CHAPTER THREE — PATERNITY AND LEGITIMACY

Constitutional Protection of the Illegitimate Child?

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In this article the author submits that the Supreme Court's treatment of the rights of the illegitimate child has been inconsistent and confused. Although some cases seem to hold that discrimination against the illegitimate child on the basis of his birth violates the equal protection clause, other cases uphold such discrimination. No comprehensible rationale can be deduced from the cases, nor can application of the decisions to other forms of discrimination be predicted. Similar difficulties have been created respecting the rights of the parents of illegitimate children.

INTRODUCTION

Since 1968 the United States Supreme Court has repeatedly reviewed the constitutionality of various disabilities imposed upon the illegitimate child by legislative or judicial action both state and federal.[1] In that year the Court held, in *Levy v. Louisiana,*[2] that a state court's construction of the Louisiana wrongful death statute denying an illegitimate child the right to recover for the death of his mother violated the equal protection clause of the fourteenth amendment. In a brief opinion the long history of different treatment of the illegitimate was brushed aside as irrelevant. It is perhaps not surprising, in view of the summary nature of the *Levy* opinion, that many lawyers, including some experienced observers of the Supreme Court, construed the case to mean that no distinctions between legitimate and illegitimate children could pass muster under the equal protec-

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[1] The constitutional implications of the illegitimate's disabilities are discussed in Krause, *Equal Protection for the Illegitimate,* 65 MICH.L.REV. 477 (1967). The Supreme Court cases to 1975 are collected in Annot., 41 L.Ed.2d 1228 (1975). *See also* Note, *Illegitimates and Equal Protection,* 10 U. MICH. J. LAW REFORM 543 (1977).

[2] 391 U.S. 668 (1968), *cited in* 35 BROOKLYN L.REV. 135 (1968), 47 TEX.L.REV. 326 (1968), 43 TULANE L.REV. 383 (1969).

tion clause.[3] It is now clear, however, that some of the distinctions do survive. Subsequent Supreme Court decisions have exhibited such confusion and vacillation that it is very difficult to predict which ones do survive, or to discern any rationale for the Court's decisions. The purpose of this article is to describe the complexities of the Supreme Court's opinions dealing with the constitutionality of the illegitimate child's disabilities and to suggest some ways of analyzing the social interests with which the disabilities are concerned.

I. Wrongful Death Statutes

The majority opinion in *Levy v. Louisiana*[4] characterized as invidious discrimination having no rational basis Louisiana's refusal to permit the illegitimate child to recover for his mother's death. Although it is difficult to be sure of the reason for this view, it seems to have been that the relation of a mother to her child is the same biologically and spiritually whether the child is legitimate or illegitimate. Both legitimate and illegitimate children are dependent upon their mothers. They suffer equally when their mothers are killed. They therefore should be treated equally under the wrongful death statute.

Mr. Justice Harlan's dissent in *Levy* argued that wrongful death statutes did not purport to base recovery upon individual biological or spiritual relationships, but rather upon legal relationships defined in somewhat arbitrary ways. The statute did not make recovery turn on the existence of affection or dependence between the deceased and the plaintiff but upon family relationships based in the first instance upon marriage. What this amounts to is the assertion that the law in the past treated relationships derived from marriage differently from relationships not based upon marriage and may continue to do so without being characterized as irrational.

The response to Mr. Justice Harlan's view must be that the disability of illegitimate children is attributable only to the circumstances of their births for which they are not responsible, and for which they should therefore not have to suffer. The difficulty with this argument is that if it applies generally to wrongful death statutes, it would invalidate most of the distinctions which they

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[3] *E.g.*, Henkin, *Foreward, The Supreme Court, 1967 Term*, 82 Harv.L.Rev. 63 (1968); Semmel, *Social Security Benefits for Illegitimate Children After Levy v. Louisiana*, 19 Buffalo L. Rev. 289, 290 (1970); In re Estate of Jensen, 162 N.W.2d 861 (N.D. 1968).

[4] 391 U.S. 68 (1968).

make. It would, for example, invalidate a statute which said that a spouse might recover in preference to a sister, where the sister is loved by and dependent upon the deceased and the spouse is living apart, not loved by and not dependent upon the deceased. The majority opinion in *Levy,* however, made no attempt to meet these arguments.

One consequence of *Levy* does seem predictable. The case held that the illegitimate child could not be deprived of the right to sue for the wrongful death of his mother where that right was given to the legitimate child. It should be equally true that he should be entitled to sue for the wrongful death of his father, if legitimate children are given that right by the applicable statute, and several cases have so held.[5]

II. Inheritance Rights

In 1971 the Supreme Court held the most important form of discrimination against illegitimate children, discrimination respecting their rights of inheritance,[6] not to violate the equal protection clause in *Labine v. Vincent.*[7] In this case the illegitimate child had been acknowledged by her parents, the effect of which under Louisiana law was to give her the right to support from her parents. Under the applicable Louisiana statutes, however, the acknowledged illegitimate child could inherit from her father only if he died leaving no legitimate descendants, no parents or grandparents, and no collateral relatives. The Louisiana court had held in this case that the illegitimate daughter could inherit nothing from her father, since he had died leaving collateral relatives.

In an opinion which reads very much like Mr. Justice Harlan's dissent in *Levy* v. *Louisiana,* the Supreme Court said the Constitution does not require that there be a biological difference between individuals as a condition on treating them differently in the intestacy statute. The Court characterized one set of relationships, those of legitimate children, as socially sanctioned, legally recognized and producing legal rights and obligations. The other relationships, those of the illegitimate child, were characterized

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[5] Cannon v. Transamerican Freight Lines, 37 Mich.App. 313, 194 N.W.2d 736 (1971); Jordan v. Delta Drilling Co., 541 P.2d 39 (Wyo. 1975). Other cases are collected in Annot., 78 A.L.R.3d 1230 (1977).

[6] The chief common law disability of illegitimate children was their inability to inherit from either their mothers or their fathers. See H.Clark, Law of Domestic Relations in the United States 155 (1968).

[7] 401 U.S. 532 (1971), *cited in* 38 Brooklyn L. Rev. 428 (1971), 47 Notre Dame Law. 392 (1971).

as "illicit and beyond the recognition of the law."[8] The opinion also seemed to place some weight upon a distinction from the statute in *Levy,* saying that the wrongful death statute in that case barred the illegitimate from recovery, whereas in this case the illegitimate was not barred from inheriting because the father could have left her one-third of his property by will, or he could have legitimated her. Finally, the opinion said specifically that *Levy* cannot be read to say a state may never treat an illegitimate child differently from a legitimate child.[9] Four justices dissented in this case[10] and Mr. Justice Harlan concurred specially.[11]

As the dissent in *Labine* amply demonstrated, there was no possible way of distinguishing the *Levy* and *Labine* results. If *Levy* was right, *Labine* was wrong and vice versa. Lower courts reached differing conclusions as to which case should be followed and as to whether subsequent cases overruled *Labine.*[12]

The confusing consequences of *Labine* are made most obvious by those state statutes which provide that the wrongful death action is for the benefit of those persons entitled to take the intestate personal property of the decedent.[13] In that situation it is impossible to say which case, *Levy* or *Labine,* governs the constitutionality of the statute, since *Levy* purports to invalidate the wrongful death statute, but *Labine* upholds the intestate provision.

The Supreme Court decided other cases dealing with the rights of the illegitimate child between its *Labine* decision in 1971 and

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[8] Labine v. Vincent, 401 U.S. 532, 538 (1971)

[9] *Id.* at 539

[10] *Id.* at 541 (Brennan, Douglas, White, Marshall, JJ., dissenting.)

[11] *Id.* at 540. (Harlan, J., concurring.)

