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Leave and Marriage: The Flawed Progress of Paternity Leave in the U.S. Military

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NOTES

LEAVE AND MARRIAGE: THE FLAWED PROGRESS OF PATERNITY LEAVE IN THE U.S. MILITARY

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INTRODUCTION

During the summer of 2015, Navy Secretary Ray Mabus made headlines by tripling the Navy's allotment of paid maternity leave.¹ Although commendable, this expansion failed to increase the Navy's paternity leave allowance, which affords new fathers only ten days of paid leave.² Notably, due to limitations set by Congress, those ten days were exclusively reserved for sailors married to the mothers of their newborn children.³

Less than nine months after Secretary Mabus's announcement, Defense Secretary Ash Carter proposed sweeping changes to the parental leave policies of all United States military branches.⁴ Carter's proposal called for a uniform twelve-week maternity leave and the expansion of paternity leave from ten to fourteen days.⁵ Although Carter's proposal is still awaiting congressional ratification, early indications suggest his plan will do little to cure a lingering defect in the military's paternity leave policy: the use of marriage as an exclusive proxy for fatherhood.⁶

1. See Meghann Myers, *Navy Triples Maternity Leave for Sailors*, USA TODAY (Aug. 6, 2015, 11:24 AM), <http://www.usatoday.com/story/news/nation-now/2015/08/06/maternity-leave-navy-sailors-31211055/> [<https://perma.cc/C468-EA57>].

2. See U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL 1050-010, at 4 (2013) ("Paternity Leave—A period of authorized absence up to 10 days granted to a married Service member whose wife gives birth to a child and is subsequently used in connection with this birth.").

3. See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 532, 122 Stat. 4356, 4449 (2008) (codified at 10 U.S.C. § 701(j) (2012)) [hereinafter NDAA].

4. See Jamie Crawford & Jim Sciutto, *Pentagon Sets Maternity Leave at 12 Weeks*, CNN (Jan. 28, 2016, 7:30 PM), <http://www.cnn.com/2016/01/28/politics/defense-department-maternity-leave-ashton-carter/> [<https://perma.cc/UV4Q-QQBH>].

5. See *id.*

6. See U.S. DEP'T OF DEF., FACT SHEET: BUILDING THE SECOND LINK TO THE FORCE OF THE FUTURE STRENGTHENING COMPREHENSIVE FAMILY BENEFITS 2 (2016) [hereinafter FACT SHEET] (setting out Secretary Carter's plan to expand paternity leave in the military, but making no mention of altering the marriage requirement). In the wake of Carter's announcement, Congresswoman Tammy Duckworth proposed the Military Parental Leave Modernization Act, which aims to "allow any service member, regardless of gender or marital status, to take 12 weeks of leave following a child's birth, adoption or foster placement." See Amy Bushatz, *Lawmaker Proposes Bill to Expand Military Paternity Leave to 12 Weeks*, MILITARY.COM (Mar. 22, 2016), <http://www.military.com/daily-news/2016/03/22/lawmaker-proposes-bill-expand-military-paternity-leave-12-weeks.html> [<https://perma.cc/HY2X-6FDB>].

In a nation where more than 40 percent of children are born out of wedlock,⁷ reason demands that we critically reexamine any policy that hinders the formation of parental bonds in nonmarital families. Although ten days—or even the proposed fourteen days—of leave might seem insignificant in the greater scheme of fatherhood, the military’s current paternity leave policy promulgates two troubling assumptions: (1) unmarried fathers are somehow less deserving parents than their married counterparts, and (2) nonmarital children are somehow less deserving of paternal care than their “legitimate” peers.⁸

This Note contends that the military’s paternity leave policy, currently codified at 10 U.S.C. § 701(j)(1), is logically flawed, potentially unconstitutional, and sorely in need of revision. Part I examines the general societal value of paternity leave, the legislative history of 10 U.S.C. § 701(j)(1), and the faulty reasoning that likely led to the law’s adoption in 2009. Part II imagines and assesses the viability of a constitutional challenge to the law on the basis of illegitimacy discrimination. Additionally, Part II demonstrates how such a challenge would call attention to the inherent shortcomings of the military’s current paternity leave policy. Part III considers the implications of revising 10 U.S.C. § 701(j)(1) and advocates for a functional modification of the law that would afford all military fathers a fairer opportunity to spend time with their newborn children. Despite its seemingly progressive aims, 10 U.S.C. § 701(j)(1) manages to perpetuate a longstanding assumption about the insignificant role of unmarried fathers in American families and demands revision.

7. See Brady E. Hamilton et al., U.S. Dep’t of Health & Human Servs., *Births: Preliminary Data for 2014*, NAT’L VITAL STAT. REPS., June 17, 2015, at 1, 4 (“The percentage of all births to unmarried woman declined to 40.3% in 2014, from 40.6% in 2013.”); see also Andrew J. Cherlin et al., *Changing Fertility Regimes and the Transition to Adulthood* (May 3, 2014) (unpublished manuscript), <http://paa2014.princeton.edu/papers/140559> [<https://perma.cc/4YF5-C3AK>] (discussing how data from the 1997 cohort of the National Longitudinal Survey of Youth showed that, by the time the cohort had reached ages 26-31 in 2011, “57% of the births ... had occurred outside of marriage”).

8. If language itself is any indication of societal assumptions, it is difficult to contend that children born to unmarried parents are favorably regarded in the United States. Although the categorical label of “illegitimate” connotes more positivity than its predecessor, “bastard,” illegitimate still seems to suggest deficiency. This Note uses the label “nonmarital” throughout, even though it is also negatively phrased and only slightly more endearing.

I. THE ORIGINS OF PATERNITY LEAVE IN THE MILITARY

The National Defense Authorization Act for Fiscal Year 2009 created the first codification of a uniform military paternity leave policy in the United States through its adoption of 10 U.S.C. § 701(j).⁹ The law provides that, contingent upon approval from a serviceman's commanding officer, a serviceman may take up to ten days of paternity leave in connection with his wife giving birth.¹⁰ Despite its flaws, the legislation provides married servicemen with a valuable benefit that few American men enjoy: paid paternity leave.¹¹ Given this relatively novel backdrop, any qualitative assessment of the military's paternity leave policy must be predicated on a clear understanding of the context and rationalities that led to its creation. This Part explores the background of 10 U.S.C. § 701(j) by first considering the social value of its aim, then by examining the provision's legislative history, and finally by speculating on Congress's reasons for using marital status as a proxy for fatherhood.

A. *The Social Value of Paternity Leave*

By establishing a paternity leave policy for the military, Congress implicitly acknowledged that such a policy served some worthy end. Although the precise details of that end are discussed at length in later sections of this Part, this Section considers the worth of paternity leave generally: What benefits are realized when fathers have access to paternity leave, and which stakeholders realize those benefits?

A crucial preliminary matter in this discussion is whether fathers even use paternity leave when it is available to them. This inquiry is necessarily shaped by a number of case-specific factors—such as whether leave is paid, its duration, and socio-cultural norms—but

9. See NDAA, *supra* note 3.

10. See 10 U.S.C. § 701(j)(1) (2012).

11. See U.S. DEP'T OF LABOR, PATERNITY LEAVE: WHY PARENTAL LEAVE FOR FATHERS IS SO IMPORTANT FOR WORKING FAMILIES 2 (2014) (citing JACOB ALEX KLERMAN ET AL., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 135 (2012)) (finding 13 percent of men receive paid parental leave).

is crucial to assessing the actual impact that paternity leave policies have on society.¹² Although American men face substantial “economic and social barriers that keep them from taking longer paternity leaves, such as inadequate access to paid leave and outdated workplace norms about male breadwinners,”¹³ recent international studies suggest an intuitive result: when paid paternity leave is available, fathers are more likely to take it.¹⁴

Although no foreign sample can identically model the behavior of American fathers, a study that tracked the conduct of Spanish fathers after Spain introduced its thirteen-day paternity leave is particularly revealing.¹⁵ There, a national paternity leave allowance that was much shorter than those offered in Germany and other Scandinavian countries,¹⁶ but close to the ten-day mark currently set by the United States Military,¹⁷ resulted in significantly more fathers taking paternity leave.¹⁸ Interestingly, that study also found “the probability of being on childbirth leave [was] higher among those fathers working in the public sector.”¹⁹ Another study tracking fathers working in Quebec found that “establishing a

12. Under the Family and Medical Leave Act, American men have access to up to twelve weeks per year of unpaid leave to use in connection with the birth of a child. *See* Family and Medical Leave Act of 1993 § 102, 29 U.S.C. § 2612(a)(1)(A) (2012). Despite this allowance, “in the United States ... social and cultural biases along with gaps in policy make fathers even less able to access time away from work for their children.” U.S. DEP’T OF LABOR, *supra* note 11, at 1.

