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A Return to Filius Nullius

Jay R. Petterson

NOTES

A RETURN TO FILIUS NULLIUS

INTRODUCTION

The subject matter of this note concerns the rights of illegitimates in relation to paternal intestate inheritance. A growing number of commentators advocate complete equality in intestate succession between the illegitimate and his biologically legitimate sibling.[1] These proponants argue that the judicial recognition of illegitimates by the Supreme Court in *Levy v. Louisiana* (1968)[2] should extend to paternal inheritance even though the decision dealt with the right of such children to recover for the death of their mother, equally with legitimate children, under a Louisiana wrongful death statute. The Court declared:

> Illegitimate children are not 'non-persons.' They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[3]

The Supreme Court in *Labine v. Vincent* (1971)[4] did not, however, extend the principles of equality in *Levy* to intestate inheritance rights, refusing to discuss the subject in an equal protection context:

> The social difference between a wife and a concubine is analogous to the difference between a legitimate and an illigimate child. *One set of relationships is socially sanctioned, legally recognized, and gives rise to various rights and du-*

1. Note, *Uniform Probate Code—Illegitimacy*, 69 MICH. L. REV. 112, 119 (1970); Note, *Inheritance By, From or Through Illegitimates*, 84 U. PA. L. REV. 531, 540-541 (1936); New York State Joint Legislative Committee on Matrimonial Laws, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 90 (1958); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decision on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 362 (1969); *Report of the Committee on the Law of Succession in Relation to Illegitimate Persons*, 30 MOD. L. REV. 532, 555 (1967); Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 217, 228-229 (1939).
2. Levy v. La., 391 U.S. 68 (1968).
3. *Id.* at 70.
4. Labine v. Vincent, 401 U.S. 532 (1971).

> *ties. The other set of relationships is illicit and beyond recognition of the law.*[5] (Emphasis added).

The purpose of this note is to examine the *Levy-Labine* dichotomy in view of an Equal Protection argument. This analysis will include a discussion of the cases which have accepted or rejected the contention that *Levy* extends to other factual situations, including inheritance, beyond wrongful death recovery. It is also pertinent to discuss the purposes advanced by the states in support of discriminatory statutes. Proceding this, an historical foundation is in order.

HISTORICAL TREATMENT OF ILLEGITIMATES

> Discrimination. . . is rooted so deeply in our culture that legislative enactments are generally silent as to purpose.[6]

Under both French civil law and English common law the illegitimate suffered greatly under two basic premises. First, it was believed that the social, moral stigma of illicit sex attached to the child:

> The rise of Christian morality with its horror of sexual acts falling outside the monogamous marriage. . . The fact that it is the child who suffers because of the varying strength of disapproval put upon his parents' acts is of course nothing new in the history of moral ideas. Whatever the basis of the concept of vicarious expiation,—the Greek one of divine retribution, the Hebrew one of an entail of punishment from generation to generation, or the primitive concept of sin as a contagious matter which may be transmitted from parent to child—it certainly became a well established one in Christian morality.[7]

Secondly, the concept of the family as a state institution was foreign to illegitimates in that such children were seen as a deterrent to family unity.[8] Domat, the French jurist, from whom the Louisiana

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5. *Id.* at 538.

6. Krause, *Equal Protection For The Illegitimate,* 65 MICH. L. REV. 477, 489 (1967).

7. Robbins & Deak, *The Familial Property Rights of Illegitimate Children: A Comparative Study,* 30 COLUM. L. REV. 308, 312 (1930). *But see generally,* Davis, *Illegitimacy and the Social Structure,* 45 AM. J. SOC. 223 (1939). "As far back as the Middle Ages there were men (theologians among them) who argued that all offspring, being God-given, are by nature neither legitimate nor illgitimate, and that it is irrational to punish innocent children for the sins of their parents."

8. "An integral trait of the civil law system is a clear and fundamental recognition of the family as a basic unit of society. The importance of this principle is particularly seen in the laws of successions, donations and community property." So speaks Chief Justice Fournut of the Louisiana Supreme Court in DAGGET, MATERIALS ON SUCCESSIONS (Foreward) (1967) as quoted in Comment, *The Status of Illegitimates in Louisiana,* 16 LOYOLA L. REV. 87, 90 n.23 (1970).

Code adopted its distinction between illegitimate and legitimate children,[9] once explained the 18th century civil law position as follows:

> Marriage being the only lawful way appointed for the propagation of mankind it is but just to distinguish the condition of bastards from that of children lawfully begotten.[10]

This language parallels the distinction made in *Labine*.

Under these concepts the child became a child of no-one, *filius nullius*, and without heirs or family, had no rights of inheritance or support. The concept of *filius nullius* was pursued in common law, as in civil law, under the auspices of family unity and marriage.[11] Blackstone, as late as 1840, described the function of family and marriage in these terms:

> [T] rule of descent to English land is that the heir must be born after actual marriage of its mother and father. . .

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9. The concept that illegitimate children constituted an attack on the family unit was drafted into the LOUISIANA CODE (1808) and (1825) and was expressed as follows in the LOUISIANA CODE (1870):

> Illegitimate children, generally speaking, belong to no family and have no relations, accordingly they are not submitted to paternal authority, even when they have been legally acknowledged. LA. CIVIL CODE art. 238 (1870).

As to inheritance rights the Louisiana provision promotes the exclusionary spirit of earlier codes.

> Bastards, adulterous or incestuous children shall not enjoy the right of inheriting the estates of their natural fathers or mothers, in any of the cases above mentioned, the law allowing them nothing more than a mere alimony. LA. CIVIL CODE art. 920 (1952).

The following observations as to the position of Louisiana law upon family life have been made in Tucker, *Sources of Louisiana's Law of Persons, Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 264 (1970):

> The law of persons represents something of an intrusion by the public law into the domain of the private. It is nexus of public order and private relationships: the most personal aspect of public law, the least individual of private law. As reflective of both realms, it is usually the most characteristic feature of any legal system, and as the least rational area of civil regulation—held together by the silent force of custom and presupposition—it is also the least receptive to innovation.

H. Maine has noted "[T]he movement of the progressive societies has been uniform in one respect. . . . The Individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . [T]he change has not been subject to reaction or recoil, and apparent retardation will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source." H. MAINE, ANCIENT LAW 168-169 (14th ed. 1891) as quoted by Tucker, 264.

10. Domat cited *Deuternonomy* in a footnote to illegitimacy as authority for the quote. 1 DOMAT, PUB. BK. 2 as quoted in Tucker, *Sources of Louisiana's Law of Person, Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 264, 270 (1970).