[12] Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975), per Stevens, J., took the position that cases subsequent to Labine v. Vincent, 401 U.S.532 (1971) had severely limited its holding, and that it applied only to inheritance from the father. The court then held that a federal statute governing intestate succession to Indian Trust Land which had the effect of barring the inheritance by an illegitimate through her mother was in violation of the due process clause of the fifth amendment. On the other hand, In re Estate of Karas, 61 Ill.2d 40, 329 N.E.2d 234 (1975), held that *Labine* did not require holding an Illinois statute unconstitutional where it permitted illegitimate children to inherit from their mothers but not from their fathers. *Karas* was overruled by Trimble v. Gordon, 430 U.S. 762 (1977). *See* note 16 *infra.*

[13] Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969), decided before Labine v. Vincent, 401 U.S. 532 (1970), involved such a statute. It held the statute was unconstitutional under Levy v. Louisiana, 391 U.S. 68 (1968). What the result might be or should be if the case had come up after *Labine* is impossible to say. Presumably if it came up today, after Trimble v. Gordon, 430 U.S. 762 (1977), the statute would be held invalid.

1977,[14] but it did not again pass on a state inheritance statute until the latter year. The case was *Trimble v. Gordon*[15] which, by a five to four majority, held unconstitutional the Illinois statute providing that illegitimate chiildren could inherit from their mothers but not from their fathers.[16] Under Illinois law the legitimate child could inherit from both parents. Suit had been brought by the child's mother on the child's behalf to establish the child's right to inherit a $2500 Plymouth automobile from her father. Although the child's mother and father had never married, an Illinois Court had established paternity before the father's death. The father had complied with the cout's order for the support of the child and had acknowledged the child as his own.

The proponents of the statute, of course, relied upon the *Labine* case. They also argued that the statute served several state interests. They urged that the purpose of the statute was to ameliorate the status of illegitimate children by changing the common law rule that they could inherit from neither parent, so far as this could be done consistently with the state's interest in encouraging

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[14] For discussion of these cases, *see* notes 36-84 *infra.* and accompanying text.

[15] 430 U.S. 762 (1977).

[16] In re Estate of Karas, 61 Ill.2d 40, 329 N.E.2d 234 (1975), was overruled by Trimble v. Gordon, 430 U.S. 762 (1977). *See* note 12 *supra.* The Illinois statute was recodified after *Trimble* arose but the treatment of the illegitimate child was not changed. ILL. ANN. STAT. Ch 3, §2-2 (Smith-Hurd Cum. Supp. 1977). Many other cases which had relied upon Labine v. Vincent, 401 U.S. 532 (1971) are doubtless also overruled. *See, e.g.*, In re Estate of Ginochio, 43 Cal. App. 3d 412, 117 Cal. Rptr. 565 (1974); Murray v. Murray, 549 S.W.2d 839 (Ky. App. 1977); Hanson v. Markham, 356 N.E.2d 702 (Mass. 1976); Estate of Thompson, 136 N.J. Super. 412, 346 A.2d 442 (1975); Moore v. Dague, 46 Ohio App. 2d 75, 345 N.E.2d 449 (1975).

Two other cases from the state courts were vacated and remanded for consideration in the light of *Trimble.* Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976), *vacated and remanded,* 431 U.S. 911 (1977); Estate of Lalli, 38 N.Y.2d 77, 340 N.E.2d 721 (1975), *vacated and remanded,* 431 U.S. 911 (1977). The subsequent decision in *Lalli* is discussed *infra* at notes 19-22.

Following the remand in *Pendleton,* the Kentucky Supreme Court, in a sardonic opinion with which one cannot but sympathize, held that *Trimble* had made the Kentucky statute unconstitutional. That statute provived that illegitimate children could inherit from their mothers, but could only inherit from their fathers if they had been legitimated by the marriage of their natural parents with each other. The Kentucky court found this to be an unconstitutional discrimination between men and women. Pendelton v. Pendleton, 560 S.W.2d 538 (1977).

The peculiar Louisiana statute forbidding gifts or legacies to adulterine children has been held unconstitutional in Succession of Robins, 349 So.2d 276 (La. 1977), in reliance upon the Supreme Court decisions discussed in the text.

and preserving family relationships and its interest in establishing an accurate and efficient method of intestate disposition of property.

The Supreme Court found that the statute had little connection with the preservation of the family since penalizing the children does not influence the parents and since the distinction made by the statute between inheritance from the mother and from the father is not logically connected to the preservation of the family. Presumably the Court was of the view that preservation of the family would require that the child inherit from neither parent. That, with some qualifications, was the effect of the Louisiana statute in *Labine*. The Court mentioned this difference between the Louisiana and Illinois statutes in a footnote, but did not seem to attach much significance to it. The Court characterized the Illinois Supreme Court's analysis of this state interest as "most perfunctory",[17] an unfortunate comment from a Court whose analysis in *Trimble* can fairly be characterized as ambiguous, in *Labine* as incomprehensible and in *Levy* as non-existent.

The State interest in controlling the intestate disposition of property was also held insufficient to justify Illinois in barring illegitimates' inheritance from their fathers. The Court conceded that the uncertainty of establishing paternity in some cases might warrant a "more demanding standard"[18] for inheritance by illegitimates from their fathers, but it held that this uncertainty did not apply to all illegitimates. The difficulty of proving paternity in some cases did not justify the Illinois legislature in enacting a statute which forbade inheritance in all cases.

Finally, the Court disavowed the argument found in *Labine* that these statutes are saved by the possibility that other methods of transmitting the property to the illegitimate could have been used, such as by will or legitimation. This argument never did make constitutional sense and it was as well that the Court gave it a decent burial.

The *Trimble* opinion did not in so many words overrule *Labine*. In a footnote the Court affirmed the view which it found in *Labine* that deference should be given to the state interest in the stability of land titles and the devolution of property on death.[19] Notwith-

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[17] Trimble v. Gordon, 430 U.S. 762, 768 (1977).

[18] *Id.* at 770.

[19] The Court was relying upon the view of Labine v. Vincent, 401 U.S. 532 (1971) taken in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), which had attempted to justify the *Labine* decision on the basis of the state's interest in land titles and the determination of ownership. Neither case explains why this state interest is of greater importance than other state interests such as the

standing that saving language, *Labine* must be taken as substantially limited if not overruled. The most plausible view of the two cases is that state inheritance statutes *may* still pass muster if they only bar inheritance by illegitimate children from or through their fathers, and then only in those precise kinds of cases in which paternity is actually in doubt.

As in so many other recent cases, the Supreme Court was in effect drafting a statute for the state legislatures. In *Trimble* paternity was not in doubt because it had been both adjudicated and acknowledged. Of course this was also true in *Labine,* where the child's father had publicly acknowledged paternity.[20] Thus the facts in the two cases were identical, a point which the *Trimble* opinion failed to mention.

The uncertainty created by *Trimble's* treatment of *Labine* has not been reduced by the Supreme Court's approval of the New York inheritance statute in *Lalli v. Lalli*.[21] That statute provided that illegitimate children could inherit from their fathers only if a court of competent jurisdiction had, during the father's lifetime, made a finding of paternity in a filiation suit brought during the mother's pregnancy or within two years after the child's birth. The father in *Lalli* had acknowledged his child and all parties conceded paternity. But since a court had not established paternity in a filiation proceeding, the statute did not permit the child to inherit from his father. The Supreme Court's position was that the state has an important interest in ensuring the orderly disposition of property on death, and in the finality of intestate distribution. The Court found that the New York Legislature intended the statute to accomplish these objectives whereas the Illinois statute held invalid in *Trimble* went beyond the accomplishment of similar objectives.

Mr. Justice Blackmun concurred in the *Lalli* judgment on the ground that it in effect overruled *Trimble* and resurrected *Labine*.[22] Mr. Justice Rehnquist concurred in the *Lalli* judgment for the reason stated in his dissent in *Trimble*. His argument was in essence that the Court was using the equal protection clause to second-guess legislatures with respect to issues on which the Court has no greater expertise than the legislators who enacted

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interest in controlling wrongful death claims or workmen's compensation claims. Nor is it explained why, if illegitimate children can establish paternity in the wrongful death action, they are not permitted to do the same in the probate proceeding.

[20] Labine v. Vincent, 401 U.S. 532, 533 (1971).

[21] 99 S. Ct. 518 (1978).

[22] *Id.* at 529.

the statutes.[23] And, finally, four justices dissented on the ground that the statute in *Lalli* did not differ from that in *Trimble,* and that both statutes inflicted injustice upon illegitimate children unnecessarily.[24] The result is that the plurality opinion in *Lalli* speaks for only three justices. Two justices have the view that *Labine* was correct, while four justices would hold all such statutes unconstitutional unless very carefully tailored to deal with the problem of proving paternity.