13. U.S. DEP’T OF LABOR, *supra* note 11, at 1.

14. *See* Lorenzo Escot et al., *Fathers’ Use of Childbirth Leave in Spain: The Effects of the 13-Day Paternity Leave*, 33 POPULATION RES. & POL’Y REV. 419, 449-50 (2014) (“These findings confirm the hypothesis that in Spain the introduction of paternity leave has increased the degree to which men use the Spanish childbirth leave system.”); Sakiko Tanaka & Jane Waldfogel, *Effects of Parental Leave and Work Hours on Fathers’ Involvement with Their Babies*, 10 COMMUNITY WORK & FAM. 409, 421 (2007) (examining the Millennium Cohort Study, which covered a large group of children in the United Kingdom, and finding that “[f]athers with access to parental leave or paternity leave are five times as likely to take some leave after the birth, as otherwise comparable fathers who did not have such rights”); *see also* Ankita Patnaik, *Reserving Time for Daddy: The Short and Long-Run Consequences of Fathers’ Quotas* 17 (May 14, 2016) (unpublished manuscript), http://papers.ssrn.com/so13/papers.cfm?abstract_id=2475970 [<https://perma.cc/Q8QN-2GHQ>] (finding that the Quebec Parental Insurance Program, which increased benefits for all parents, increased fathers’ participation by 250 percent).

15. *See* Escot et al., *supra* note 14, at 421.

16. *See id.*

17. *See* 10 U.S.C. § 701(j)(1) (2012).

18. *See* Escot et al., *supra* note 14, at 449-50.

19. *Id.* at 450.

nontransferable period of paternity leave in 2006 doubled fathers' leave taking—from 22 to 50 percent, and by 2011 that [number] had risen to 84 percent.”²⁰ These findings suggest that, even when offered for limited durations, the mere availability of paternity leave makes fathers more inclined to take it.

The proposition that fathers take paternity leave when they have access to it does not, by itself, do much to prove the value of paternity leave. Accordingly, this discussion now turns to whether paternity leave serves any real benefit to society. Given the relative scarcity of paid paternity leave in the United States,²¹ much of the empirical research on this subject comes from studies conducted abroad. Despite this reality, the Department of Labor has summed up paternity leave as a policy that “can promote parent-child bonding, improve outcomes for children, and even increase gender equity at home and at the workplace.”²²

Various studies suggest that when fathers use paternity leave, there is a notable increase in how much time they spend with their children after that leave has ended.²³ Whether this is the result of fathers having greater access to father-child bonding time, or simply their acquisition of competencies that prevent mothers from gaining monopolistic expertise in child rearing, early father-child interaction has been shown to result in fathers spending more time with their children in the long-run.²⁴

20. U.S. DEP'T OF LABOR, *supra* note 11, at 5 n.20 (citing Andrea Doucet, *Dad and Baby in the First Year: Gendered Responsibilities and Embodiment*, 624 ANNALS AM. ACAD. POL. & SOC. SCI. 78 (2009)).

21. *See supra* note 11 and accompanying text.

22. U.S. DEP'T OF LABOR, *supra* note 11, at 1.

23. *See* Tanaka & Waldfogel, *supra* note 14, at 421 (finding that in the United Kingdom, “[f]athers who take leave after the birth are significantly more involved in the care of their child 8-12 months later”); *see also* Lenna Nepomnyaschy & Jane Waldfogel, *Paternity Leave and Fathers' Involvement with Their Young Children*, 10 COMMUNITY WORK & FAM. 427, 428 (2007) (“We also find that fathers who take longer leave are more involved in child care-taking activities nine months after the birth, even after controlling for a host of father, mother and child characteristics, including measures of the father’s commitment to child care-taking prior to the birth.”).

24. *See* Mari Rege & Ingeborg F. Solli, *The Impact of Paternity Leave on Long-Term Father Involvement 1-2* (CESifo, Working Paper No. 3130, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649344 [<https://perma.cc/T9A6-C547>] (studying data from Norway related to paternity leave quotas and finding results that suggest “paternity leave has the expected positive effect on long-term father involvement”).

Ultimately, it is this long-run increase in paternal involvement that provides one of the most compelling justifications for paternity leave. Although fathers can gain a greater sense of commitment from increased interactions with their children, research suggests that their children benefit significantly from those interactions.²⁵ Not only have children's school performances been shown to improve as a result of fathers taking advantage of paternity leave quotas,²⁶ but increased father involvement with children has been linked to a decrease in adolescent behavioral problems²⁷ and improved social functioning in children.²⁸ In light of this research, the expansion of paternity leave policies in America should be viewed as an attempt to benefit not only fathers, but also their children.

B. The Scant Legislative History of 10 U.S.C. § 701(j)

Interestingly, the Navy's initial proposal to Congress for a suitable paternity leave policy was for a longer and more inclusive leave.²⁹ To some extent, congressional compromise in 2008 shaped the codification of the shorter, marriage-based policy.³⁰ In light of

25. See Natasha J. Cabrera et al., *Fathers' Influence on Their Children's Cognitive and Emotional Development: From Toddlers to Pre-K*, 11 APPLIED DEV. SCI. 208, 212 (2007) ("Over and above mother engagements, fathers' supportiveness matters for children's cognitive and language development across ages as well as children's social and emotional behaviors.").

26. See Sara Cools et al., *Causal Effects of Paternity Leave on Children and Parents*, 117 SCANDINAVIAN J. ECONOMICS 801, 803 (2015).

27. See Anna Sarkadi et al., *Fathers' Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 ACTA PÆDIATRICA 153, 155 (2008) (citing M. Carlson, *Family Structure, Father Involvement, and Adolescent Behavioral Outcomes*, 68 J. MARRIAGE & FAM. 137-54 (2006)); see also Jen Jen Chang et al., *Maternal Depressive Symptoms, Father's Involvement, and the Trajectories of Child Problem Behaviors in a US National Sample*, 161 ARCHIVES PEDIATRIC ADOLESCENT MED. 697, 697 (2007).

28. See Sarkadi, *supra* note 27, at 155 (citing R. Levy-Shiff et al., *Father's Hospital Visits to Their Preterm Infants as a Predictor of Father-Infant Relationship and Infant Development*, 86 PEDIATRICS 289-93 (1990)).

29. See *Department of Defense Authorization for Appropriations for Fiscal Year 2009: Hearing on S. 3001 Before the S. Comm. on Armed Servs.*, 110th Cong. pt. 6, at 149 (2008) [hereinafter *Hearing Before Comm. on Armed Servs.*] (statement of Adm. J. Harvey) ("Navy supports establishing a paternity leave policy that provides Service Secretaries discretionary authority to grant up to 21 days permissive TDY [temporary duty] to be used in connection with the birth of a servicemember's natural child.").

30. See *Military Paternity Leave Rules Take Effect*, SIP TRUNKING REP. (Jan. 5, 2009), <http://sip-trunking.tmcnet.com/news/2009/01/05/3889571.htm> [<https://perma.cc/K36A-HYG7>] ("In May 2008 the U.S. Senate Armed Forces Committee began a push to authorize up to

these modifications, an understanding of the provision's legislative history is necessary to help decipher the rationalities that led to its creation.