11. 1 BLACKSTONE, COMMENTARIES 446-460 (Lewis ed. 1897); Note, *Equal Protection and How to Enjoy It*, 4 GA. L. J. 383-385 (1970); Note, *Legitimacy: The Liberal Trend in California*, 19 HASTINGS L. J. 232 (1967).

"The common law was historically more austere than the continental code with regard to inheritance by illegitimates. While at common law an illegitimate was characterized *nullius filius* 'the son of no one,' and could not inherit, the civil law had a limited capacity to inherit from his mother or father provided that he had been duly acknowledged as a natural child." Recent Decisions, *Inheritance by Illegitimates*, 21 CASE W. 292, 295 (1970).

> this is a rule of positive inflexible nature, applying to the inherent in the land itself. . .[12]
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> And the reason of our English Law is surely much superior to that of the (French) . . . , (t)he main end and design of marriage therefore, being to ascertain and fix upon some certain person, to whom the care, the protection, and maintenance, and the education of the children should belong.[13]

It is pertinent to note that illegitimates gained complete equality as to inheritance rights in France under the Declaration of 1793, when the French Revolutionaries declared that "all men are equal by nature, and *before the law*,"[14] a principle incorporated into the 14th Amendment.[15] This lack of discrimination between the various categories of children was believed to undermine the institution of marriage, and the old concept of *filius nullius* reappeared in 1803,[16] and was adopted into the *Louisiana Code* of 1808.[17]

Likewise, such children were recognized in England, when the Poor Laws of Elizabeth I in 1576[18] gave the illegitimate a right of support from offending parents. Economic conditions, not libertarian ideals, forced this recognition to relieve the pressures upon the religious foundations which cared for these children.[19] However, inheritance rights have never been given to illegitimates on this basis in England or in the United States.

The harsh Common Law Doctrine of *filius nullius* was adopted into every United States jurisdiction except Connecticut[20] to the extent that no rights of inheritance were allowed from either parent. It became a rule of construction that *prima facie* the word "children" meant lawful children only and that the statutes governing intestacy

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12. 1 BLACKSTONE, COMMENTARIES 454-455 (Lewis ed. 1897).
13. *Id.*
14. French Declaration of 1793.
15. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.
16. Comment, *The Status of Illegitimates in Louisiana,* 16 LOYOLA L. REV. 87, 89, 90 (1968).
17. LA. CIVIL CODE § 1.1.1-2 (1808).
18. 18 Eliz. ch. 3 (1576).

> Concerning bastards begotten and born of lawful matrimony, (an offense against God's law and man's law) the same bastard being now left to be kept at the charges of the parish where they be born to the great burden of the same parish, and in defrauding of the belief of the impotent and aged true poor of the same parish, and to the evil example and encouragement of the lewd life: it is ordained and enacted by the authority aforesaid that two justices of the peace . . . shall and may by their discretion take order, as well as for the punishment of the mother and reputed father of such bastard child as also *for the better relief of every such parish* in part or in all; and shall and may likewise by such discretion take order for the keeping of every such bastard child, by charging such mother or reputed father with the payment of money weekly or other sustenation for the relief of such child, in such wise as they think meet and convenient. . . .

19. Stone, *Illegitimacy and Claims to Money and Other Property: A Comparative Survey,* 15 INT'L. & COMP. L. Q. 505, 507 (1966).
20. Heath & White, 5 Conn. 228 (1824), *but see* Todd v. Weber, 95 N.Y. 181, 47 Am. Rep. 20 (1884).

referred only to lawful children and did not abrogate Common Law.[21] However, as to the mother, case law eventually established rights against her estate to the illegitimate.[22] Following New York's lead in 1844,[23] the states eventually allowed some form of inheritance by statute from the mother,[24] although Louisiana continues to limit this right, today.[25]

The legislative treatment of intestate succession to children born out of wedlock depicts a hodge-podge of positions concerning paternal intestate inheritance by illegitimates.[26] In thirteen jurisdictions the statutes are silent as to illegitimate paternal inheritance rights, probably due to the failure of the law to recognize the relationship between an illegitimate and his father.[27] In some cases, where statutes are silent, the courts of these jurisdictions have granted some inheritance rights even though the parents did not marry, thereby abrogating judicially, the common law.[28] In most cases, however, the courts have not allowed inheritance rights where the statutes did not expressly alter the common law.[29] The latter position is consistent with the maxim expressed in *Reynolds v. Hitchcock* that, "legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of common law and should be strictly construed."[30] Pursuant to legislative intent, in ten jurisdictions, it appears that such children have no intestate rights where the parents never marry.

In other states, though a child may be legitimated by the father's acknowledgement or a paternity suit, the statute will nevertheless deny inheritance rights if this is the sole means of legitimation. This view would imply that marriage must accompany such acknowledg-

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21. Blacklaws v. Milne, 82 Ill. 506 (1876). *See generally* Note, *Inheritance By, From and Through Illegitimates,* 84 U. PA. L. REV. 531 (1936); New York State Joint Legislative Committee on Matrimonial Laws, *Illegitimacy,* 26 BROOKLYN L. REV. 45, 47 (1958).

22. Estate of Magee, 63 Cal. 414 (1883), Stoltz v. Doering, 112 Ill. 234 (1885).

23. N.Y. LAWS ch. 547 (1855).

24. New York Committee, *supra* note 21, at 76-79. Such statutes usually follow this language. "When the mother of a bastard dies, his real estate shall descend and her personal estate be distributed in equal share to her legitimate and illegitimate children and their issue." N.H. STAT. ANN. § 561.5 (1960).

25. Recent Decisions, *Inheritance by Illegitimates,* 21 CASE W. 292, 296 (1970); LA. CIVIL CODE ANN. arts. 1484-1485 (1952).

26. Table I, Appendix.

27. *E.g.,* D.C. CODE ANN. § 19-316 (1961) states that "the illegitimate children of a *female* and the issue of illegitimate children *of a female* are capable to take real and personal property by inheritance from their mother."

28. Michigan case law has allowed the illegitimate inheritance rights if the father acknowledges the child by filing, in the appropriate office, an acknowledgment signed by two witnesses. This really does not give such children much of a right of inheritance. Ghosson v. Stewart's Estate, 319 Mich. 204, 29 N.W.2d 282 (1947), *In re* Harper's Estate, 272 Mich. 476, 262 N.W. 289 (1935).