On the current state of the cases it seems that legislatures must fashion any statute distinguishing between inheritance by legitimates and illegitimates to cover only those cases in which inheritance would create doubt, uncertainty or lack of finality in the title to property. If this can be done, then perhaps the Supreme Court will find the statute constitutional.[25] Any predictions, however, based on opinions as ambiguous as those in *Labine, Trimble* and *Lalli* are necessarily unreliable. It seems probable that the validity of particular state inheritance laws can never be certain until the Supreme Court has given or withheld its approval of them.

The supporters of the Illinois statute advanced one further justification in *Trimble* but the Court expressly did not pass upon it.[26] The argument was made that the intestacy statute distinguished between legitimate and illegitimate children because of a presumed desire on the part of decedents to have their property go to legitimate children or other relatives in preference to illegitimate children. The Court refused to respond to this argument on the ground that the legislature had not enacted the Illinois statutes for this purpose. It is not clear what basis there was for this view of the statutory purpose.[27] No evidence on this point seems

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[23] *Id.* at 528.

[24] *Id.* at 529. (Brennan, White, Marshall, Stevens, JJ., dissenting.)

[25] An example of a statute which may comply with the Court's requirements is the earlier version of the UNIFORM PROBATE CODE § 2-109, 8 UNIF. L. ANN. 328 (1972), which permits illegitimate children to inherit from their fathers if their parents marry, or if paternity is established by adjudication before the father's death, or is established thereafter by clear and convincing proof. A later version of the same section conforms to the UNIFORM PARENTAGE ACT by providing that a person is the child of his or her parents regardless of the marital status of the parents, the parent-child relationship to be established in accordance with the UNIFORM PARENTAGE ACT. 8 UNIF. L. ANN. 80 (Supp. 1977).

[26] 430 U.S. 762, 774 (1977).

[27] It is curious that the discredited notion that a statute is to be construed by reference to "the intent of the legislature" should put in a new appearance in equal protection cases. Obviously no one can know what the intent of the legislature was in passing a particular statute. In most instances there will have been

to have been offered in the trial court, probably because no such evidence was available. It does seem reasonably plain that the underlying aim of any legislature enacting an intestacy statute must be to reflect "the normal desire of the owner of wealth regarding the disposition of his property at death."[28] In fact the drafters of the Uniform Probate Code relied upon the "prevailing patterns of wills" in order to determine what these normal desires might be.[29]

If we can assume that the statute did reflect those desires, what effect does this have on the validity of intestacy provisions concerning the illegitimate child? If the deceased makes a will excluding his illegitimate child from any share in the property, presumably there is no state action and therefore no violation of the equal protection clause.[30] But when this occurs by operation of the intestacy statute, there clearly is state action.

The question then is, as the Court has several times said,[31] whether regulating the intestate devolution of property in a way of which most decedents would have approved if they had considered the matter serves a legitimate governmental interest. The state, it may be said, is only doing what the decedent would have wanted to do if he had not omitted to make a will. On the other hand it was exactly this sort of classification, made without reference to biological relationships, which the Court held unconstitutional in *Levy v. Louisiana*[32] and in *Weber v. Aetna Casualty & Surety Co.*[33]

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no single intent. If by "intent of the legislature" is meant the purpose of the statute, to be gathered from its provisions taken in their context, that is of course a legitimate and sensible aid in statutory construction. But the Court in Trimble v. Gordon, 430 U.S. 762 (1977), was not approaching the statute in this way, but rather was concerned with the subjective desire of the Illinois legislature, with its motivation.

[28] The quotation is from R. WELLMAN, 1 UNIFORM PROBATE CODE PRACTICE MANUAL 59 (1977). *See also* Wellman and Gordon, *Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments*, 1976 B.Y.U.L.REV. 357; J. WOERNER, AMERICAN LAW OF ADMINISTRATION 183 (3d ed. 1923).

[29] R. WELLMAN, 1 UNIFORM PROBATE CODE PRACTICE MANUAL 59 (1977).

[30] *Cf.* Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968), *cert. den.*, 391 U.S. 921 (1968), and cases cited therein, in which the involvement of the state was held sufficient to constitute state action.

[31] *E.g.*, in Trimble v. Gordon, 430 U.S. 762, 770 (1977); Mathews v. Lucas, 427 U.S. 495, 504 (1976); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172, 173 (1972).

[32] 391 U.S. 68 (1968).

[33] 406 U.S. 164 (1972). The suggestion was made in this case also that the Workmen's Compensation statute was merely distinguishing between depen-

Mr. Justice Harlan's dissent in *Levy* urged that what the legislature was doing in enacting the wrongful death statute was trying to define the interest which one person has in the death of another.[34] This involved drawing somewhat arbitrary lines based on family relationships, without reference to affection or loss in particular.

Intestacy statutes could be described in the same way. They too are attempting to define the interest which one person has in the death of another. The legislatures may also have drafted wrongful death statutes with some thought to the probable affections of decedents, but that did not save them from invalidity. Therefore if wrongful death statutes may not define this interest in the death of another person to exclude the illegitimate, as the Court held in *Levy,* it would seem that intestacy statutes may not either.

A similar argument could be based on the *Weber* case which involved worker's compensation claims for the death of an insured worker. *Weber* held invalid a statutory scheme of payments on the death of a worker which excluded illegitimates under certain circumstances and which may well have been based on some notion of the decedent's probable desires.[35] This statute also can be described as defining the interest which certain relatives have in the death of another. If neither the wrongful death statutes nor the workmen's compensation statutes may define this interest so as to exclude the illegitimate child, it would seem logical to hold that the intestacy statute may not either. But since factors other than logic influence these cases, the law's future course of development remains uncertain.

III. Social Security Act

The Supreme Court has had as much difficulty determining the constitutionality of various provisions of the Social Security Act as it has had with state inheritance laws. Of course in these cases the fifth amendment rather than the fourteenth amendment is the applicable constitutional provision, but under *Bolling v. Sharpe*[36] the constitutional principles are the same.

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dents enjoying greater familial care and affection and those enjoying less, placing illegitimates in the latter category. The Court held this not sufficient to uphold the statue because the illegitimate child "may be nourished and loved." 406 U.S. at 174.

[34] Levy v. Louisiana, 391 U.S. 68, 76 (1971) (Harlan, J., dissenting from *Levy* and from Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1971).

[35] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[36] 347 U.S. 497 (1954), holding that although the fifth amendment does not

The first Social Security cases to come before the Court concerned the validity of the complex provisions of the Act which regulate the benefits payable to a child of a deceased insured wage earner. The Statute defined a "child" of the wage earner by reference to three tests: A "child" is one (a) who by state law would take the personal property of the deceased wage earner by intestacy;[37] or (b) whose parents went through a marriage ceremony which would result in a valid marriage but for a prior subsisting marriage or some procedural defect;[38] or (c) who is a child of the deceased wage earner and who has been acknowledged as such by the wage earner, or has been adjudicated as such, or who has been ordered to be supported by the wage earner by a court, or who is shown to the satisfaction of the Secretary of Health, Education and Welfare to be the child of the wage earner and who was living with or being supported by the wage earner.[39] The statute also provided, however, that if the claims of persons entitled under the Act exceed the maximum amount payable on the death of the wage earner, then those entitled under (c) in the foregoing list must have their payments reduced (or even eliminated) to the extent necessary to bring the total claims of survivors within the amount payable.[40] The practical effect of this was that if the wage earner left a spouse and legitimate children whose allowable claims exceeded the payments due on the wage earner's death, any illegitimate children of the wage earner would receive less than their entitlement, or in some cases nothing at all. In this fashion the Act clearly discriminated against illegitimate children, vis à vis the spouse and legitimate children.

In 1972 two three-judge federal district courts held that the discrimination so imposed by the Social Security Act was arbitrary and violated the fifth amendment. The Supreme Court affirmed both cases *per curiam*[41] on the authority of *Weber v. Aetna Casualty & Surety Co.*[42]

Two years later the Supreme Court, in *Jimenez v. Weinberger*,[43] similarly decided that the disability provision of the Social

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contain an equal protection clause as does the fourteenth amendment, the standards of the equal protection clause have been judicially imported into the due process clause of the fifth amendment.