Even today, American parental leave policies are some of the least generous in the developed world.³¹ As discussed previously, Congress's adoption of a uniform paternity leave policy for the military was, to some degree, a very progressive step in 2009.³² Despite its progressive nature, the precise origins of the policy set forth in 10 U.S.C. § 701(j)(1) are not readily discernable from its legislative history. This is due, in part, to the sheer enormity of the bill that created 10 U.S.C. § 701(j), the National Defense Authorization Act (NDAA) for Fiscal Year 2009.³³ The NDAA is a complex and comprehensive annual spending authorization that provides funding for the entire Department of Defense and the national security programs of the Department of Energy.³⁴ The bill includes appropriations for a broad variety of affairs, ranging from "maintenance of retired KC-135E aircraft,"³⁵ to "chiropractic health care for members on active duty."³⁶ For this reason, extensive legislative histories are not often available for every provision embedded within the NDAA.

Although a review of publicly available legislative records for the NDAA for Fiscal Year 2009 reveals relatively little discussion of the paternity leave policy later adopted as 10 U.S.C. § 701(j), one senator was a particularly outspoken champion for uniform military paternity leave. Claire McCaskill, a Democrat from Missouri, brought the issue to the forefront during two separate hearings of the Senate Committee on Armed Services.³⁷ During the first such

three weeks of paternity leave. A compromise with members in the House resulted in the 10-day mark.").

31. See Gretchen Livingston, *Among 41 Nations, U.S. Is the Outlier when It Comes to Paid Parental Leave*, PEW RES. CTR. (Sept. 26, 2016), <http://pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave/> [https://perma.cc/A5NL-CZSL].

32. See *supra* notes 9-11 and accompanying text.

33. See *supra* note 3.

34. See HOUSE ARMED SERVS. COMM., FACT SHEET: HIGHLIGHTS OF THE COMMITTEE ON ARMED SERVICES BILL, H.R. 1735 NATIONAL DEFENSE AUTHORIZATION FOR FISCAL YEAR 2016, at 1 (2015).

35. NDAA, *supra* note 3, § 131.

36. NDAA, *supra* note 3, § 703.

37. See *Hearing Before Comm. on Armed Servs.*, *supra* note 29, pt. 1, at 142; *id.* pt. 6, at 148.

hearing, Senator McCaskill provided some useful context on the issue while addressing leaders of the armed services:

I think that it's time for the ... Secretary of Defense to look at, overall, a uniformity of policy between the various branches as it relates to both maternity leave and acknowledgment of some recognition of paternity leave. I know this was being discussed. I know that there was a pullback that occurred by one of the Under Secretaries of Defense about paternity leave. But, I just wanted to say that I'm hopeful that you all continue to look at that issue, because it dovetails nicely with what I want to ask you about this morning, which is our ability to retain officers.³⁸

Senator McCaskill went on to advocate for a military-wide paternity leave policy during a later hearing of the Senate Committee on Armed Services, in which she addressed numerous military leaders:

I understand that most of the Services have indicated that they support instituting a paternity leave policy that would permit unit commanders to provide military members administrative paternity leave at the commander's discretion. It strikes me that such a policy would be supportive of military families, would be consistent with policies in the civilian sector, and would send a strong message to servicemembers about the respect their Services have for their personal lives. It also seems to me that such a policy can only prove helpful in retention efforts.³⁹

Later in that hearing, Senator McCaskill expressed concern that the Department of Defense “may have ordered that work on paternity leave policies be terminated and that the issue not be considered

38. *Id.* pt. 1, at 142 (statement of Sen. C. McCaskill). The information referred to by Senator McCaskill as “being discussed” was as follows:

The Department of Defense is reviewing a legislative proposal that will amend section 701 of title 10, U.S.C., to include a new authorization to allow up to 21 days of permissive temporary duty for servicemembers in conjunction with the birth of a new child. The legislative proposal is consistent with a recent congressional change to section 701 of title 10 (section 593), which authorized up to 21 days of administrative leave for a servicemember adopting a child. As with all leave, paternity leave would be granted on an individual basis dependent on the unit's mission and operational circumstances.

Id.

39. *Id.* pt. 6, at 148 (statement of Sen. C. McCaskill).

for a DOD-wide personnel policy initiative.”⁴⁰ She questioned then Under Secretary of Defense for Personnel and Readiness David S.C. Chu on the matter,⁴¹ to which he responded:

This legislative proposal is being worked within the Department. It would allow spouses up to 21 days of discretionary administrative absence after the birth of a child. The Department is weighing the proposal against operational readiness, cost, and equity factors. We anticipate a decision on proceeding with the present proposal by end of March 2008.⁴²

Although these few comments do not express the views of every member of Congress or Department official involved in the passage of 10 U.S.C. § 701(j), they provide valuable insight into the logic that shaped the legislation’s formation. Senator McCaskill twice mentioned that she believed the policy would benefit the military’s personnel retention efforts.⁴³ She also pointed out that a uniform paternity leave policy “would be supportive of military families, would be consistent with policies in the civilian sector, and would send a strong message to servicemembers about the respect their Services have for their personal lives.”⁴⁴ These statements suggest that Senator McCaskill intended the policy to benefit not only servicemen, but also their families and “personal lives.”⁴⁵

Under Secretary Chu’s remarks also shed light on the logic underpinning 10 U.S.C. § 701(j)(1). By acknowledging that the Department “weigh[ed] the proposal against operational readiness, cost, and equity,”⁴⁶ Chu revealed that feasibility and fairness concerns likely limited the ultimate legislative outcome. By the time the NDAA for Fiscal Year 2009 was enacted, the paternity leave allocation was limited to only ten days, and reserved for “a married

40. *Id.*

41. *Id.*

42. *Id.* at 149 (statement of Sec. D. Chu).

43. *See id.* pt. 1, at 142 (statement of Sen. C. McCaskill) (“I’m hopeful that you all continue to look at that issue, because it dovetails nicely with what I want to ask you about this morning, which is our ability to retain officers.”); *id.* pt. 6, at 148 (“It also seems to me that such a policy can only prove helpful in retention efforts.”).

44. *Id.* pt. 6, at 148.

45. *Id.*

46. *Id.* (statement of Sec. D. Chu).

member of the armed forces on active duty whose wife gives birth to a child.”⁴⁷

Today, the military paternity leave policy remains very similar to the one adopted in 2008.⁴⁸ Congress has proposed a slight change to the language, aiming to change “wife” to “spouse,”⁴⁹ but even with these changes, the updated statute would still read: “Under regulations prescribed by the Secretary concerned, a married member of the armed forces on active duty whose spouse gives birth to a child shall receive 10 days of leave to be used in connection with the birth of the child.”⁵⁰ This change in wording would only impact married lesbian couples, and has seemingly no effect on the unmarried fathers for whom this Note advocates. In light of this limited legislative history, this Note now builds upon that record by way of inference.

C. Inferring Rationality: Why Marital Status Was Used as a Proxy for Fatherhood

Because there is not a robust legislative record for 10 U.S.C. § 701(j), some speculation is required to create a fuller picture of why Congress first enacted the marriage-centered military paternity leave policy. Considering the societal gains of paternity leave,⁵¹ alongside Senator McCaskill’s remarks,⁵² Congress likely sought to benefit servicemen and their families through the enactment. Taking these worthy beneficiaries into account, why then did Congress reserve this benefit exclusively for married fathers? Under Secretary David Chu’s remarks provide a starting point to answer this question,⁵³ but his comments require further speculation. If

47. NDAA, *supra* note 3, § 532 (“SEC. 532. PATERNITY LEAVE FOR MEMBERS OF THE ARMED FORCES.(a) LEAVE AUTHORIZED.—Section 701 of title 10, United States Code, is amended by adding at the end the following new subsection: (j)(1) Under regulations prescribed by the Secretary concerned, a married member of the armed forces on active duty whose wife gives birth to a child shall receive 10 days of leave to be used in connection with the birth of the child.”).