29. *E.g.,* Garland v. Harrison, 35 Va. (8 Leigh) 368 (1837); Rodrigues v. Rodrigues, 286 Mass. 77, 190 N.E. 20 (1934); Walker v. Walker, 274 F.2d 425 (S.C. 1960); Scalzi v. Folsom, 156 F. Supp. 838 (R.I. 1957); Jackson v. Prudential Ins. Co., 106 N.J. Super. 61, 254 A.2d 141 (1969).

30. Reynolds v. Hitchcock, 52 N.H. 340, 56 A. 745, 746 (1903) citing Cope v. Cope, 137 U.S. 682 (1891).

ment.[31] It may be that these statutes are hold-overs of Blackstone's concept of the function of marriage as a creation of legal rights. Many jurisdictions have granted an even greater liberation from the common law by allowing children born out of wedlock to inherit from the father who has acknowledged such children to be his own offspring.[32] However, this greater liberality is conditioned upon the statutory preference concerning persons who may take in intestacy before the acknowledged illegitimate. For example, such children in Louisiana take only to the exclusion of the escheat of the state.[33] Furthermore, states have placed a myriad of conditions upon these acknowledgments. In Montana, the father must in writing acknowledge a child to be his own and he must, in addition, sign the acknowledgment in the presence of a witness to establish heirship.[34] In Nevada, the witness must also sign the declaration.[35] In other states, statutes have left it to the interpretation of the courts to ascertain what type of acknowledgment is sufficient.[36]

At least ten states allow the child some means to prove paternity for inheritance purposes through the courts.[37] On one hand are those states that stipulate that the father must bring such an action,[38] although this is actually a less than likely event, assuming most fathers would not actively initiate court proceedings to proclaim his "guilt" to the world. On the other hand, many statutes take this discretion out of the father's hands. In Vermont, only the mother can bring suit,[39] whereas in some other states interested public welfare authorities may bring the action.[40]

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31. DEL. CODE ANN. tit. 13, § 1301 (1953) "A child conceived out of wedlock shall be legitimate . . . upon acknowledgment of the paternity made in writing by the parents, if both are living or by the father if the mother is not living and filed in the Prothonotary's office of any county of the state."

§ 1304 "Any person legitimated solely by an acknowledgment of paternity in accordance with § 1301 of this title shall not inherit *from the father* under the inheritance laws of this state." (emphasis added)

32. Table I, Appendix.

33. LA. CIVIL CODE ANN. arts. 1482-1486 (1952).

34. MONT. REV. CODE ANN. § 91-404 (1947).

35. NEV. REV. STAT. § 134.170 (1967).

36. UTAH CODE ANN. § 74-4-10 (1953). "Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child, . . . and inherits his estate . . . in the same manner as if he had been born in lawful wedlock." However, Maine insists that such declarations be made to a "justice of the peace or notary public." ME. STAT. ANN. ch. 18, § 1003 (1964).

37. *E.g.*, IOWA STAT. ANN. § 633-222 (1964). "Unless he has been adopted, an illegitimate child shall inherit from his natural father when the paternity is proven during the father's lifetime. . . ." *See also* IND. CODE ANN. § 6-207 (1954).

38. *E.g.*, GA. CODE ANN. § 113-904 (1959) "Bastards have no inheritable blood, except that given to them by express law." § 74-103 (1959) "A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence. . . ." *See also* N.C. GEN. STAT. § 49-10 (1960).

39. VT. STAT. ANN. tit. 14, § 553, tit. 15, § 331 (Supp. 1970).

40. WIS. STAT. ANN. § 52.24 (1961). *See generally* Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Illegitimacy*, 44 TEX. L. REV. 829, 849 (1966).

The Tennessee statute exemplifies most statutes of this nature in that it causes suit to be brought in behalf of the child only if state coffers are threatened. The petition is to be brought by "[T]he mother, or her personal representative, or, *if the child is likely to become a public charge* by the state department of public welfare or by any

Only three states have expressed the "equality in the law" ideal of the French Revolution to make illegitimates expressly equal to legitimates — North Dakota,[41] Oregon[42] and Arizona.[43] North Dakota advances the concept as follows:

> Every child is hereby declared to be the legitimate child of his natural parents, and entitled to support and education, to the same extent as if he had been born in lawful wedlock. He shall inherit from his natural parents, and from their kindred heir, lineal and collateral.[44]

EQUAL PROTECTION

To fully explore the equal protection argument it is necessary to place the discussion in the context of the contradictory positions referred to in the introduction. This will entail an examination of *Levy*, which extended the equal protection clause in a broad sense to illegitimates, as well as *Labine*, which failed to discuss equal protection on the narrow issue of paternal intestate inheritance. The *Levy* language was unclear in many respects and was a source of great confusion to state courts subsequently analyzing the decision.[45] Further, it is difficult to determine whether *Levy* is to be restricted merely to the narrow facts of that case. Even more perplexing is an attempt to discover what equal protection test *Levy* utilized in striking down Louisiana's Wrongful Death statute as discriminatory. This lack of clarity, as well as the subsequent confusion in applying that case, left the Court in *Labine* a basis to avoid the *Levy* declaration that illegitimates are entitled to equal protection. To facilitate the following analysis of equal protection, *Levy* and *Labine* will serve as the foundation. An overview of the varying state court opinions will follow to present a broad picture of the equal protection argument problems and alternatives left open by the *Levy* decision.

1. The *Levy-Labine* Dichotomy

Judicially, courts have become more cognizant of the child and have liberally construed very strict statutes.[46] Federal legislation

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other person. . . ." (emphasis added). TENN. CODE ANN. § 36-224 (Supp. 1970). *See* Young v. Willis, 58 Tenn. App. 678, 436 S.W.2d 445 (1968).