[37] 42 U.S.C. § 416(h)(2)(a) (1976).

[38] 42 U.S.C. § 416(h)(2)(b) (1976).

[39] 42 U.S.C. § 416(h)(3) (1976).

[40] 42 U.S.C. § 403(a)(3) (1976).

[41] Davis v. Richardson, 342 F.Supp. 588 (D.Conn. 1972), *aff'd*, 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F.Supp. 1226 (D.Md. 1972), *aff'd*, 409 U.S. 1069 (1972).

[42] 406 U.S. 164 (1972), *see* note 73 *infra*.

[43] 417 U.S. 628 (1974). A similar case reaching the same result as *Jimenez* is

Security Act violated the fifth amendment in excluding illegitimate children born after the onset of the father's disability from disability insurance benefits of a wage earner. Since they were born after the disability occurred, they could not come within the provision of the statute requiring that their paternity be acknowledged or that they were living with and being supported by their father before his disability occurred.[44] The effect of this provision was therefore to discriminate between two classes of illegitimate children, those born before and those born after the occurrence of the father's disability, as well as between legitimate and illegitimate children.

The argument made in support of the Act's validity was that its purpose was to prevent spurious claims by illegitimate children not really dependent upon the disabled wage earner. The Supreme Court found this argument unpersuasive because the exclusion of the after-born illegitimates was not reasonably related to this purpose. The opinion asserted that for all that appeared in the case some illegitimate children entitled under the statute to benefits might not be dependent upon the wage earner, while some excluded because born after the disability might be dependent.

Jimenez exemplifies, perhaps to a greater degree even then *Trimble v. Gordon*,[45] the Supreme Court's intermittent tendency to second guess legislative bodies and rewrite statutes. As Mr. Justice Rehnquist points out in dissent, the Court seems to base its decision not only upon equal protection but also upon the very dubious notion that irrebuttable presumptions violate the due process clause. Finally the Court relies upon an argument that the government had failed to present sufficient evidence to demonstrate that the classification of illegitimates did in fact serve a valid purpose.[46] As a guide to the further legislative treatment of the illegitimate child the case is therefore of limited significance.

By 1976, then, the Court had upset two kinds of discrimination imposed by the Social Security Act, one which gave a priority in social security benefits to the spouse, the legitimate children and

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Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *aff'd per curiam*, 418 U.S. 901 (1974). The Fifth Circuit opinion in this case took a broader view of the issue, holding that once dependency is established, the Constitution requires that all dependents must be treated alike. 478 F.2d at 308.

[44] The applicable portions of the statute are 42 U.S.C. § 402 (d)(3) (1976) and 402 U.S.C. § 416(h)(3)(B)(ii) (1976).

[45] 430 U.S. 762 (1977). *See* note 15 *supra*.

[46] *Id.* at 777 (Rehnquist, J., dissenting.)

some classes of illegitimate children over other classes of illegitimate children,[47] and the other which excluded from disability benefits illegitimate children born after the occurrence of the disability.[48] In 1976, however, the Supreme Court, in *Mathews v. Lucas*,[49] held constitutional a section of the Social Security Act[50] indirectly involved in the earlier cases. *Mathews v. Lucas* arose out of claims by two illegitimate children for children's insurance benefits on the wage earner's death. The trial court found that the claimants were the children of the deceased wage earner. It also found that the deceased had lived with the children's mother from 1948 to 1966, and apparently with the children from their birth to 1966. It found that in 1966 the deceased left his "family" and lived apart from them until his death in 1968, and at his death he was not contributing to their support. The deceased never acknowledged the children in writing as his own, nor were his paternity or support obligations ever the subject of a court decree. Under those circumstances the Act excluded the children from insurance at the death of the deceased. Reversing a trial court holding of unconstitutionality,[51] the Supreme Court found that the statute had as its purpose the financial protection of children actually dependent upon the wage earner at his death, and that the classification in the statute was valid because reasonably related to the likelihood of dependency at death.[52]

The obvious difficulty with the result in *Mathews* is that the statute permits children's insurance benefits to be paid to legitimate children without any showing that they lived with or were receiving support from the wage earner when he died.[53] The Court's solution of this difficulty was to say that what amounts to a presumption of dependency in the statute is justifiable on the

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[47] *See* note 4 *supra*.

[48] Jimenez v. Weinberger, 417 U.S. 628 (1974).

[49] 427 U.S. 495 (1976). The decision was by a six to three vote, Justices Stevens, Brennan and Marshall dissenting. A case dealing with the same provition of the Social Security Act likewise upheld the statute in the same term of court. Norton v. Mathews, 427 U.S. 524 (1976). *See also* Kimbrell v. Mathews, 429 F.Supp. 440 (D. La. 1977).

[50] 42 U.S.C. § 416(h)(3)(c)(ii) (1976). *See* text accompanying note 39 *supra*.

[51] Lucas v. Secretary, Dep't of Health, Educ. & Welfare, 390 F.Supp. 1310 (D.R.I. 1975).

[52] Matthews v. Lucas, 427 U.S. 495, 509-516 (1975).

[53] 42 U.S.C. §§ 402(d)(1), 416(h)(2)(A) (1976), the latter section providing that benefits go to a child who would be entitled, under the applicable state law, to take the wage earner's property by intestacy. This of course would include legitimate children in all states, plus some illegitimate children in some states.

ground of administrative convenience.[54] These categories of children, including legitimate ones, said the Court, who need not prove actual dependency in order to receive benefits, are children as to whom there is a likelihood of actual dependency. The Court characterized as "rational" the presumption that legitimate children are ipso facto dependent.[55]

Involved in all of the cases on the rights of illegitimate children, but especially emphasized in the *Mathews* case, is the question (to put it in the currently fashionable court phrase) of the strictness of the "scrutiny" with which the Court is to regard the legislation before it. In *Trimble v. Gordon,*[56] *Jimenez v. Weinberger,*[57] and *Mathews v. Lucas,*[58] the opponents of the statutes urged the court to characterize illegitimacy as a "suspect classification", which, according to the prevailing reasoning, would require that the Court give the "strictest scrutiny" to statutes discriminating between the legitimate and the illegitimate child.[59] The argument was that illegitimacy as a basis for classification is like race in that it turns on personal characteristics for which individuals are not responsible, which they cannot change, and which have no relation to their abilities, or their worth as citizens.

While conceding the aptness of the analogy, the Court has nevertheless refused to accept the argument. The reason seems to be that although illegitimates in the past have endured legal disabilities, they have never been as severe or pervasive as those imposed upon women and Blacks.[60] This might be a reason for a legislature not to remove some of the disabilities, but it certainly is irrelevant on the issue of the validity of those disabilities which continue to exist.

The only apparent reason for invalidating statutes which discriminate against illegitimate children is that the statutes are irrelevant to the children's worth and that the children are not responsible for the circumstances of their births. Therefore if any

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[54] *Cf.* Stanley v. Illinois, 405 U.S. 645, 656 (1972), in which administrative convenience was found to be insufficient justification for a statute which deprived fathers of illegitimate children of parental rights. The argument of administrative convenience was stronger in *Stanley* than in Mathews v. Lucas, 427 U.S. 495, 506 (1976), leading one to conclude that the Court applied the wrong scale of priorities in both cases.

[55] Mathews v. Lucas, 427 U.S. 495, 513 (1976).

[56] 430 U.S. 762 (1977).

[57] 417 U.S. 628 (1974).

[58] 427 U.S. 495 (1976).

[59] *E.g.,* Loving v. Virginia, 388 U.S. 1, 11 (1967), holding that classifications based upon race must be subjected to the "most rigid scrutiny".

[60] Mathews v. Lucas, 427 U.S. 495, 506 (1976).

classification is to be given "strictest scrutiny", that turning on legitimacy should be.

Perhaps in partial recognition that the rejection of the "strictest scrutiny" test makes little sense, the Court has taken what might be viewed (if one can discern what it is) a middle position somewhere between "strictest scrutiny" and the minimum requirement that the statute bear some rational relation to a legitimate state purpose.[61] The scrutiny which the Court will direct to a classification based upon legitimacy is characterized in both *Mathews*[62] and *Trimble*[63] as "not a toothless one." There is no indication in either opinion that the Court was being facetious, but some amusement is irresistible at the image of the justices engaging in either the "toothless scrutiny" of a statute, or one that is not "toothless."