48. *See* 10 U.S.C. § 701(j) (2012).

49. *See* H.R. 2976, 114th Cong. (2015).

50. *See* 10 U.S.C. § 701(j); H.R. 2976.

51. *See supra* Part I.A.

52. *See supra* notes 38-44 and accompanying text.

53. *See Hearing Before Comm. on Armed Servs.*, *supra* note 29, pt. 6, at 149 (statement of Sec. D. Chu) (“The Department is weighing the proposal against operational readiness, cost,

administrability and “equity”⁵⁴ factors were truly the reasons marital status was used as a substitute for natural paternity, then a closer examination of that logic is necessary to assess Congress’s ultimate decision.

1. *Cost and Administrative Ease*

It seems plausible to think that the financial and administrative costs of an inclusive paternity leave policy would have been much higher than the marriage-based policy. If Congress had made unmarried fathers eligible for the benefit, then logically it would have expanded the total pool of eligible servicemen. Although the military has received some unsuccessful requests for paternity leave from single fathers,⁵⁵ unmarried fathers constitute only a small fraction of all military parents.⁵⁶ As of 2013, 42.8 percent of all active duty members of the armed services had dependent children, but just 5 percent of active duty parents were unmarried.⁵⁷ Using these figures, and the assumption that unmarried fathers are just as likely to request paternity leave as their married counterparts, the exclusion of unmarried fathers only reduces the number of servicemen taking the benefit by around 12 percent.⁵⁸

When compared to leave duration, the marginal benefit of excluding unmarried fathers from paternity leave seems even more insignificant. United States Air Force General Lloyd W. Newton expressed this concern before the Senate Committee on Armed Services when he stated that “[t]he Air Force continues to study a policy proposed by the Navy for 21 days of paternity leave. We understand the rationale, but with over 15,000 new dependents born to Air Force families yearly we are considering the impacts of

and equity factors.”).

54. *Id.*

55. See Karen Jowers, *Paternity Leave for Single Military Fathers?*, MIL. TIMES (July 23, 2015, 7:36 PM), <http://www.militarytimes.com/story/military/benefits/2015/07/23/paternity-leave-single-military-fathers/30590819/> [<https://perma.cc/BVU5-EU56>].

56. See OFFICE OF THE DEPUTY ASSISTANT SEC’Y OF DEF., 2013 DEMOGRAPHICS REPORT 120, 130-31 (2013).

57. *Id.* at 120.

58. See *id.* (showing that 42.8 percent of persons in the armed services have dependent children, and 5 percent of persons in the armed services both have children and are unmarried). Consequently, 11.58 percent of persons in the military with children are unmarried.

having those fathers out for 21 days each.”⁵⁹ Congress ultimately addressed General Newton’s concerns by drastically reducing the duration of the proposed leave allowance from twenty-one to ten days,⁶⁰ an action that more than halved the benefit.

Another perceived cost of providing unmarried military fathers access to paternity leave may have been the burden of proving paternity. Although married men are assumed to be the fathers of each child born to their wives, unmarried fathers receive no similar presumption.⁶¹ Although suitable administrative policies to avoid this problem are discussed in Part III,⁶² it warrants mentioning here that Congress may have sought to exclude unmarried fathers, at least in part, because of the administrative burden of determining paternity.⁶³ Even so, Congress could have chosen to leave the administrative details of how paternity would be determined to the leaders of the military branches in order to avoid dealing with the matter so comprehensively.⁶⁴

2. Equitable Congruence with Adoptive Leave

Although cost and operational considerations likely played into Congress’s decision to use marital status as a proxy for paternity, some broader “equity” considerations probably also shaped the decision.⁶⁵ During a hearing before the Senate Committee on Armed Services, Admiral John C. Harvey mentioned the Navy’s goal in

59. *Hearing Before Comm. on Armed Servs.*, *supra* note 29, pt. 6, at 150 (statement of Gen. L. Newton).

60. *See* NDAA, *supra* note 3, § 532.

61. *See* OFFICE OF CHILD SUPPORT ENF’T, U.S. DEP’T OF HEALTH & HUMAN SERVS., A HANDBOOK FOR MILITARY FAMILIES, HELPING YOU WITH CHILD SUPPORT 19 (2013) (“Under state law, a child born during marriage is presumed to be the child of those married parents. When a child is born outside of a marriage, his or her paternity must be legally established in order for the child and parents to have certain legal rights and responsibilities.”).

62. *See infra* Part III.

63. *See* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 178-79 (2015) (“[L]egal rules tend to use marriage as a proxy for a meaningful family relationship. In the case of certain rights and privileges, legislatures and courts believe marriage is a necessary condition for receipt of benefits. In the case of parenting and the marital presumption, legislatures and courts consider marriage a sufficient condition to presume commitment and closeness, regardless of actual family circumstances.”).

64. *See* 10 U.S.C. § 701(j)(1) (2012) (leaving administrative details of the policy to be determined by “regulations prescribed by the Secretary concerned”).

65. *See supra* notes 53-54 and accompanying text.

providing twenty-one days of paternity leave was “to align the Department’s policy for natural fathers with policy applicable to adoptive parents, as provided for in the NDAA for Fiscal Year 2006.”⁶⁶

The adoptive leave policy referenced by Admiral Harvey, codified at 10 U.S.C. § 701(i), provides that “a member of the armed forces adopting a child in a qualifying child adoption is allowed up to 21 days of leave in a calendar year to be used in connection with the adoption.”⁶⁷ When compared with the military’s paternity leave policy before the passage of the National Defense Authorization Act for Fiscal Year 2009, 10 U.S.C. § 701(i) appears to create a glaring inequity: fathers who adopted children received twenty-one days of parental leave, while biological fathers received none at all.⁶⁸ Although a clear disparity still exists between the twenty-one days afforded to adoptive fathers and the ten days currently allotted to married natural fathers,⁶⁹ perhaps one of the legislature’s aims in adopting 10 U.S.C. § 701(j) was to take a step, albeit an unsuccessful one, toward correcting this inequity.

Nevertheless, if equity was truly a substantial consideration in the legislative process, it seems inconsistent to have then left unmarried fathers altogether out of the benefit. Imagine a scenario in which an unmarried military father adopts a child with his partner. The current regime allows him to take twenty-one days of paid leave in connection with that adoption,⁷⁰ but affords him no leave if he chooses to father a biological child with that same partner.⁷¹ Disregarding the unfavorable impact that this policy has on married gay couples,⁷² one would struggle to label the policy as fundamentally fair.

66. *Hearing Before Comm. on Armed Servs.*, *supra* note 29, pt. 6, at 149 (statement of Adm. J. Harvey).

67. *See* 10 U.S.C. § 701(i)(1).

68. *See id.*

69. *Compare id.*, with 10 U.S.C. § 701(j)(1).

70. 10 U.S.C. § 701(i)(1).

71. *Id.*

72. To illustrate this point, consider the hypothetical case of a married gay man in the armed services. Should that man and his husband choose to have a child through surrogacy, and the serviceman donates the genetic material, the serviceman would be unable to take paternity leave in connection with the birth of his child because his spouse did not (and could not) give birth to that child. This situation creates substantial inequality between the parental rights afforded to married heterosexual and married homosexual couples in the military.

3. *Promotion of the Marital Family*

Perhaps Congress's decision to limit paternity leave to married men stemmed, in part, from a slightly biased sense of equity—one more akin to traditional morality than fairness. Under this framing, Congress may have sought to reward what it perceived to be the commitment of married men, and embedded that incentive into 10 U.S.C. § 701(j). Legislation that privileges marriage is not uncommon in the United States,⁷³ and it is possible that Congress viewed the policy as an additional way to encourage marriage-based families.

Ignoring the problems that the legalization of gay marriage pose to this logic, the trouble with the marriage-incentive rationality is that, in this particular case, the policy likely has little positive effect (and potentially a deleterious one) on the formation of marital units. Denying an unmarried father who wishes to spend time with his newborn child that opportunity is a sorry way of encouraging the formation of marital families. Although the prospect of gaining ten days of paternity leave might motivate some unmarried persons to marry before the birth of their child, it seems unlikely that such a small benefit would entice many to make such a substantial commitment.