41. N.D. CENT. CODE § 56-01-05 (Supp. 1969).
42. ORE. REV. STAT. § 111.231 (1969).
43. ARIZ. REV. STAT. ANN. § 14-206 (1956).
44. N.D. CENT. CODE § 56-01-05 (Supp. 1969).
45. Krause, *The Bastard Finds His Father,* 3 FAM. L. Q., 100, 104 (1969).
46. Judicially the illegitimate has likewise gained some degree of recognition as some courts have followed this statement of Morrow v. Morrow, 299 Ill. 135, 124 N.E. 386, 387 (1919):

> While . . . the statute conferring rights upon illegitimates is in derogation of the common law, still the tendency of the legislature in this state . . .

likewise has become increasingly aware of the illegitimate in providing for such children in social legislation.[47] Following this general trend of lifting the rigors of the common law from the illegitimate, the United States Supreme Court in *Levy v. Louisiana* recognized that illegitimates are persons within the meaning of the Equal Protection Clause of the 14th Amendment.[48]

In *Levy*, a suit was brought by the administratrix of the mother of five illegitimates claiming damages as a result of the death of their mother under a Louisiana wrongful death statute. A Louisiana District Court dismissed the suit, and a Court of Appeal affirmed, holding that "child" pursuant to the statute means "legitimate child," thereby denying recovery in the name of promotion of the "morals and general welfare" through discouraging the bringing of children into the world out of wedlock.[49] The Supreme Court of Louisiana concurred with the lower courts reasoning in denying certiorari.[50]

The United States Supreme Court held the Louisiana statute to be unconstitutional as a violation of the Equal Protection Clause, declaring, "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."[51] Though, as a result of *Levy*, it appeared that the Equal Protection Clause would become the basis upon which to rule other discriminations against illegitimates unconstitutional, the lack of clarity and completeness in the *Levy* opinion created a deficiency which prompted the United States Supreme Court to reconsider the question of paternal inheritance rights in *Labine v. Vincent*.[52]

On March 15, 1962, Rita Vincent was born to Lou Bertha Labine and Ezra Vincent, who jointly executed a form, acknowledging that Ezra Vincent was the "natural father" of Rita Vincent.[53] Ezra died intestate on September 16, 1968, leaving substantial property and the guardian of Rita petitioned in state court for a declaration naming Rita as sole heir of Ezra. Relatives of the deceased intestate challenged on the basis that collateral relations of an intestate under Louisiana law take to the exclusion of illegitimate children.

> shows an intention . . . to remove the rigors of common law and to establish a rule of descent to illegitimates consonant with the finer sense of justice and right, and not to visit the sins of the parents upon the unoffending offspring.

See generally Note, *Legitimation: The Liberal Judicial Trend in California*, 19 HASTINGS L. J. 232 (1967).

47. *E.g.*, Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1963); KRAUSE, ILLEGITIMACY, LAW AND SOCIAL POLICY 37-40 (1971).
48. Levy v. La., 391 U.S. 68, 70 (1968).
49. Levy v. La., 192 So.2d 193, 195 (La. App. 1967).
50. Levy v. La., 250 La. 25, 193 So.2d 530 (1969).
51. Levy v. La., 391 U.S. 68, 72 (1968).
52. Labine v. Vincent, 401 U.S. 532 (1971).
53. The father fulfilled the requirements of Louisiana law. LA. CIV. CODE ANN. arts. 202-210 (1952).

The Louisiana Code defines "acknowledged children" relating to paternal inheritance rights as follows: "Illegitimate children who have been acknowledged by their father, are called natural children . . . ."[54] However, the code further states that such "children, though duly acknowledged, cannot claim the rights of legitimate children,"[55] unless, "their natural father, who has duly acknowledged them, . . . has left no descendants, nor ascendants, nor collateral relations, nor surviving wife . . . ."[56] Following this statutory language, the state court dismissed the guardian's petition.[57]

An appeal to the United States Supreme Court based upon the Equal Protection and Due Process Clauses of the United States Constitution proved futile, and the Court affirmed the decision below.[58] Mr. Justice Black, speaking for the majority, rejected petitioner's claim that *Levy* was controlling, and stated "*Levy* did not say and cannot fairly be read to say that a state can never treat an illegitimate child differently from legitimate offspring."[59]

The Court found no equal protection problem and did not discuss the case in that light. Rather, it was conceded that, "[t]he power . . . to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States . . . to the legislature of that state."[60] The majority could find no discrimination and distinguished the legitimate child from the illegitimate—the former being "socially sanctioned and legally recognized," and the latter as "illicit and beyond recognition of the law."[61]

2. Is there an Equal Protection problem?

Labine refused to discuss the Louisiana statute in terms of equal protection. Mr. Justice Brennan, dissenting, noted:

> For reasons not articulated, the Court refuses to consider in this case whether there is any reason at all, or any basis whatever, for the difference in treatment that Louisiana ac-

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54. LA. CIV. CODE ANN. art. 202 (1952). It is interesting to note that the civil code recognizes three classifications of children for inheritance purposes: legitimate, natural and bastard:

"[T]hose who have not been acknowledged by their father . . . are contra distinguished by the appellation of bastards." LA. CIV. CODE ANN. art. 202 (1952). "Natural-children [acknowledged illegitimates] . . . can not receive from their natural parents, by donations *inter vivos* or *Mortis Causa* . . . whenever the father *or* the mother who has thus disposed in their favor, leaves legitimate children or descendants." LA. CIV. CODE ANN. art. 1482 (1952).

55. LA. CIV. CODE ANN. art. 206 (1952).

56. LA. CIV. CODE ANN. art. 919 (1952).

57. The Louisiana Court of Appeals *affirmed,* Labine v. Vincent, 229 So.2d 449 (La. App. 1969), and the Supreme Court of Louisiana *denied certiori,* Labine v. Vincent, 255 La. 480, 231 So.2d 395 (1970).

58. Labine v. Vincent, 401 U.S. 532 (1971).

59. *Id.* at 536.

60. *Id.* at 538.

61. *Id.*

cords to publicly acknowledged illegitimates and to legitimate children.[62]

However, the court seemingly asserted two grounds for its refusal to discuss the problem in such a light. The first ground stated was that the equal protection argument is inapplicable to the states, on the basis that intestacy and the distribution of property is within the exclusive area of state action.[63]

This served as the basis for Brennan's commentary that such reasoning is contrary to "104 years of constitutional adjudication" in that, "it is precisely state action which is subjected by the 14th Amendment to its restraints."[64] It is difficult to distinguish entrance by the Court into the "traditional state area" of wrongful death recovery in *Levy* from judicial intrusion into intestacy on the basis of equal protection. Before *Levy*, the former area was within the "special" bounds of legislation reserved to the states and purely statutory in origin.[65]

The second ground for not discussing the equal protection argument was the assertion that such children are as different as concubines and prostitutes are to a "chaste wife", a purely social distinction. Although there may be some justification for recognizing distinctions between a concubine and a "chaste wife" to discourage acts over which the former has control, why should legal disabilities from this illicit sex attach to the child? It must be stressed that the key to the child's argument is his lack of control over his destiny, and in this respect the illegitimate is akin to the various groups who have felt the racial and religious prejudices through the ages.[66]

3. Which Equal Protection test is applicable?

The United States Supreme Court in the course of litigation concerning equal protection has developed two distinct tests[67]—the ec-

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62. *Id.* at 548.