In any event, what this seems to mean as a practical matter is that where an illegitimate child claims the statute creates an unconstitutional distinction between legitimate and illegitimate children, he or she has the burden of establishing that the distinction bears no substantial relation to a proper state interest.[64] Although Supreme Court opinions do seem to emphasize the level of scrutiny to be addressed to a particular statute, perhaps this is not a controlling factor in the illegitimacy cases after all. To the skeptical reader it looks very much like a rhetorical device for putting a good face on a decision already taken for other reasons.

The question remains whether *Jimenez* and *Mathews* can be reconciled. In both cases the statute excluded a class of illegitimate children from benefits which were available to legitimate children. Both cases turned in part upon the same provision of the statute.[65] The purpose of the discrimination in *Jimenez* was to exclude from disability benefits children born after the occurrence of the disability because their claims might be spurious.[66] The statute's supporters argued that claims are more likely to be trumped up after the benefits have accrued by children who are either not the children of the wage earner, or who are not dependent upon him, thereby circumventing the overriding aim of the statute, to provide support for dependent children.[67]

The Court in *Jimenez* rejected this argument, saying that some

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[61] *Id.* at 510.
[62] *Id.*
[63] 430 U.S. 762 (1977).
[64] Mathews v. Lucas, 427 U.S. 495, 510 (1976).
[65] 42 U.S.C. § 416 (1976).
[66] 417 U.S. 628, 635 (1973).
[67] *Id.* at 636.

of the included illegitimates may not be dependent, and some of the excluded ones may be.[68] In other words the statutory distinction does not precisely correspond with the statutory purpose. In *Mathews,* however, the same condition existed. Some of the children, either legitimate or illegitimate, that the statue included in the list of those entitled to death benefits might not in fact be dependent on the wage earner. Yet they received benefits. Those excluded were children not living with nor being supported by the wage earner, but they may well have been dependent upon him in the sense of having no other source of support.

Thus in both cases a distinction was made between legitimate and illegitimate children which was not related to the statutory purpose. If ever the facts and legal issues in two cases were alike, they are in these cases. The two cases therefore cannot be reconciled. *Mathews* is also inconsistent with *Trimble v. Gordon,*[69] with the result in *Levy v. Louisiana,*[70] and with the result and much of the language in *Weber v. Aetna Casualty & Surety Co.*[71] *Mathews* withholds a statutory benefit, in other words, on the basis of illegitimacy of birth, a condition for which the child is not responsible, and one which has no relation to the withholding of the benefit. Such a result belies all that one thought the prior cases, other than *Labine v. Vincent,*[72] had established.

IV. Support Statutes

On three other occasions the Supreme Court has upset state legislation which discriminated against the illegitimate child by denying benefits granted to the legitimate child. The first of the cases, *Weber v. Aetna Casualty & Surety Co.*[73] has already been mentioned. This decision held unconstitutional the Louisiana worker's compensation statute which provided that illegitimate children not acknowledged by their father could only receive benefits on the death of their father if there were not enough surviving dependents of other classes, including legitimate children and acknowledged illegitimate children, to exhaust the maximum allowable benefits.

The Court, relying heavily on *Levy v. Louisiana,*[74] and distin-

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[68] *Id.* at 637.
[69] Trimble v. Gordon, 430 U.S. 762 (1977).
[70] 391 U.S. 68 (1968).
[71] 406 U.S. 164 (1972).
[72] 401 U.S. 532 (1971).
[73] 406 U.S. 164 (1972).
[74] 391 U.S. 68 (1968).

guishing *Labine v. Vincent,*[75] suggested that the case involved fundamental personal rights calling for a "stricter scrutiny" of the statute, a position which the Court apparently has now repudiated.[76] Louisiana had stated the purpose of the statute to be the protection of legitimate family relationships. Construing this expression of purpose, the Court attributed to Louisiana the obviously absurd notion that persons contemplating illicit sexual relations would abstain because they knew that the state would deny worker's compensation death benefits to any children resulting from the union. Finding it inconceivable that the statute would have this effect upon people, the Court said that the statute bore no rational relation to its purpose and therefore violated the equal protection clause.[77] Later in the opinion the Court took a more sensible view of this and similar statutes, saying that they express "society's condemnation of irresponsible liaisons beyond the bonds of marriage."[78] The Court then disclosed what must be the real meaning of the case, that it is illogical and unjust to enforce this condemnation by imposing disabilities upon the innocent illegitimate child.[79] This violates the fundamental legal principle that burdens should be related to responsibility or wrongdoing.

No analysis is apparent by which this decision can be reconciled with the Court's discussion and decision in *Mathews v. Lucas.*[80] In both cases the broad statutory purpose was the financial relief of dependents of the wage earner. In *Mathews* the Court indulged in a presumption that illegitimates were less likely than legitimates to be dependent.[81] But in *Weber,* where a similar presumption would have been just as appropriate, the statutory classification was condemned.

The impression one gets from *Weber,* that it was broadly condemning all statutory disabilities of the illegitimate, is reinforced by *Gomez v. Perez,*[82] decided less than a year later. *Gomez* held

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[75] 401 U.S. 532 (1971).

[76] Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976).

[77] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1971).

[78] *Id.* at 175.

[79] *Id.*

[80] 427 U.S. 495 (1976).

[81] *Id.* at 509.

[82] 409 U.S. 535 (1973). Texas law has been brought into conformity with with the rule of this case by In re R—V—M—, 530 S.W.2d 921 (Tex. Civ. App. 1975). Idaho, the only other state in which illegitimate children formerly had no claim on their fathers for support, now has a statute which gives them such a claim. IDAHO CODE §§ 7-1101 to 7-1123 (Cum. Supp. 1977).

that the state of Texas violated the equal protection clause by not permitting an illegitimate child to recover support from his father when legitimate children had such a right to support.

The Court also relied upon *Weber* to hold, in the same Term of Court, that a New Jersey welfare statute was unconstitutional when it limited benefits to those families composed of married persons and their children.[83] Although the legislation was obviously aimed at the preservation of families in the traditional sense of the term, the Court held that its effect was to exclude illegitimate childeren from benefits, that the benefits were as indispensable to them as to legitimate children. The statute therefore violated the equal protection clause.[84] The brevity of the opinion in this case leaves unanswered the question why the traditional definition of "family" has suddenly turned out to be unfairly discriminatory. The statutory benefit here, involving financial assistance to the family, might well be an inducement for the parties to marry. Therefore the relation between the statute and its goal was certainly rational. The Court must have thought that the encouragement of traditional family relationships was not a sufficiently important statutory purpose to justify excluding illegitimate children from welfare payments.

V. Immigration Laws

The immigration laws give preferred status to aliens who are either "children" or "parents" of United States citizens or permanent residents.[85] One section of those laws, however, defines "child" in such a way as to exclude the illegitimate child seeking preferred status by virtue of his relation to his father.[86] Likewise the father who is seeking such status by virtue of a child who is a United States citizen may not receive the preferred treatment if the child is illegitimate.[87] The effect of obtaining preferred status is that the alien may enter the United States independently of either a numerical quota or a labor certification requirement, if his relative is a United States citizen, or independently of the labor certification requirement if his relative is a resident alien.[88]

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

[84] *Id.* at 621.

[85] 8 U.S.C. §§ 1151 (a), (b), 1182(a), (b), (1976).

[86] 8 U.S.C. § 1101(b)(1) (1976). This section does grant preferred status to illegitimate children seeking to enter the United States by virtue of their relations to their mothers. *Id.* § 1101(b)(1)(D). Thus it discriminates on the basis of sex as well as of legitimacy.

[87] 8 U.S.C. § 1101(b)(2) (1976).