Further, any increased likelihood of marriage that this marriage-exclusive policy creates is likely offset by the cost of the foregone alternative opportunity: unmarried fathers spending more time with their children (and likely the mothers of those children). Weighing the marriage-encouraging utility of each of these discrete options, it is no stretch to claim that an unmarried father's physical presence with his child, even if only for ten days, might do more to encourage marital relationships than the abstract threat of forfeiting those ten days.

It warrants mentioning that under this analysis, the encouraged end was marriage and not *preparental* marriage. If Congress, through this legislation, sought to encourage preparental marriage at the expense of marriages occurring *after* a couple has had a child,

73. See Huntington, *supra* note 63, at 178 (“Individual states have different rules, but the dominant approach draws a clear distinction between married and cohabiting couples, with the latter receiving far fewer of the rights and obligations associated with marriage.”).

then the seemingly defective logic of this policy makes more sense. Setting aside traditional moral ideals, this preparental marriage preference creates a policy that rewards the formation of marriages before a child is born, but does nothing to encourage the formation of such bonds after that child's birth.

The reality remains that nonmarital children are born to military fathers.⁷⁴ Whether a father makes the conscious decision not to marry the mother of his child before she gives birth, tries to marry that mother but finds her unwilling, or is prevented from marrying her because of a preexisting marriage, legislation should encourage him to form functional relationships with his child's mother.⁷⁵ Even if allowing fathers to take paternity leave has little effect on marital outcomes, it serves the highly important purpose of fostering functional co-parenting relationships between parents—relationships that benefit children in the long term.⁷⁶

In truth, many of the rationalities that led to the creation of 10 U.S.C. § 701(j) remain unknown. Although it is clear that some parties involved in the decision weighed the policy's benefits to servicemen and their families alongside cost, administrability, and "equity" concerns,⁷⁷ the resulting legislation punishes a small minority of single fathers for relatively little benefit. Hopefully, when Congress revisits this policy in response to Ash Carter's 2016 proposal⁷⁸ it will identify its apparent shortcomings and recast it in a more functionally equitable manner.

II. A CONSTITUTIONAL CHALLENGE TO EXPEDITE CHANGE

While discussing the prospects of expanding paternity leave with a group of sailors in 2015, Chief of Naval Personnel Vice Admiral

74. See *supra* notes 56-57 and accompanying text.

75. See Huntington, *supra* note 63, at 212-13 (proposing the creation of laws that help parents become effective co-parents regardless of marital status, in order to help those parents provide their children with "the relationships necessary for child development" and "child well-being").

76. *Id.* at 213.

77. *Hearing Before Comm. on Armed Servs.*, *supra* note 29, pt. 6, at 149 (statement of Sec. D. Chu).

78. See generally FACT SHEET, *supra* note 6.

Bill Moran cautioned, “We’re a long ways from that.”⁷⁹ Less than a year later, Ash Carter’s 2016 proposal has accelerated that timeline rapidly.⁸⁰ Because Carter will soon ask Congress to revisit the policy codified in 10 U.S.C. § 701(j), the present offers a critical opportunity to highlight the marriage-proxy flaw of 10 U.S.C. § 701(j). To highlight these flaws, this Part imagines a lawsuit challenging the constitutionality of 10 U.S.C. § 701(j) on the grounds that it violates the Equal Protection Clause. Although a litigant may not prevail easily in such a challenge, a lawsuit could draw attention to this flawed policy and potentially expedite change. This Part begins with a brief discussion of the Equal Protection Clause and its limitations in the military context in Section A. It then proceeds by presenting an argument against 10 U.S.C. § 701(j) on the grounds that the law discriminates against children on the basis of illegitimacy in Section B.

A. *The Equal Protection Clause and the Military Context*

The Equal Protection Clause was added to the United States Constitution within the Fourteenth Amendment, and, in pertinent part, reads “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁸¹ Although the clause was initially enacted as a measure to buttress the rights of newly freed slaves,⁸² the scope of the law has expanded substantially since its adoption. The provision now prohibits state and federal governmental entities from denying “equal protection,”⁸³ and extensive case law has developed the contours of what warrants protection today. Presently, government rules that classify individuals

79. Steven Beardsley, *Navy Leader: Lack of Budget Means Delayed Bonuses, Family Moves*, MILITARY.COM (Oct. 15, 2015), http://www.military.com/daily-news/2015/10/15/navy-leader-lack-of-budget-means-delayed-bonuses-family-moves.html#disqus_thread [<https://perma.cc/D68P-C7QZ>] (quoting Chief of Navy Personnel Vice Admiral Bill Moran).

80. See FACT SHEET, *supra* note 6.

81. U.S. CONST. amend. XIV, § 1.

82. See U.S. Nat’l Archives & Records Admin., *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, <http://www.ourdocuments.gov/doc.php?Flash=true&doc=43> [<https://perma.cc/67ND-EM6U>].

83. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (recognizing that the Fifth Amendment subjects laws passed by the federal government to equal protection review).

on the basis of race are subject to strict scrutiny, and courts frequently invalidate such rules as being unconstitutional.⁸⁴ Federal and state rules that classify individuals on the basis of gender or illegitimacy are reviewed under a separate framework, frequently referred to as intermediate scrutiny,⁸⁵ and courts often invalidate these rules as well.⁸⁶ Generally, when a government law or policy faces intermediate scrutiny, the government must prove that it has an exceedingly persuasive justification for the law,⁸⁷ and that the law is an appropriate means to achieve that purpose.⁸⁸

In the hypothetical case that follows, the military context would potentially have a significant impact on a court's decision. Although Congress enacted the military's universal paternity leave policy by adopting 10 U.S.C. § 701(j),⁸⁹ the Supreme Court has often deferred to Congress's decisions within the military context.⁹⁰ This deference was prominently highlighted in *Rostker v. Goldberg*, a 1981 Supreme Court case in which a man challenged the constitutionality of a law requiring only men to register for selective service.⁹¹ There, the Court rejected the petitioner's argument that the policy was discriminatory on the basis of gender, stating that "judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance

84. See *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

85. For examples of cases in which the Supreme Court invalidated laws discriminating on the basis of gender using a form of intermediate scrutiny, see *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976). For cases in which the Court struck down laws on the basis of illegitimacy discrimination, see *Trimble v. Gordon*, 430 U.S. 762 (1977); *Gomez v. Perez*, 409 U.S. 535 (1973).

86. See *Trimble*, 430 U.S. at 776; *Gomez*, 409 U.S. at 537-38.

87. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) ("Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981))).

88. *Id.* ("The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980))).

89. 10 U.S.C. § 701(j) (2012).

90. See Tim Bakken, *A Woman Soldier's Right to Combat: Equal Protection in the Military*, 20 WM. & MARY J. WOMEN & LAW 271, 280 (2014) ("Beginning in the 1970s, the Supreme Court, spurred by Associate Justice William Rehnquist, began a policy of extreme deference toward the military.").

91. 453 U.S. 57, 59 (1981).

is challenged.”⁹² The Court pointed out that “[Congress’s] decision to exempt women from registration was not the ‘accidental by-product of a traditional way of thinking about females,’”⁹³ and rooted its decision in an implicit acceptance of the notion that women were not necessary to achieving Congress’s goal of providing our nation with combat troops.⁹⁴

Despite this claimed “apogee” of deference,⁹⁵ the Supreme Court has also shown some willingness to overturn gender classifications in the military context, as was the case in *Frontiero v. Richardson*.⁹⁶ There, a servicewoman challenged the constitutionality of a military policy that determined how dependency was established.⁹⁷ Although that policy required military wives to prove that their husbands were actually dependent upon them to receive military dependent status, military husbands were not required to offer any proof to have their wives deemed dependent.⁹⁸ Making no reference to any special deference, the Supreme Court invalidated the military policy because Congress offered no suitable reason to justify the “differential treatment to male and female members of the uniformed services.”⁹⁹

A brief comparison of *Frontiero* and *Rostker* suggests that the deference afforded to congressional decisions in the military context is not uniformly applied to all challenges. In *Rostker*, where the challenged policy related directly to combat operations and the composition of the fighting force, the Court applied a high degree of deference.¹⁰⁰ By contrast, in *Frontiero*, where the challenged policy related to an employment benefit provided to nonmilitary individuals, the Court seemed to ignore the military context outright.¹⁰¹

92. *Id.* at 70.