63. *Id.* at 538.

64. *Id.* at 549.

65. *E.g.*, W. PROSSER, LAW OF TORTS §§ 120-121 (3rd ed. 1964); S. SPEISER, RECOVERY FOR THE WRONGFUL DEATH § 1:1-1:10 (1966).

"The law of successions, even more than wrongful death and tortious injury statutes has been a jealously protected province of state control, since the rules of succession are so intimately linked to the orderly descent and redistribution of property and thereby constitute a cornerstone in the state tax structure . . . . Regardless of the amount of discretion allowed, state statutes of any sort may not interfere with the individual rights and freedoms which are guaranteed to every citizen by the Constitution. Therefore, even the laws of succession are susceptible of close scrutiny in light of such standards as equal protection." Note, *Discrimination Based Upon Illegitimacy as a Denial of Equal Protection*, 43 TUL. L. REV. 383, 391 (1968).

66. Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 353 (1919) Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1067, 1173 (1969).

67. Note, *supra* note 66, at 1077-1131.

onomic interest test and the fundamental right[68]—suspect classification test.[69] Cases dealing with businesses[70] and public utilities[71] have usually applied the former, namely, that the statute be reasonably related to its purposes in regulating the rights of those similarly situated.[72] This test requires little active review of the purposes of the statute or the statute itself as applied to the purposes.[73]

The second test developed in case law requires a more searching inquiry by the courts into the statutory purpose. As such, the burden of proof that the statute is reasonable in relation to its purposes is shifted to the states,[74] and "the state must select the method of achieving its goal which least prejudices those within the protective group."[75] Therefore, the statutes must be narrowly drawn to meet the requirements of necessity and precision.[76] As to suspect classifications[77] it has been noted that:

> Experience in America teaches that a racial classification will usually be perceived as a stigma of inferiority and a badge of opprobrium. The same may be said of many national, ethnic, and religious classifications. In this sense, a racial or national minority differs from an economic minority. In this sense, too, race, lineage, and ethnic origin differ from other congenital and unalterable characteristics such as sex or certain physical capabilities. Indeed, the question of whether opprobrium readily attaches to a particular classificiation may be the touch stone to predicting what other con-

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68. Tussman v. tenBroeck, *supra* note 66, at 344-349, 367-373; Note, *supra* note 66, at 1077-1087; Krause, *Equal Protection For the Illegitimate,* 65 MICH. L. REV. 477, 485-489 (1967).

69. *See generally* Tussman & tenBroeck, *supra* note 66, at 353-361; Note, *supra* note 66, at 1087-1131; Note, *Uniform Probate Code—Illegitimacy.* 69 MICH. L. REV. 112, 113-114 (1970).

70. Tigner v. Texas, 310 U.S. 141 (1940); Central Lumber Co. v. S. Dak., 226 U.S. 157 (1912).

71. Davidson v. New Orleans, 96 U.S. 97, 105 (1887); Missouri, Kansas, and Texas Railway Co. v. May, 194 U.S. 267 (1903).

72. Two Guys From Harrison-Allentown, Inc. v. McKinley, 366 U.S. 420 (1961); Note, *supra* note 66, at 1078.

73. The economic test is a growth from a very old doctrine that any classification must be reasonable. Hollen v. James, 11 Mass. 396 (1814); Vanyart v. Waddell, 8 Yerger 260, 270 (Tenn. 1829). This was the early restriction upon "[T]he essence of classification . . . burdens different from those resting upon the general public . . . . Indeed, the very idea of classification is inequality . . . ." Atchison, Topeka, and S.F. R.R. v. Mathews, 174 U.S. 96, 106 (1899). Naturally, great deference was paid to legislative judgment in dealing with economics and business. "Reasonableness" became quite broad since such regulation was usually technical and egalitarian principles seemed to be left undisturbed when impersonal, inanimate, or inhuman organizations were subject to classification-oriented restrictions.

74. "A suspect classification must bear a higher degree of relevance to purpose than other classifications . . . . For example, the ordinary presumption of validity is reversed when a suspect classification is made." Note, *supra* note 66, at 1101; *See also* Fuji v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952); Loving v. Va., 388 U.S. 1 (1967).

75. Gray & Rudovsky, *The Court Acknowledges the Illegitimate,* 118 U. PA. L. REV. 1, 11 (1969).

76. Shelton v. Tucker, 364 U.S. 479 (1960); Cantwell v. Conn., 310 U.S. 296 (1940).

77. Kotch v. River Pilot Commr., 350 U.S. 552, 565 (1947); Korematsu v. United States, 323 U.S. 214, 216 (1944); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Fuji v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952); Muir v. La. Park Theatrical Ass'n., 347 U.S. 971 (1954); *vacating mem.* 202 F.2d 275 (6th Cir. 1953); Johnson v. Va., 373 U.S. 61 (1963).

> genital and unalterable traits will be viewed as suspect in the future. *Illegitimacy of birth, for example, would be a likely candidate under this formulation. . . .*[78] (Emphasis added).

These minorities seem to possess the same hardship—lack of control over their status—such as race[79] and ancestry.[80]

The court has extended this searching inquiry to discrimination involving fundamental rights.[81] Among rights which have apparently come within this definition are rights with respect to criminal procedure,[82] voting,[83] procreation,[84] education,[85] and travel[86]—personal interests. Apparently, the main reason for providing greater judicial protection here is that such rights are considered much more important.[87]

In *Levy*, the court seemed to base its decision in part upon the intimate familial relationship between a child and his mother prompting one commentator to note that this familial right must be classified among the basic civil rights we all enjoy.[88] Others have urged that the child has a right to the same relationship with his father,[89] a concept foreign to a society which seems to block this relationship in most respects. It would certainly seem that there is

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78. Note, *Development in the Law: Equal Protection*, 82 HARV. L. REV. 1067, 1127 (1969). The Supreme Court applied this reasoning in Oyama v. Calif., 332 U.S. 631 (1948) stating that a statute which barred Japanese citizens from holding certain land in the United States, did not justify discrimination against his son merely because of the status of his birth; therefore, the petitioner was allowed to keep the land and it did not escheat to the state.