[88] *See* note 85 *supra*. As of January 1, 1977 the parent-child relationship does

In *Fiallo v. Bell*[89] several fathers and several illegitimate children sued to invalidate these provisions of the imigration laws on the ground that they violated the equal protection clause, in that they discriminated on the basis of illegitimacy, among other factors, without either compelling or rational justification. The Court's response relied upon "the limited scope of judicial inquiry into immigration legislation," and the established doctrine that Congress' "power over aliens is of a political character and therefore subject only to narrow judicial review."[90]

The Court, in that context, held that it could not consider the claim of unconstitutional discrimination against illegitimate children because statutory distinctions of this kind were within the exclusive authority of the political branches of the government. This was so notwithstanding the obvious fact that the statute discriminated against United States citizens and permanent residents as well as against aliens, since it prevented such citizens and residents from being united with their relatives.[91] This aspect of the case is unique in the Court's refusal to give the slightest consideration to biological relationships after it had so heavily emphasized those relationships in *Levy*[92] and *Weber*.[93]

VI. Discrimination Against Parents of Illegitimate Children

A companion case to *Levy, Glona v. American Guarantee & Liability Insurance Co.*,[94] held unconstitutional a Louisiana statute which denied recovery to the mother of an illegitimate child for the wrongful death of her child. Recognizing that this statute raised issues different from those raised in *Levy*, the Court found no rational basis for it, so long as the statute permitted the mother of a legitimate child to recover for his death. In a most unsatisfactory opinion, the Court discussed the only possible basis for the distinction, that it was aimed at discouraging illegitimacy, a basis which the Court found far-fetched.[95]

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not confer preferred status with respect to the labor certification requirement. 8 U.S.C.A.§ 1182 (a)(14) (West Cum.Supp. 1977).

[89] 430 U.S. 787 (1977).

[90] *Id.* at 792.

[91] *Id.* at 798.

[92] Levy v. Louisiana, 391 U.S. 68 (1968).

[93] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[94] 391 U.S. 73 (1968).

[95] *Id.* at 75.

The Court has recently upheld against constitutional attack a Georgia statute denying fathers of illegitimate children the right to sue for the wrongful death of their children, when the mothers of such children were permitted to sue.

The Court gave no consideration to the obvious basis for all such statutes, that they recognized family relationships in the traditional sense and do not recognize them when no marriage has occurred between the parents. One of the major purposes of our law of marriage and legitimacy is to give legal significance to the commitment undertaken when a man and woman marry. This commitment is absent when they do not marry but merely have sexual relations which may or may not produce offspring. To say that the states may under the Constitution require such a legal commitment, one having traditional moral and social aspects as well, is bizarre in the extreme.

Another decision, *Stanley v. Illinois*,[96] invalidated an Illinois statute which recognized only the mother of an illegitimate child as a "parent" for the purposes of the neglect statute. In operation the statute meant that upon the death of the mother of an illegitimate child the state could assume custody of the child and place him or her for adoption without giving the father notice or a hearing, and without having to prove that he was unfit or had abandoned the child. Broadly speaking, under the statute the father of an illegitimate child had no parental rights with respect to that child.

The Court treated the statute as creating a conclusive presumption of unfitness on the part of the father and held that it

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Under the statute fathers could sue if they had previously availed themselves of the statutory legitimation procedure. Four of the justices dissented. Parham v. Hughes, 99 S. Ct. 1742 (1979). The statute was attacked both as creating an impermissible discrimination between men and women, and between fathers of legitimate children and fathers of illegitimate children. Under the Georgia statute the father of a legitimate child could sue for the child's death if the mother were no longer alive. The state's interests which the Court held were sufficient to justify the statutory classification were the prevention of fraudulent claims of paternity and the avoidance of multiple suits by plaintiffs all claiming to be fathers of the deceased. *Glona* was distinguished because the discrimination there, between married and unmarried mothers, involved no risk of fraudulent claims, and because the statute there foreclosed all mothers of illegitimate children, while the Georgia statute in *Parham* barred only the father who had failed to legitimate his child. Although the factual distinction between the two cases does exist, the reasoning in *Glona* would lead to a different result in *Parham*, as the *Parham* dissent points out. And the risk of fraudulent claims exists in all cases where paternity is in issue, such as, for example, *Gomez*, *Weber*, *Levy* and *Jiminez*. Yet the prevention of fraudulent claims was not thought a sufficient state interest to warrant the statutory classification in those cases. In short, *Parham* constitutes still another example of the Court's confusion and inability to deal with illegitimacy in a sensible way.

[96] 405 U.S. 645 (1972), 34 U. PITT.L.REV. 303 (1973); 1973 WIS.L.REV. 908; 59 VA.L.REV. 517 (1973). *See* Schwartz, *Rights of a Father With Regard to His Illegitimate Child*, 36 OHIO ST. L.J. 1 (1975).

violated both the due process clause and the equal protection clause of the fourteenth amendment.[97] The rationale seems to have been that a father has a "cognizable and substantial" interest in the custody of his child of which he cannot constitutionally be deprived without procedural due process.[98] The distinction between fathers of legitimate and illegitimate children made by the Illinois statute was not related to any proper state interest, and therefore could not meet the test of the equal protection clause.

The case has had a profound effect upon adoption procedure and is questionable on a variety of grounds. Suffice it to say here that the opinion, like that in *Glona,* attached no value to the state's interest in distinguishing between those parents willing to make the social, personal financial commitments attendant upon a legal marriage from those unwilling to make such commitments.

The Court has apparently begun to recognize that its decision in *Stanley* was a mistake. In *Quilloin v. Walcott*[99] it held that a Georgia statute was constitutional when it provided that an illegitimate child could be adopted without first obtaining his father's consent. The consent of fathers of legitimate children is required for adoption in Georgia and elsewhere, but the Court found that due process was not violated because the adoption was in the child's best interests and, perhaps, because the father was given a hearing.[100] It held that the statute did not violate the equal protection clause of the fourteenth amendment because the fa-

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[97] *Id.* at 658.

[98] 405 U.S. at 652.

[99] 434 U.S. 246 (1978).

Since the text was written the Supreme Court has decided Caban v. Mohammed, 99 S. Ct. 1760 (1979), again by a five to four margin. This decision held invalid under the equal protection clause a New York statute providing that only the consent of the mother of an illegitimate child was necessary for its adoption, and that the adoption could be accomplished without the father's consent. The Court's reasoning was that this gender-based form of discrimination bore no substantial relation to the state's interest in providing adoptive homes for illegitimate children. The Court made no attempt to distinguish *Quilloin*, nor did it indicate that it was overruling *Quillion*. The status of *Quillion* is thus left in doubt, but the Court's reliance upon *Stanley* seems to signify that case's continued force as a precedent. As Justice Stevens' dissent demonstrates, *Caban* has the potential for creating chaos in adoption procedure. He suggests that it should be confined to its precise facts, but of course it is doubtful that it can be so limited. One can only marvel at the inability of the majority to understand the background of adoption and to appreciate the predicament of the illegitimate child.

[100] *Id.* at 254-55.

ther of the illegitimate child has different interests from those of the father of the legitimate child who has divorced or separated from the child's mother. In the Court's view the difference seems to have been that in *Quilloin* the father never assumed any responsibility for the care or support of the child, while the divorced or separated father has assumed such responsibility during the marriage.[101] Of course this distinction may or may not exist in other cases. It is therefore impossible to say whether the Court's analysis has any general application. It is equally impossible to determine from its opinion whether the Court was overruling *Stanley*, beating a partial retreat from *Stanley*, or just emphasizing a factual difference in the cases. *Quilloin* thus has the dubious distinction of compounding the confusion originally created by *Stanley*.

We are in a period when moral values are rapidly changing and when there is a wide tendency to question and to criticize marriage as an institution. At the same time the overwhelming majority of the people of the United States choose marriage as a way of life. A legislature might well decide that it is wiser in such circumstances to give the father of the illegitimate child some rights with respect to custody. Other legislatures might decide that the father of such a child who is not willing to make the commitment which marriage represents should not have such rights. To hold that the second legislature may not make that choice without violating the Constitution of the United States unwisely and unnecessarily restricts the diversity of response to social problems which is one of the chief benefits of a federal form of government.

VII. Further Application of Equal Protection to Illegitimates

The Supreme Court's treatment of the illegitimate child raises many questions, both practical and constitutional. These questions have significance both for illegitimate children and for family relations in general. The Court has already confronted one such question and has been unable to resolve it. An illegitimate child sought to recover the proceeds of a military life insurance policy authorized by federal statute which provided that such policies should be paid first to the deceased's spouse, or if none to any child of the deceased, or if none to the deceased's parents.[102] The Georgia Court of Appeals held that the illegitimate

[101] *Id.* at 255-56.