93. *Id.* at 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)).

94. *See id.* at 77 (“The existence of the combat restrictions clearly indicates the basis for Congress[s] decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them.”).

95. *Id.* at 70.

96. 411 U.S. 677, 690-91 (1973) (plurality opinion).

97. *Id.* at 678.

98. *Id.* at 678-79.

99. *Id.* at 690.

100. *See Rostker*, 453 U.S. at 69.

101. *See Frontiero*, 411 U.S. at 680-82.

Although the paternity leave policy codified at 10 U.S.C. § 701(j) has similarities to both the regulation of military combat personnel and the regulation of military employment benefits, it bears a closer resemblance to the latter. Providing unmarried fathers the opportunity to take paternity leave could diminish the pool of available combat personnel,¹⁰² but such a concern is wholly tempered by the fact that any parental leave taken under 10 U.S.C. § 701(j) is subject to authorization by a serviceman's commanding officer.¹⁰³ Thus, if a commanding officer determines that his combat unit cannot adequately bear the absence of a new father, that commanding officer is entirely capable of denying paternity leave.¹⁰⁴ Accordingly, if 10 U.S.C. § 701(j) is correctly viewed as a rule governing an employment benefit, the fact that the benefit pertains to military personnel may not necessarily subject it to heightened judicial deference.

B. Discrimination on the Basis of Illegitimacy

1. Reframing 10 U.S.C. § 701(j): The Child's Argument

Though not intuitive, the most compelling constitutional argument for reforming the military's marriage-exclusive paternity leave policy is that the rule discriminates against children on the basis of illegitimacy.¹⁰⁵ At first glance, 10 U.S.C. § 701(j) appears to classify servicemen only on the basis of their marital status.¹⁰⁶ Because marital status is not subject to heightened scrutiny under the Constitution, one could easily believe that the policy is patently constitutional. Despite this impression, a careful assessment of the law—one that acknowledges the fact that every invocation of the

102. See *supra* Part I.C.1.

103. See, e.g., U.S. DEP'T OF NAVY, *supra* note 2, at 4 (noting that servicemen may only take "a period of *authorized* absence" (emphasis added)).

104. See *id.*

105. At first glance, an alternative claim that 10 U.S.C. § 701(j) discriminates on the basis of gender also appears viable. Such a claim would likely argue the policy discriminates against men because they are required to be married to become eligible for parental leave, while servicewomen face no such marriage requirement. For the purposes of this Note, this gender argument was not explored more thoroughly because of one critical reality: women actually give birth to and nurse children; men do not. This clear biological difference, and the physical difficulty it involves, likely justifies much of the differential treatment of men and women in the sphere of parental leave.

106. See 10 U.S.C. § 701(j) (2012).

policy (or denial thereof) implicates a child—reveals another category on which the policy might be classifying: legitimacy. Simply, 10 U.S.C. § 701(j) allows legitimate children access to ten leave days with their military fathers, while nonmarital military children are prevented from enjoying the same benefit.¹⁰⁷ Through this child-centered framing of the military’s paternity leave policy, a clever plaintiff could succeed in undermining the constitutionality of the policy.¹⁰⁸

A central premise of this child-centered argument is that a direct link exists between the policy set forth in 10 U.S.C. § 701(j) and the children impacted. Although Congress likely did not aim to disadvantage the nonmarital children of servicemen through its exclusion of unmarried fathers, nonmarital children are almost certainly disadvantaged by their exclusion from the benefit.¹⁰⁹ Because a necessary condition for 10 U.S.C. § 701(j) to take effect is the birth of a child, a strong argument must be made that nonmarital children are, on the face of the law, distinguished and discriminated against.¹¹⁰ Rephrasing the policy to read “a member of the armed forces on active duty who fathers a legitimate child shall receive 10 days of leave” would have nearly the same effect as the current one.¹¹¹

The Court has considered this sort of child-centric reframing in the context of illegitimacy discrimination with mixed opinions. In *New Jersey Welfare Rights Organization v. Cahill*, the Court overturned a state welfare policy that provided specific benefits to families “which consist[ed] of a household composed of two adults of the opposite sex ceremonially married to each other who [had] at

107. *See id.*

108. An integral assumption of this argument is the issue of whether an affected plaintiff could even get standing in court to raise this claim. Such an argument would have to be brought on behalf of an affected child—a complication that would likely require his or her mother to bring the claim. Nevertheless, this complication has been overcome in past cases involving the rights of nonmarital children. *See, e.g., Trimble v. Gordon*, 430 U.S. 762, 763-64 (1977) (allowing a mother to bring a lawsuit on behalf of her nonmarital daughter for inheritance that her daughter forfeited under an Illinois intestacy statute that excluded nonmarital children from inheriting from their biological fathers).

109. *See supra* Part I.A.

110. *See* 10 U.S.C. § 701(j).

111. This hypothetical phrasing would actually be *more* inclusive than the current policy because it would allow recently divorced natural fathers to take paternity leave after a divorce if their children were born during wedlock.

least one minor child ... of both, the natural child of one and adopted by the other, or a child adopted by both.”¹¹² There, the Court accepted the petitioner’s argument that “although the challenged classification turn[ed] upon the marital status of the parents as well as upon the parent-child relationship, in practical effect it operate[d] almost invariably to deny benefits to illegitimate children while granting benefits to [legitimate children].”¹¹³

In contrast to this acceptance of a reframing, the Court was not persuaded by a mother’s arguments in *Califano v. Boles* that a Social Security provision granting “mother’s insurance benefits” exclusively to mothers who were married to deceased wage earners discriminated against children on the basis of illegitimacy.¹¹⁴ There, the Court helpfully noted that

[t]he proper classification for purposes of equal protection analysis is not an exact science, but scouting must begin with the statutory classification itself. Only when it is shown that the legislation has a substantial disparate impact on classes defined in a different fashion may analysis continue on the basis of the impact on those classes.¹¹⁵

The Court in *Califano* went on to hold that the legislation did not have enough of an impact on illegitimate children to warrant an investigation into the purposes of the law, citing, in part, the fact that the children of deceased wage earners received separate “child’s insurance benefits” under the program.¹¹⁶ From these cases, it is not entirely clear how favorably a court would view the child-centric framing on which this constitutional challenge to 10 U.S.C. § 701(j)

112. 411 U.S. 619, 619 (1973) (third alteration in original) (quoting N.J. STAT. ANN. § 44:13-3(a)).

113. *Id.* at 619-20.

114. 443 U.S. 282, 285-87 (1979).

115. *Id.* at 293-94.

116. *Id.* at 294.

relies.¹¹⁷ Accordingly, a fuller discussion of illegitimacy discrimination is necessary to assess the overall viability of this claim.