The Oyama case is similar to the circumstances in *Labine* since the petitioner's main objection in that case was the burden of proof imposed upon him. For most children, the court found that where a parent pays for a conveyance to his child there is a presumption that a gift was intended, and there is no presumption that the child takes the land for the benefit of his parent. Thus, the burden of proving that there was no de facto gift falls on those challenging the gift's validity. "Fred Oyama, on the other hand, faced at the outset the necessity of overcoming a statutory presumption that conveyances financed by his father and recorded in Fred's name were not gifts at all. . . . Fred was presumed to hold title for the benefit of his parent." Oyama v. Calif., 332 U.S. 631, 642 (1948). More important to the issue of equal protection, no other case in which the penalty for a guardian's derelictions had fallen on anyone but the guardian was in existence, the whole idea of guardianship being to protect the ward during his incapacity. "In Fred Oyama's case, however, the father's deeds were visited on the son; the ward became the guarantor of his guardian's conduct. The cumulative effect, we believe, was clearly to discriminate against Fred Oyama. He was saddled with an onerous burden of proof which need not be borne by California children generally." Oyama v. Calif., 332 U.S. 631, 644 (1948).

79. Brown v. Board of Educ., 374 U.S. 483 (1954); Loving v. Va., 388 U.S. 1 (1969).

80. Korematsu v. United States, 323 U.S. 214, 216 (1944); Takahashi v. Fish and Game Comm'r., 334 U.S. 410 (1948).

81. Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Griffin v. Ill., 351 U.S. 12, 18 (1956); Douglas v. Calif., 372 U.S. 353 (1963); Shapiro v. Thompson, 394 U.S. 618 (1969).

82. Griffin v. Ill., 351 U.S. 12 (1956).

83. Reynolds v. Sims, 377 U.S. 533 (1964).

84. Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

85. Brown v. Board of Educ., 374 U.S. 483 (1954).

86. Shapiro v. Thompson, 394 U.S. 618 (1969).

87. Note, *supra* note 66, at 1127-1129.

88. Comment, *The Status of Illegitimates in Louisiana*, 16 LOYOLA L. REV. 87, 109 (1969).

89. Note, *Discrimination Based on Illegitimacy as a Denial of Equal Protection*, 43 TUL. L. REV. 383 (1969).

sound argument for classifying the father-child relationship within the sphere of fundamental rights, especially with today's moral and social changes.[90]

4. The *Levy* Confusion: Analysis of Subsequent Cases

Did the court in *Levy* feel that classifications involving bastards are suspect, thereby, throwing the burden of proof upon the state to justify their statute? Note the following language:

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted upon the mother. . . . [T]hey were hers in the *biological* and spiritual sense. . . .[91] (Emphasis added).

Another basis which the court could have relied upon is the "fundamental rights" concept. Note this *Levy* court dicta: "[W]e have been extremely sensitive when it comes to basic civil rights . . . the rights asserted here involve the *intimate, familial relationship* between a child and his own mother."[92] (Emphasis added). There is also dicta to support an interpretation that *Levy* utilized the less stringent test. In any case, the *Levy* decision does not discuss the alternative purposes or reasons upon which such statutes are claimed to be based. It was due to this ambiguity that the rights of illegitimates achieved varying treatment in the decisions following *Levy*, although it seems that the subsequent cases did imitate *Levy* uniformly in one respect—ambiguity, prompting one authority to observe: "None of the cases that has been decided so

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90. This is an aspect which the courts have avoided—the social stigma, not only in a historical context, but also relative to our social familial structure. The discrimination between the sexes has been a large cause of perpetuating this stigma wherein the community condemns the immoral woman (also condemning the child due to the physical realities of who bears the child) and winks at the father. The community is unwilling to attach such children too closely to him, although it sometimes extracts a minimum support "price" for his acts, [b]ecause the mother cannot be expected to support [the child] . . . in a world organized on feminine dependence." Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 217 n.5, 228 (1939):

> It should be realized that just as it takes two to make an act of prostitution, so it takes two to procreate an illegitimate child. If one is to reason in terms of the motivation of becoming an illegitimate parent, the father as well as the mother should be considered. The pre-occupation with the female in the discussion of 'causes' . . . reflects the double standard of morality.
>
> Since legal controls form only a framework of social life, one can say that were it solely a matter of law, illegitimacy would constitute no great hardship. But legal disabilities are sustained and supplemented by an attitude that enters into the texture of daily life, coloring in countless ways the feelings of the unfortunates . . . not only in its prsence a disgrace to the . . . family, but its support may fall on them as well.

At present, although the father's relationship is being recognized by increasing penalties to redress the "wrong" he has committed, society still seems to actively block the father-child relationship and has not given the father rights in ascertaining the child's future. Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decision on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 356-366 (1969).

91. Levy v. La., 391 U.S. 68, 72 (1968).

92. *Id.* at 71.

far has attempted a careful analysis of the meaning and limits of the Equal Protection Clause."[93] The courts following *Levy* not only had to determine what constitutional test the United States Supreme Court utilized, but also if the constitutional test used applied beyond the factual context of *Levy* to the familial—paternal relationship, and if so, to succession.

The Louisiana Supreme Court on remand reluctantly[94] accepted the Court's decision in December of 1968, extending the wrongful death benefits under its statutes to the father:

> The United States Supreme Court has held that, as alleged in the petition of this case, when a *parent* openly and publicly recognizes and accepts an illegitimate to be *his or her* child and the child is dependent upon the parent, such an illegitimate is a 'child' as expressed in Civil Code Article 2315.[95] (Emphasis added).

In this respect the Louisiana court inadvertently extended the rights of the illegitimate beyond the mere facts of the case, to encompass the father-child relationship. Just prior to the *Levy* decision, the Supreme Court of Washington, sitting *en banc*, extended the right of recovery to the illegitimate child for her father's death under that state's wrongful death statute, but in a spirit of benevolence, rather than inadvertance, noting:

> [I]t is apparent that construction of a statute to thrust the burden of illegitimacy upon an innocent child would be an unfortunate and ill advised exercise of our judicial function, and one we choose to avoid.[96]

The Family Court of New York City applied *Levy* to New York's paternal support statute in *Storm v. None*,[97] to invalidate an agreement for support of a child born out of wedlock by its father as "unfair" to the child in light of the father's $45,000 per year income. The Supreme Court of Colorado, also sitting *en banc*, followed *Storm* stating: "*Levy*. . . point[s] the way to the inescapable conclusion that the support obligation owed by a father to his legitimate child cannot differ substantially from the duty owed to his illegitimate

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93. Krause, *supra* note 45, at 102.

94. "The members of this court may totally disagree with the reasoning and the results of the United States Supreme Court majority opinion and may agree with the dissent of Justice Harlan wherein it was said that the majority resolved the issue in this case ' . . . by a process that can only be described as brute force.' Nevertheless it is our obligation to discharge our responsibility under constitutional authority and limitation." Levy v. La., 253 La. 73, 216 So.2d 818, 820 (1969).

