 414(c) (1982).

294. 10 U.S.C. § 1477 (1982).

295. 10 U.S.C. § 1477(a) (1982).

296. The original legislation referred to a Veteran's Administration publication for the definitions of "parents" and "children." Servicemen's and Veteran's Survivor Benefits Act, Pub. L. No. 881, § 102, 70 Stat. 860 (1956). Congress codified the current definitions by Pub. L. No. 85-861, § 1(32)(A), 72 Stat. 1452 (1958). The definition is nearly the same as that for illegitimate children found in 38 U.S.C. § 101.

297. 10 U.S.C. § 1477(b)(5) includes illegitimate children of a male decedent -

> (A) who have been acknowledge in writing signed by the decedent;
>
> (B) who have been judicially determined, before the decedent's death to be his children;
>
> (C) who have been otherwise proved, by evidence satisfactory to the Administrator of Veterans' Affairs, to be the children of the decedent; or
>
> (D) to whose support the decedent had been judicially ordered to contribute.

298. Act of June 7, 1956, ch. 374, 70 Stat. 250 (1956).

299. 10 U.S.C. § 1071 (1982).

300. 10 U.S.C. § 1072(2)(D) (1982).

301. 349 F.Supp. 1034 (D.D.C. 1972).

302. Id. at 1038.

303. These included 38 U.S.C. § 101(4) and 42 U.S.C. § 416(h)(3). See supra notes 272-274 and accompanying text.

304. Id. at 1046. See supra notes 45-47 and accompanying text.

305. Id.

306. Id. at 1047.

307. Army Reg. 40-121, Medical Services: Uniformed Services Health Benefit Program (15 Sept. 1970)(C1, 15 June 1973) [hereinafter, AR 40-121].

308. Id., para. 3-2f. Congress has never amended 10 U.S.C. § 1072 in response to Miller v. Laird.

309. Dep't of Defense Instruction 1000.13, Identification Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals (June 6, 1984) [hereinafter DOD Instr. 1000.13].

310. Id., Enclosure 6.

311. Id.

312. Id.

313. Id.

314. Army Reg. 640-3, Identification Cards, Tags, and Badges (17 Aug. 1984) [hereinafter, AR 640-3]. AR 40-121, para. 2-2a refers to the predecessor of AR 640-3, Army Reg. 606-5 (same title) for guidance on dependency determinations.

315. AR 640-3, para. 3-3a. "The mere existence of the relationship establishes eligibility of these dependents for medical care."

316. Id., para. 3-3b. Illegitimate children of female members are not mentioned in para 3-3, but the regulation as a whole and the authority of DOD Instr. 1000.13 makes these children automatically eligible.

317. Id., para. 3-17. The Commander, USAFAC also must approve eligibility in cases where a relationship is doubtful and for rare cases such as for the illegitimate children of a male spouse of a female member. Id., Table 3-1, para. 1-4f(4).

318. Id., para. 3-17.

319. Id., para. 3-15b(8).

320. See supra notes 60, 65-66 and accompanying text.

321. See supra notes 147-153 and accompanying text.

322. 411 U.S. 677 (1973).

323. Pay Manual, para. 30238c.

324. AR 640-3, para. 3-3a.

325. Letter, Deputy Assistant Secretary of Defense, Resource Management and Support, Subject: Dependency, 27 Oct. 1989, at 3.

326. The recent Department of Defense review mistakenly assumed that soldiers did have this option with respect to medical care for illegitimate children. Id. at Encl. 3, p. 2.

327. Army Reg. 608-99, Personal Affairs: Family Support, Child Custody, and Paternity (22 May 1987) [hereinafter AR 608-99].

328. Id., para. 1-8, 7-4. BAQ is based on federal law; the legal obligation to support dependents is almost always based on state law. See Arquilla, Family Support, Child Custody, and Paternity, 112 Mil. L. Rev. 17, 26-27 (1986).

329. Id., para. 2-4a(1). This applies only to court orders requiring support on a periodic basis. The regulation gives commanders the responsibility to ensure that soldiers comply with other financial support provisions as well. This would include provisions for property division and payment of medical expenses. Id., para. 2-3c(1).

330. Id., para. 2-4a(2), 2-3b.

331. Id., para. 2-4a(3).

332. Id., Glossary: "Any written agreement between husband and wife in which the amount of periodic financial support to be provided by the soldier spouse has been agreed to by the parties."

333. See supra note 331 and accompanying text.

334. Id.

335. Id.

336. Id., para. 3-1 through 3-4. The regulation also instructs the commander on how to proceed if there are allegations of an offense such as rape or indecent acts with a minor. Id., para. 3-2a.

337. Id., para. 3-2b(4).

338. Id., para. 3-2b(5).

339. Id., para. 3-3a. This includes soldiers who refuse to answer questions about the paternity claim, soldiers who deny paternity, and soldiers who admit paternity but refuse to provide financial support.

340. Id., para. 3-3a(2), 3-3b.

341. Arquilla, supra note 328, at 54.

342. Id., para. 3-3c.

343. Id., para. 3-3c(1).

344. See supra note 257 and accompanying text.

345. For instance, AR 608-99 advises the commander that an Identification Card application may require a birth certificate. AR 640-3, para. 3-15 clearly requires a birth certificate.

346. Army Reg. 608-99, Support of Dependents, Paternity, and Related Adoption Proceedings (15 Nov. 1978).

347. Id., para. 3-2c, 3-3a. For a comparison of this regulation and the 1985 version, see Arquilla, supra note 328, at 52-54.

348. AR 608-99 (22 May 1987), para. 3-1b, 3-2b(5).

349. Id., para. 3-3c(6).

350. See The President's Commission on Veterans' Pensions, Veterans' Benefits in the United States (1956).

351. Id. at 220-221.

352. Pub. L. 100-456, §654 (1988).

353. The Department recommended that unwed mothers no longer be required to provide a written admission of parentage. Letter, Deputy Assistant Secretary of Defense, Resource Management and Support, Subject: Dependency, 27 Oct. 1989, at 2 [hereinafter, DoD Letter].

354. The review also included the definition of dependents found in the Internal Revenue Code, 26 U.S.C. §§ 151-152.

355. DoD Letter, at 4.

356. Id. at 4.