2. An Overview of Illegitimacy: Cases and Theoretical Explanations

Although a handful of cases help to illustrate the Supreme Court's rationalities where ruling on alleged government legitimacy classifications, a complete analysis of the Court's jurisprudence on the topic is not warranted here. Even so, two cases are helpful for introducing the Court's logic. The first is *Levy v. Louisiana*, a 1968 case dealing with the rights of a deceased mother's nonmarital children to recover in a tort action for their mother's wrongful death.¹¹⁸ There, the Court asked "[w]hy should the illegitimate child be denied rights merely because of his birth out of wedlock?"¹¹⁹ The Court found no answer to justify sufficiently denying nonmarital children the right to recover for the death of their mother.¹²⁰

Later, in *Trimble v. Gordon*, the Court seemed to solidify its position on the constitutionality of discriminating against "illegitimate" children. There, the Court stated 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."¹²¹ In *Trimble*, a mother brought suit on behalf of her nonmarital daughter for the inheritance that an Illinois intestacy statute prevented her daughter from receiving.¹²² The statute excluded nonmarital children from inheriting property from their natural fathers.¹²³ The

117. Should a court reject the argument that 10 U.S.C. § 701(j), on its face, disadvantages nonmarital children, a potential plaintiff might attempt to gather evidence to show that the policy has a disparate impact on nonmarital children. If faithfully followed, the policy would exclude 100 percent of children born out of wedlock to military fathers from receiving the benefits of paternity leave. Borrowing logic from the Supreme Court's gender-discrimination jurisprudence, "when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

118. 391 U.S. 68, 69-70 (1968).

119. *Id.* at 71.

120. *See id.*

121. 430 U.S. 762, 769 (1977).

122. *Id.* at 763-65.

123. *Id.* at 764-65.

Trimble Court applied a form of heightened scrutiny that required “more than the mere incantation of a proper state purpose” and a state purpose that was “carefully tuned to alternative considerations.”¹²⁴ As such, the *Trimble* Court rejected the state’s arguments that the intestacy statute was purposed to promote legitimate familial relationships and to reduce the administrative burdens of determining paternity.¹²⁵

The Court in *Trimble* disregarded the state’s purported goal of promoting legitimate familial relationships through the challenged intestacy rule by finding that “illegitimate children can affect neither their parents’ conduct nor their own status.”¹²⁶ Further, the Court rejected the state’s claim that its rule was rooted in efficiency concerns related to determining paternity because the rule failed to strike a “middle ground between the extremes of complete exclusion and case-by-case determination of paternity.”¹²⁷

Despite its strong language in *Trimble*, the Supreme Court has not been entirely consistent with its treatment of laws that classify individuals on the basis of legitimacy. For example, in another case involving intestacy statutes, the Court upheld a New York rule requiring nonmarital children to obtain a filiation order during their natural father’s lifetime in order to take as heirs.¹²⁸ In that case, the Court reasoned that because that law was “substantially related to the important state interests the statute [was] intended to promote,” it did not violate the Constitution.¹²⁹ Considering this seemingly varied treatment of illegitimacy by the Supreme Court, scholars have developed some helpful theories to further explain the Court’s reasoning.

One theory offered to explain the Supreme Court’s illegitimacy holdings is that the Court prefers parenting relationships that mimic traditional marital ones.¹³⁰ Professor Melissa Murray presents this point through an analysis of both illegitimacy and gender-based discrimination cases in her article *What’s So New About the*

124. *Id.* at 769, 772 (quoting *Matthews v. Lucas*, 427 U.S. 495, 513 (1976)).

125. *Id.* at 772-73.

126. *Id.* at 769-70.

127. *Id.* at 770-71.

128. *See Lalli v. Lalli*, 439 U.S. 259, 261-62, 275-76 (1978).

129. *Id.* at 275-76.

130. *See* Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & LAW 387, 390 (2012).

*New Illegitimacy?*¹³¹ Viewing *Levy* and its progeny as “a series of cases that offer limited protection for nonmarital families, if they comport themselves in a particular way,” Murray contends the many illegitimacy cases represent “not necessarily a more liberal era in law’s treatment of illegitimacy, but rather a permutation of the common law tradition in which marriage, the marital family, and marital birth was privileged and prioritized.”¹³² Murray espouses the view that as a part of this “permutation” the Court often examines the strength of relationships between both biological parents and their children, and between the biological parents themselves.¹³³ The more those relationships resemble traditional nuclear marriages, she contends, the more likely the Court is to protect rights in the nonmarital family context.¹³⁴

Another theory proffered to explain the Supreme Court’s underlying rationalities in cases involving illegitimacy discrimination is that of the “Proto-Citizen.”¹³⁵ According to this hypothesis, the Court affords “special judicial solicitude” to certain fundamental rights involving children because they “recognize[] that depriving children of these rights at the beginning of life sets a pattern of marginalization and deprivation that has lasting effects on their ability to develop into full-fledged citizens.”¹³⁶ As such, courts are likely to protect children, not only because they bear little responsibility for their station in life, but also because of the implications that failing to do so might have upon their ability to develop into “full-fledged citizens.”¹³⁷

It is important to assess the role that each of these scholarly explanations of Supreme Court behavior might have on the outcome of the hypothetical case at bar. Considering Professor Murray’s assessment of the Court’s underlying rationality, the nature of the nonmarital family involved in this potential litigation could prove

131. *See generally id.*

132. *Id.* at 412.

133. *Id.* at 410-13.

134. *Id.*

135. *See generally* Catherine E. Smith & Susannah W. Pollvogt, *Children as Pro-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases*, 48 U.C. DAVIS L. REV. 655 (2014) (discussing how depriving children of certain substantive rights can inhibit their development as citizens).

136. *Id.* at 660.

137. *See id.*

to be an extremely important variable. Under Murray's framework,¹³⁸ the Court would respond more sympathetically toward a plaintiff-child whose unmarried parents remained committed to both their child and to one another. Moreover, if the Court is truly motivated by "Proto-Citizen" logic, it might view the long-term benefits that paternity leave has on children as a compelling reason to apply favorable illegitimacy discrimination protection to the plaintiff-child.

3. Applying Intermediate Scrutiny

If a plaintiff succeeded in convincing a court that 10 U.S.C. § 701(j) discriminated against children on the basis of illegitimacy, the policy would then be subject to a form of the intermediate scrutiny framework discussed earlier.¹³⁹ Under such a framework, Congress would need to offer a convincing reason for excluding unmarried fathers from taking paternity leave in the military.¹⁴⁰ Although these rationalities were discussed in greater detail in Part I.C., a brief review is helpful to assess how favorably a court might view Congress's rationalities. Three potential justifications are addressed below: administrative ease, scope reduction, and marital family promotion.

First, Congress may have sought to reduce the administrative burden of determining whether unmarried fathers qualify for leave by simply excluding them from the benefit outright. If the logic in *Trimble* and *Frontiero* offers any guidance on this matter, such an argument seems unlikely to succeed as a justification for the policy.¹⁴¹ Although *Frontiero* dealt with gender discrimination, there the Court noted that its "prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'"¹⁴²

138. See *supra* notes 130-32 and accompanying text.

139. See *supra* notes 85-89 and accompanying text.

140. See *supra* notes 85-89 and accompanying text.

141. See *Trimble v. Gordon*, 430 U.S. 762, 772 (1977); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

142. See *Frontiero*, 411 U.S. at 690 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

Additionally, the Court in *Trimble*, dealing in the context of illegitimacy discrimination, found that the difficulties associated with proving paternity—and the dangers of spurious claims—were not compelling reasons for completely excluding nonmarital children from intestacy benefits.¹⁴³ In the hypothetical case at bar, Congress’s failure to provide any “middle ground between the extremes of complete exclusion and case-by-case determination of paternity”¹⁴⁴ would likely cause a court to view the appropriateness of 10 U.S.C. § 701(j) skeptically. By offering no alternative means for unmarried fathers—and their children—to access the benefits of paternity leave, Congress may have stretched its efficiency argument beyond constitutionally justifiable bounds.

Similar to administrative ease, Congress’s other potential arguments to justify 10 U.S.C. § 701(j) would likely also fail to persuade a court. Although the exclusion of unmarried fathers may have been intended as a measure to cut the cost and scope of a military paternity leave benefit,¹⁴⁵ unmarried fathers only constitute a small fraction of the individuals eligible for the benefit.¹⁴⁶ It seems unlikely that a court would view such a small reduction in program size as an adequate reason for the exclusion of an entire class of protected individuals from the benefit.