95. Levy v. La., 253 La. 73, 216 So.2d 818, 819-820 (1969).

96. Armijo v. Wesselius, 440 P.2d 471, 473 (Wash. 1968); *accord*, R_____ v. R_____, 431 S.W.2d 152 (Mo. 1968).

97. Storm v. None, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (Fam. Ct. N.Y. City 1968); *see also* Schmall v. Creecy, 254 A.2d 525 (N.J. 1969); *In re* Estate of Ortiz, 60 Misc. 2d 756, 303 N.Y.S.2d 806 (1969).

child."[98] The Surrogate's Court of Kings County, New York relied on *Levy* to allow an illegitimate child access to "letters of administration" which were necessary for her recovery under New York's Wrongful Death statute for her father's death.[99] New York requires formal judicial proceedings to be initiated within two years from the birth of the child as the only means of legitimation. Pursuant to this, the court noted that:

> [N]o initiative of a child, since at age two he cannot act for himself, can achieve for him legitimate status. This court and other courts have questioned the constitutionality of such procedures. . . . The essence of the opinion in *Levy* is that it is invidious to discriminate against them (illegitimate children) when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done to the mother.[100]

The Surrogate's court distinguished *Labine* on the facts as applicable only to *inheritance*,[101] but the implication that *Labine* will be used as an argument in the future to restrict other rights is apparent.

On the other hand, the Wisconsin Supreme Court, without discussing *Levy*, refused to extend its welfare statutes to an illegitimate as far as the *father* was concerned.[102] Applying similar reasoning, the Supreme Court of Ohio rejected the claim that *Levy* applied to any father-child relationship, narrowly holding *Levy* to its facts and refused to extend the protection of its support statute equally to illegitimates:

> [Levy v. Louisiana] had not been decided at the time appellee presented his case in this court, but we believe that it is inapplicable. The rights announced in *Levy* were based on the intimate, familial relationship which exists *between a mother and her child*, whether the child is legitimate or illegitimate.[103] (Emphasis added)

Presented with the question of whether *Levy* applies to succession, the Louisiana court gained some recompence for their former inadvertance when in *Succession of Bush*[104] it expressly refused to apply *Levy* to invalidate their restrictive intestacy statutes, even where the father had attempted to adopt the illegitimate child into his family:

> While we do not consider the *Levy* case to be analogous

98. Munn v. Munn, 450 P.2d 68 (Colo. 1969).
99. *In re* Estate of Ross, 323 N.Y.S.2d 770 (Surrogate's Court, Kings County 1971).
100. *Id.* at 772.
101. *Id.*
102. State v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W.2d 56 (1970).
103. Baston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968).
104. Succession of Bush, 222 So.2d 642 (La. App. 1969); *accord*, Labine v. Vincent, 249 So.2d 449 (La. App. 1969).

> to the case before us we feel constrained to add that we are not disposed to extend by analogy the holding in that case to any case which does not involve the same codal article and the same factual situation.[105]

In re Estate of Jensen,[106] decided by the North Dakota Supreme Court, is the only case to date that has applied *Levy* to strike down a succession statute. An examination of North Dakota's history exposes two extreme positions. Prior to 1917, North Dakota adhered to the common law rule,[107] but in that year the legislature granted full inheritance rights to all illegitimate children.[108] However, in 1943, the 1917 Act was repealed[109] which resulted in "a re-embracement" of the common law, which treated an illegitimate child as a child of no one and deprived him of being an heir of anyone.

In 1969, the Supreme Court of North Dakota in *In re Estate of Jensen*[110] took a dim view of this turn of events, noting that the repeal of 1943, ". . . was a return to the unjust rule which visited the sins of the parents upon the unoffending offspring."[111] Although the second clause of the statute which dealt with the rights of legitimates to inherit through their illegitimate father from the latter's parents was applicable to the facts, the *Jensen* court discussed the whole statute and conspicuously did not separate the first clause, which denied illegitimates the right of inheritance from their father. Thus, the entire statute was declared unconstitutional by the court which stated:

> This statute, which punishes innocent children for their parents transgressions, has no place in our system of government, which has as one of its basic tenets equal protection for all.[112]

The application of *Levy* in *Jensen* was relied upon by a Florida county court to strike a statute which required paternal acknowledgment as a prerequisite to any intestate inheritance rights. This court in *In re Caldwell's Estate*,[113] incorporated this *Jensen* dicta as a basis for its holding:

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105. *Id.* at 644.
106. *In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1969).
107. N.D. COMP. LAWS § 5752 (1913).
108. N.D. COMP. LAWS § 5745 (1917).
109. N.D. REV. CODE § 56-01-05 (1943).
110. *In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1969).
111. *Id.* at 869.
112. *Id.* at 878. This decision led the North Dakota electives in 1969 to repeal the 1943 Statute thereby eliminating the discrimination that the North Dakota Supreme Court saw fit to condemn. N.D. CENT. CODE § 56-01-05 (Supp. 1971). A note pursuant to the above quoted North Dakota Statute illustrates the motivation of the legislators. "This section [the 1943 measure] prior to the 1969 amendment was held unconstitutional as an invidious discrimination against illegitimate children in violation of § 1 of the 14th Amendment to the U. S. Constitution . . . ." N.D. CENT. CODE § 56-01-05 (Supp. 1971).
113. *In re* Caldwell's Estate, 33 Fla. Supp. 158 (1970).

> Applying the reasoning in *Levy*, as no action, conduct, or demeanor of the illegitimate children in the instant case is relevant to their status of illegitimacy, we conclude that the classification for purposes of inheritance contained in [the statute] which is based on such a status and which results in illegitimate children being disinherited while their legitimate brothers and sisters inherit, is unreasonable.[114]

It appears that the *Jensen* and *Caldwell* cases viewed such classifications as suspect, and therefore placed a heavier burden upon the states to justify such statutes.

Although the Second District Court of Appeals of Florida affirmed in a memorandum decision,[115] the Supreme Court of Florida reversed.[116] The court felt it could not abrogate common law where not altered by statute, even ". . . though we prefer a liberal interpretation of the Florida legitimacy statutes. . . ."[117] No discussion of equal protection was attempted, the court stating:

> We do not find in this case that there has been a demonstration of unconstitutionality sufficient to overcome the presumption that the statute is valid. Under the common law, no inherent right of inheritance existed regardless of whether the survivor was legitimate or illegitimate.[118]

The dissent pointed out that many courts have struck the common law doctrine if it was unjust, or if changing times warranted such a change, agreeing with the county court that *Levy* and *Jensen* should apply as a basis for declaring the discriminatory statute unconstitutional.[119] The court left the burden upon the claimants to overcome the statutory presumption of validity. Great deference was given to the legislature and no discussion of the possible archaic and prejudicial motives incorporated into this Florida statute was undertaken.