[102] 38 U.S.C.A. § 770 (West Cum. Supp. 1978).

child was entitled to the proceeds of the policy[103] but the Georgia Supreme Court reversed in a brief per curiam opinion which seemed to take the position that Georgia law controlled on the meaning of the policy and that under that law "child" did not include illegitimate children.[104] The Supreme Court affirmed this decision by an equally divided court.[105]

It is hard to see why the *Weber* case[106] does not imply that, regardless of whether state or federal law governs the construction of the insurance policy, the equal protection clause requires that the illegitimate child be included in the class of beneficiaries described as "children" in the statute. The purpose of the worker's compensation act in *Weber* and of the military insurance statute here are surely the same, to provide some security or support for the dependents of deceased workers in the one instance and of deceased military personnel in the other.[107] The Court's treatment of the case produces further uncertainty about what the relevant factors in evaluating these statutes can be.

The Supreme Court's decision on the constitutionality of statutes of limitation in paternity suits is equally puzzling. Many states have such statutes, which provide that the paternity suit may not be brought after a relatively short period following the birth of the child.[108] In 1972 the Colorado Supreme Court held that the state's five-year statute of limitations was constitutional, the reason being that the paternity of an illegitimate child is uncertain and that this justifies treating him differently from the legitimate child.[109] The United States Supreme Court dismissed

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[103] Prudential Ins. Co. of America v. Willis, 123 Ga.App. 150, 179 S.E.2d 688 (1970).

[104] Prudential Ins. Co. of America v. Willis, 227 Ga. 619, 182 S.E.2d 420 (1971).

[105] Willis v. Prudential Ins. Co. of America, 405 U.S. 318 (1972). *See also* Annot., 62 A.L.R.3d 1329 (1975).

[106] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), decided slightly more than a month after the *Willis* case, 405 U.S. 318 (1972).

[107] *Cf.* Gentry v. United States, 546 F.2d 343 (Ct.Cl. 1976), rehearing denied 551 F.2d 852 (Ct.Cl. 1977), and Tenny v. United States, 441 F.Supp. 224 (E.D.Mo. 1977), holding unconstitutional a provision of the Civil Service Retirement Act which excluded from death benefits an illegitimate child of a civil service employee who did not live with his father.

[108] Annot., 59 A.L.R.3d 685 (1974); Note, 15 J.FAM.L. 611 (1977).

[109] In re L.B., 179 Colo. 11, 498 P.2d 1157 (1972). Three of the seven justices dissented on the ground that the statute violated the equal protection clause since there was no such limit on the legitimate child's claim for support. Colorado has since enacted the UNIFORM PARENTAGE ACT, which allows children to sue for support until they reach 21. COLO. REV. STAT. ANN. §§ 19-1-103, 19-6-101 to 6-129, 13-25-126 H.B. 1584, Colo. Sess. Rep. New Stat. Serv. (1977).

the appeal from this decision for want of a substantial federal question.[110]

The difficulty of proving paternity and the uncertainty of the father-child relationship exists in most of the cases in which the Supreme Court has held the legitimate-illegitimate child distinction unconstitutional, particularly *Weber* and *Jimenez*.[111] If the difficulty was not enough to uphold the different treatment of illegitimates in those cases, it is difficult to see why it justifies a short statute of limitations in paternity suits when there is no limit on suits by legitimate children for support. Furthermore, *Gomez* recognized the difficulties of proving paternity but broadly insisted that if the state gives rights of support from their fathers to legitimate children it cannot deny them to illegitimate children simply because their mothers or fathers did not marry.[112] Therefore a decision that the statute of limitations is constitutional seems inconsistent with *Gomez*.

Orders for the support of legitimate children are almost universally modifiable upon proof of changed circumstances occuring after entry of the original order.[113] But many states have enacted legislation providing that paternity suits may be compromised by agreement between the child's mother and the putative father, and that such agreements when approved by a court are final and

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The Illinois Supreme Court held the Illinois two-year statute of limitations constitutional in Cessna v. Montgomery, 63 Ill.2d 71, 344 N.E.2d 447 (1976). *See also* Mores v. Feel, 73 Misc.2d 942, 343 N.Y.S.2d 220 (Fam.Ct. 1973). Other states have avoided the constitutional issue by holding that the statute applies only to suits by the child's mother and not to suits by the child. Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974); Sandifer v. Womack, 230 So.2d 212 (Miss. 1970).

In contrast with these cases are those which hold that the support to which illegitimate children are entitled from their fathers cannot constitutionally be limited more strictly than the support to which legitimate children are entitled. Some states have statutes providing that illegitimate children need only be supported to age sixteen, while legitimate children must be supported to eighteen or twenty-one. Such statutes were held unconstitutional in Rias v. Henderson, 342 So. 2d 737 (Miss. 1977), and State v. Booth, 15 Wash. App. 804, 551 P.2d 1403 (1976).

[110] Colorado *ex rel.* L.B. v. L.V.B., 410 U.S. 976 (1973). *See also* In re Estate of Pakarine, 287 Minn. 330, 178 N.W.2d 714 (1970), *dismissed for want of a substantial federal question*, 402 U.S. 903 (1971), holding constitutional at Minnesota statute requiring an attested, written acknowledgment for legitimation of illegitimate children.

[111] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Jimenez v. Weinberger, 417 U.S. 628 (1974).

[112] Gomez v. Perez, 409 U.S. 535, 538 (1973).

[113] See H.CLARK, DOMESTIC RELATIONS § 15.2 (1968).

not modifiable.[114] The effect is to give the man alleged to be the father of the illegitimate child a chance to "buy his peace". The justification for such statutes is the same as for statutes of limitation, that is, that paternity is often uncertain and charges of paternity are not always made on the basis of convincing evidence.[115]

Where the illegitimate child's paternity was not uncertain, the father having acknowledged the child, the statute providing for non-modifiable compromise of the support claim has been held invalid under the equal protection clause, as lacking any justification.

In *Shan F. v. Francis F.*,[116] the New York City Family Court expressly refused to decide whether such a statute would be constitutional as applied to situations in which paternity was uncertain.[117]

Another case has applied the same doctrine conversely, by holding that the putative father's constitutional rights are violated when the nature of his support obligation to the illegitimate child differs from that owed to the legitimate child.[118] His argument was that a judgment for support of a legitimate child is modifiable, and therefore the award to the illegitimate child must also be modifiable. He was presumably contemplating the possibility that he might succeed in having the award reduced later if his ability to make the payments should be impaired.

It is difficult, if not impossible, to predict what the final verdict on the modifiability question will be. The problem is really the same here as in many other cases, that there is a practical difference between the legitimate and the illegitimate child. One knows or can in most instances easily prove who his or her father is. The other, in many instances, either does not know or has

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[114] *E.g.*, ILL. ANN. STAT. ch. 106-¾, §§ 59, 59a (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 675.30 (West 1950); N.Y.FAM.CT.ACT § 516 (McKinney 1975); UTAH CODE ANN. § 77-60-16 (1953). Under the UNIFORM PARENTAGE ACT § 18(2), *reprinted in* 9 UNIF.L.ANN. 307 (Supp. 1976), a judgment for a lump sum may specify that it is not modifiable. *See also* S. SCHATKIN, 1 DISPUTED PATERNITY PROCEEDINGS § 12.05 (4th ed. 1977). Cases construing these and similar statutes are collected in Annot., 20 A.L.R.3d 500 (1968).

[115] H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 106, 107 (1971); S. SCHATKIN, 1 DISPUTED PATERNITY PROCEEDINGS 4.01 (4th ed. 1977).

[116] 88 Misc.2d 165, 387 N.Y.S.2d 593 (Fam.Ct. 1976).

[117] A case holding that a contract between mother and father could not be constitutionally foreclose the child's claim in any circumstances is Walker v. Walker, 266 So.2d 385 (Fla.App. 1972).