Finally, if Congress sought to promote marital families by adopting this policy, not only did it choose a poor means of doing so, but such a rationale would likely violate the principle made clear in *Trimble*: “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.”¹⁴⁷

Admittedly, a challenge to 10 U.S.C. § 701(j) on the grounds that it constitutes illegitimacy discrimination would need to rely on a great deal of luck in order to be successful. Arising in an unfavorable military context, and relying upon creative reframing, the argument is undoubtedly vulnerable to dismissal. Despite these vulnerabilities, an unsuccessful lawsuit could serve to draw attention

143. See *Trimble*, 430 U.S. at 770-76.

144. *Id.* at 770-71.

145. See *supra* Part I.C.1.

146. See OFFICE OF THE DEPUTY ASSISTANT SEC’Y OF DEF., *supra* note 56, at 112.

147. *Trimble*, 430 U.S. at 770 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

to this flawed policy. At its core, the underlying message of such a suit—that nonmarital children deserve equal access to paternal care—is one worth advancing.

III. A PROPOSED ALTERNATIVE

One of the most striking features of the policy codified in 10 U.S.C. § 701(j) is that it is entirely discrete in nature. Other than marriage, unmarried fathers have no alternative avenues through which to prove their eligibility for paternity leave. Considering such a policy's logical shortcomings¹⁴⁸ and corresponding constitutional issues,¹⁴⁹ Congress must consider an alternative plan. Although making all servicemen eligible for paternity leave upon the alleged birth of their natural child seems sufficiently inclusive to rectify the policy's current shortcomings, in light of genuine resource constraints, such a solution may not be a realistic legislative goal. For this reason, Congress should amend 10 U.S.C. § 701(j) to allow unmarried fathers the opportunity to rebut a presumption that they are ineligible for paternity leave. The exact means by which a serviceman might rebut this presumption is discussed in this Part.

A realistic alternative to the military's current paternity leave policy must provide unmarried servicemen with an opportunity to take paternity leave and check that opportunity with a fair and efficient clearing mechanism to limit abuse. This abuse could arise in a variety of ways, but three important concerns are worth noting: fraudulent use, misuse, and overuse. Fraudulent use might occur if an unmarried serviceman takes leave knowing that he is not the natural father of a child, or takes leave under the mistaken impression that he is the natural father. Misuse describes a scenario in which an unmarried father takes paternity leave, but uses the leave entirely for purposes other than interacting with his child. Finally, overuse refers to an obscure scenario in which an unmarried father might be able to take leave more frequently than his married comrades by fathering children with multiple women. Although some mechanisms might be necessary to address these specific

148. *See supra* Part I.C.

149. *See supra* Part II.

concerns, a carefully drafted revision of 10 U.S.C. § 701(j) policy could mitigate many of these issues.

Fraudulent use probably constitutes the most valid concern that Congress might have with allowing unmarried fathers to take paternity leave. The issue is simple: How do we decide who is actually a father, and how do we make that determination efficiently? Although the current answer to this question—using marriage as a proxy for fatherhood—seems to address this concern, less restrictive options exist. For example, one option is to require fathers to sign a legally binding voluntary acknowledgement of paternity. The Department of Defense has already adopted such voluntary acknowledgements as an expedited vehicle for determining the healthcare eligibility of children born out of wedlock to servicemen.¹⁵⁰ This healthcare policy relies on state law “procedure[s] to allow a father to voluntarily acknowledge paternity of a child born out of wedlock” as a means of avoiding more arduous, judicially obtained paternity determinations.¹⁵¹ Although such an acknowledgement requires the acknowledger to assume legal responsibility as a parent, it provides a means by which an unmarried military father can efficiently establish his own paternity. Integrating a similar acknowledgement option into 10 U.S.C. § 701(j) would surely inhibit fraudulent use, while providing committed unmarried fathers an alternative vehicle through which to take paternity leave.

In order to address the issues of misuse and overuse, a revised 10 U.S.C. § 701(j) would likely require no further alteration. This is because each of these perceived abuses remains largely unaddressed under the current policy. To illustrate this point with misuse, compare a hypothetical married military father on paternity leave to an unmarried military father who signed a voluntary acknowledgment in order to take the leave. Under the language of 10 U.S.C. § 701(j), neither man would be legally bound to spend any of that leave time with his newborn. In this situation, a belief that the unmarried father is more likely to misuse his leave than a married father seems dubious at best, and is likely based on stereotypical reasoning.

150. See Memorandum from David S. Chu, Under Sec’y of Def., to Sec’ys of the Military Dep’ts on Determinations of Dependency for Health-Care Benefits for Out-of-Wedlock Children (Jan. 28, 2008), http://www.acf.hhs.gov/sites/default/files/ocse/dcl_08_07a.pdf [https://perma.cc/X4XN-9V2J].

151. *Id.* at Attachment 1.

Because married servicemen are as free to misuse their paternity leave as their unmarried counterparts, adding additional provisions to 10 U.S.C. § 701(j) to prevent unmarried servicemen from misusing their paternity leave seems unnecessary and inequitable.

Finally, there is the lingering concern of overuse. Although relatively obscure, this worry arises from a conceivable asymmetry between married and unmarried fathers. Disregarding some conceivable exceptions,¹⁵² under 10 U.S.C. § 701(j), a married serviceman will only become eligible for paternity leave, at most, approximately once every nine months. The same would not be true for unmarried servicemen under a revised policy. A particularly vigorous soldier could *conceivably* father children by different women on a far more compressed timeline. Disregarding the financial deterrents that would likely accompany that soldier's frequent acknowledgment of paternity, such a concern could be entirely neutralized by introducing a frequency requirement to 10 U.S.C. § 701(j). Such an amendment could simply limit servicemen eligibility for paternity leave to once every eight months. Considering the relative obscurity of the threat posed by paternity leave overuse, and the adverse impact that such a policy could have on military families who have premature babies,¹⁵³ this Note does not advocate for a frequency limitation as a worthwhile addition to 10 U.S.C. § 701(j).

Balancing the need for expanded military paternity leave with these concerns of efficiency and abuse, a suitable revision of 10 U.S.C. § 701(j)(1) could read as follows:

Under regulations prescribed by the Secretary concerned, a member of the armed forces on active duty whose spouse gives birth to a child, or an unmarried member of the armed forces on active duty who signs a legally binding voluntary acknowledgment of paternity for his child before the child's birth or within

152. For an exception, consider the case of a fast remarriage. If a married serviceman divorced his wife shortly after taking paternity leave for the birth of their child, and then remarried a different woman whom he impregnated during his previous marriage, under the current rule, he would be eligible to take paternity leave multiple times within a nine-month span.

153. Another problem with a frequency requirement is that it is incongruous with the military's adoptive leave policy. Under the policy set forth in 10 U.S.C. § 701(i), no frequency limit is set on the number of children a servicemember may adopt.

three months thereafter, shall receive fourteen days of leave to be used in connection with the birth of the child.

Undoubtedly, such a revision would send a stronger “message to servicemembers about the respect their Services have for their personal lives,”¹⁵⁴ and the important role of all fathers in the lives of their children.

CONCLUSION

Although ten, or even the proposed fourteen, days of military paternity leave might seem insignificant in the greater scheme of fatherhood, 10 U.S.C. § 701(j) should be viewed as a law that perpetuates two troubling assumptions: that unmarried fathers are inherently less deserving parents than their married counterparts, and that nonmarital children are less deserving of paternal care than their marital peers. Through an assessment of its legislative history, logical flaws, potential constitutional shortcomings, and acceptable modifications, this Note has advocated for a revision of 10 U.S.C. § 701(j) that affords all military fathers the opportunity to take paternity leave. Every child born to a military father, regardless of the household in to which he or she is born, deserves an opportunity to receive early paternal care. Through a revision of 10 U.S.C. § 701 (j), Congress now has a great opportunity to take a meaningful step towards eroding longstanding assumptions about the role of unmarried fathers in American parenthood.

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154. *Hearing Before Comm. on Armed Servs., supra* note 29, pt. 6, at 148 (statement of Sen. C. McCaskill).

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