[118] Munn v. Munn, 168 Colo. 76, 450 P.2d 68 (1969). A similar case is Boyles v. Brown, 69 Mich. App. 480, 245 N.W.2d 100 (1976).

greater difficulty in proving paternity.

State laws in these circumstances may take one of three forms: a) State statutes might provide that all illegitimate children must be treated like legitimate children in all respects relating to support by their fathers;[119] b) they might provide that only illegitimate children who have been acknowledged by their fathers or legitimated by a prior judicial proceeding, as to whom there is no uncertainty as to paternity, must be treated like legitimate children for support purposes; or c) they might provide, as some now do, that judicially approved compromises respecting the support of all illegitimate children are final and non-modifiable relying upon the Supreme Court's apparent view that statutes of limitations restricting support of illegitimate children are valid, presumably on the ground that proof of paternity in some cases is difficult and becomes more so with the lapse of time.

One may surmise that with much inconsistency and vacillation the Supreme Court is working toward the principle that the illegitimate child must, under the equal protection clause, have the same rights as the legitimate child except in those categories of cases where the difficulties of proving paternity justify some limitation of those rights. If that is true, then the second alternative is constitutionally permissible but the third is not. This result is also consonant with the Supreme Court's frequently exhibited tendency to demand greater precision and less generality of effect in legislation.[120] But one can do no more than speculate at this stage of the law's development.

No less uncertainty exists respecting the constitutional rights of the parents of illegitimate children. The problems created by the *Gomez* case and its relation to other constitutional decisions are illustrated in *Doe v. Norton.*[121] Several mothers of illegitimate children brought that case in order to establish the unconstitutionality of a Connecticut statute requiring such mothers to disclose the name of the child's father to state officials where the

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[119] This is the effect of the UNIFORM PARENTAGE ACT §§ 15, 18, *reprinted in* 9 UNIF.L.ANN. 305, 307 (Supp. 1976), except that a lump sum award or the award of an annuity may specify that it is not modifiable.

[120] *E.g.*, Trimble v. Gordon, 430 U.S. 762 (1977), and Jimenez v. Weinberger, 417 U.S. 628 (1974).

[121] 365 F. Supp. 65 (D.Conn. 1973), *vacated and remanded for consideration in the light of an amendment to the Social Security Act sub nom.*, Roe v. Norton, 422 U.S. 391 (1975). A case involving the similar Wisconsin statute is Burdick v. Miech, 385 F.Supp. 927 (E.D.Wis. 1974), *dismissed on the authority of Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), in Burdick v. Miech, 409 F.Supp. 982 (E.D.Wis. 1975).

mother was receiving welfare assistance. Failure to disclose was punishable by contempt but did not involve the forfeiture of the welfare payments.

After finding that the state statute did not conflict with the AFDC program created by the Social Security Act,[122] the Court held that it did not infringe the mother's right to privacy created by *Griswold v. Connecticut,*[123] nor did it violate the equal protection clause. The statute did not invade the right to privacy, the Court said, because the government has broad power to compel testimony and because any invasion of privacy which the statute caused was relatively minor. The Court rejected the equal protection claim on the ground that this statute operated to assist illegitimate children to receive the support to which *Gomez v. Perez*[124] entitled them.

The difficulty here is that the constitutionalization of the relationships between mother, father and illegitimate child has introduced rigidity into the legal regulation of those relationships, making impossible a flexible statutory or administrative handling of them. For example in the *Doe v. Norton* situation it might well be that under some circumstances it would be detrimental not only to the mother but to the child to reveal the father's identity.[125] All parties might be better off if, in such a case, his name were not revealed. But it would be unwise to reason from those cases that the statute is unconstitutional, since in many other circumstances the children would benefit by having their fathers' identity known and orders for support entered.

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[122] This is the Aid to Families with Dependent Children Program described in King v. Smith, 392 U.S. 309 (1968), in which federal funds are contributed to the states whose programs for the support of such families that comply with federal statutory and administrative standards. The Social Security Act has been amended since *Doe v. Norton* was decided so as to require the states to provide, as a condition of eligibility for aid, that the applicant for aid cooperate in establishing the paternity of the child and in obtaining support payments. 42 U.S.C.A. § 602(s)(26) (Supp. 1977). Thus the Social Security Act now requires substantially the same cooperation by the mother as did the Connecticut statute in *Doe v. Norton.* Of course this raises the question whether the Act is constitutional.

[123] 381 U.S. 479 (1965).

[124] 409 U.S. 535 (1973).

[125] Poulin, *Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits,* 70 NW.U.L.REV. 910 (1976) suggests many reasons why the mother would not wish to identify the illegitimate child's father. A Note, *The Social Services Amendments of 1974: Constitutionality of Conditioning AFDC Grant Eligibility on Disclosure of Paternity of Illegitimate Child,* 64 GEO.L.J. 947 (1976) argues the new provision is constitutional.

It is unworkable to deal with such cases in constitutional terms, and yet the Supreme Court's decisions seem to have left the courts no alternative. At the same time they have provided little guidance where the interests of mother, father and child are at variance.

A further illustration of these conflicting interests occurs in *Slawek v. Stroh.*[126] Here the Wisconsin Supreme Court held that the father of an illegitimate child had a constitutional right, under *Stanley v. Illinois,*[127] to establish his paternity and to assert his parental rights against the child's mother who had custody of the child and who resisted the father's claim. Here the assertion of the father's claim may well be harmful to both mother and child in some cases, and one suspects from the facts given in *Slawek* that it was such a case, since the mother filed a counterclaim in the same suit for seduction and damages. If *Stanley* is to be given the expansive reading which the majority of the Wisconsin Supreme Court adopted, harm to the child is unavoidable.

VIII. Conclusion

Ten years of Supreme Court litigation have undeniably eliminated many of the legal disabilities formerly afflicting the illegitimate child. The cases seem to rest on the rationale, often articulated more precisely by lower courts than by the Supreme Court, that the illegitimate child, by virtue of a status for which he is not responsible and which has no relation to his worth as an individual, has been the object of discriminatory legal doctrines having no substantial social purpose. The implication, seldom spelled out, is that the recognition by the law of the special position of the traditional family, composed of a married man and woman and their offspring, is not a social purpose which could warrant the discrimination.

This being so, the question is, why was this rationable not sufficient to justify the elimination of all forms of discrimination against the illegitimate child? Why were the early students of *Levy v. Louisiana* not correct in assuming that that case did end differential treatment of the illegitimate?[128] The Supreme Court has certainly provided no satisfactory answer to these questions. The only reason which comes to mind is the obvious practical consideration that paternity of the illegitimate child is often uncertain while that of the legitimate child is usually, though by no

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[126] 62 Wis.2d 295, 215 N.W.2d 9 (1974).

[127] 405 U.S. 645 (1972).

[128] *See* note 4 *supra.*

means always, clear. But this does not explain why some statutes have been held valid while most have been found wanting.If this is to be the final result, it would have been preferable for the Supreme Court to abstain entirely. The position of the illegitimate child could have been more effectively, and more efficiently, protected by state statutes which were coming to be passed before the Court decided the *Levy* case and are now exemplified by the Uniform Parentage Act.[129] As matters now stand, it is unclear to what extent some states' statutes are valid. It will remain unclear until we have another round of Supreme Court pronouncements, and perhaps even beyond that point.

There is another consequence of the Supreme Court's activity in this field which should not be overlooked. Turning so many aspects of parent-child relationships into constitutional issues, particularly as in the *Stanley* and *Glona* cases, is likely to have unforeseen effects in the future, especially in view of the current fashion for giving constitutional decisions broad readings. The result is that techniques for dealing with social problems in the future may be limited to what the Supreme Court or some other court decides is wise.

In light of later experience the approved techniques may turn out to be unworkable or unsuited to social conditions, and more effective techniques may be disapproved. This is especially true of the law as it affects family relationships, where the implications are subtle and far-reaching and where the Supreme Court and other federal courts have had little experience. For example, it may not be long until the uncertainty of paternity is either sharply reduced or eliminated by new developments in blood testing. In these days of rapid social change it is therefore hardly a sensible policy to limit future legal responses to social problems by constitutional principles having the dual disadvantages of rigidity and uncertainty.

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[129] *Reprinted in* 9 UNIF. L. ANN. 294 (Supp. 1976).