The Minnesota Supreme Court in *In re Estate Pakarinen*[120] did discuss its illegitimate-intestacy statute in the light of equal protection. However, the court upheld its validity as it required acknowledgment by the father as a prerequisite to inheritance. The Minnesota Court interpreted *Levy* to hold unconstitutional distinctions based solely on the basis of illegitimacy; nevertheless, it felt that:

> [N]either *Levy*, . . . [nor *Storm*] . . . can be considered controlling authority for the proposition that it is constitu-

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114. *Id.* at 167.
115. Caldwell v. Caldwell, 240 So.2d 538 (Fla. App. 1970) (memorandum decision).
116. *In re* Estate of Caldwell, ____ Fla. ____, 247 So.2d 1 (1971).
117. *Id.* at 3.
118. *Id.*
119. *Id.* at 9-12 (Ervin dissenting).
120. *In re* Pakarinen, 287 Minn. 330, 178 N.W.2d 714 (1970), *cert. denied*, 402 U.S. 903 (1971); *accord*, Kostamo v. Northern City National Bank, 287 Minn. 556, 178 N.W.2d 896 (1970), *cert. denied*, 402 U.S. 902 (1971).

> tionally impermissible to require an illegitimate attempting to inherit from his putative father to produce *virtually unassailable proof* that the decedent is in fact his father for the distinct purpose of determining his rights of inheritance. (Emphasis added).[121]

It is clear that the court applied a rational relationship-economic test to uphold its statute, but it seems strange that the court did not require the state to meet a stricter test of justification for its statute since it did seem to find classifications based "solely on illegitimacy" as prohibited.[122] The court did find such a relationship between the testator's intent and the acknowledgment provisions. As further "justification for the different treatment afforded this classification of illegitimates,"[123] the court felt that the difficulty in ascertaining paternity precluded *conclusive certainty*, and thus warranted this severe burden of proof.

Perhaps the best interpretation of *Levy* is that the decision rests on the grounds of both "suspect criteria" and "fundamental rights." It may be that neither illegitimacy, nor the familial right of inheritance, or for that matter any concept of familial relationship, would prompt a strict test when standing alone. Yet when considered together, these factors could very well trigger such a test. This test would be analogous to the balancing test implemented by those courts that considered the interest of criminal classifications based upon ability to pay,[124] the interest of education combined with the race criteria,[125] or the indigency-travel duet of *Shapiro v. Thomp-*

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121. *In re* Pakarinen, 287 Minn. 330, 178 N.W.2d 714, 717 (1970).

122. *Id.* at 717. The Supreme Court of Minnesota refused to grant the child a share of her intestate father's estate since the child had not met the statutory burden of proof. In doing so the court rejected the petitioner's claim that the Equal Protection Clause was violated on the reasoning that unlike her biological siblings her rights were contingent upon her father's acts over which she had no control. The Minnesota Court, in contrast to the *Labine* Court did see the problem in an equal protection context. The Minnesota Court apparently utilized the less stringent test in finding the Minnesota statutes requiring acknowledgment to be in furtherance of the desires of the testator. "[I]t cannot be said that distinctions made in § 572.172 are 'irrational' or bear no 'relation to the purpose' sought to be achieved." *Id.* Although the Minnesota Court discussed the father's intent in the context of refuting an equal protection argument, it is obvious that a possible due process claim can also be raised. This test is an attempt to compare the rationality of a statute to its purpose, the question being whether the legislators or officials in question had set up arbitrary, or unreasonable guidelines which have no relation to the purpose sought. The standard upon which the courts have measured such a relationship in the past are the concepts of 'fundamental fairness' or the 'American scheme of justice'." Palko v. Conn., 302 U.S. 319, 324-325 (1937).

However, it may well be repugnant to a natural concept of fairness that an arbitrary standard of proof is imposed to exclude one class from inheriting. The Minnesota Court reached its conclusion despite realizing, "[T]hat the innocent child cannot with any justification be held accountable for the transgressions of his parents." *In re* Pakarinen, 287 Minn. 330, 178 N.W.2d 714, 718 (1970). In addition, the petitioner submitted several pieces of evidence to support his claim—a birth certificate naming the intestate as her father, a paternity proceeding finding the decedent as the father, as well as a letter and oral testimony.

123. *In re* Pakarinen, 287 Minn. 330, 178 N.W.2d 714, 718 (1970).

124. Griffin v. Ill., 351 U.S. 12 (1956); Douglas v. Calif., 372 U.S. 353 (1963).

125. Brown v. Board of Educ., 349 U.S. 294 (1954); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

son.[126] Certainly, the nature of the interest sought by such children is more akin to a fundamental right than an economic matter, and the status of an illegitimate over which he has no control should receive a more than passing glance.[127]

PURPOSE ADVANCED BY THE STATES IN SUPPORT OF DISCRIMINATORY STATUTES

One of the primary deficiencies of the preceding cases is the failure to discuss the relation of the various purposes advanced to justify such statutes. It is important to note that the Louisiana statute is the most restrictive in the United States, not only placing a severe limitation on the right to inherit from the putative father, but also restricting the illegitimate child's right to *maternal* inheritance as well.[128] The *Labine* decision may therefore hold severe consequences for the child born out of wedlock. Nonetheless, the restrictiveness of a statute being a question of degree, the preceding discussion of equal protection and the following examination of the purposes advanced for such statutes can be applied to all "restrictive measures." However, the Louisiana standards would certainly be the most difficult to justify.

The rationale for such distinctions that have been advanced can be summarized as follows: that such statutes (1) are an attempt to distribute property pursuant to the father's intent, (2) discourage promiscuity, (3) promote marriage and family unity and harmony, (4) avoid severe problems of proof which would beset the courts, (5) preserve the quiet title of property.

1. The father's intent:

The supposed purpose of intestacy law is to distribute property according to the testator's will.[129] Thus the argument is made that most fathers do not want their out-of-wedlock mistakes to inherit. Several objections to this reasoning have been advanced.

First, it seems that the premise that discriminatory statutes should not include those it does not intend to cover, and should include those it intended to cover, is not met.[130] It is evident that the statues exclude illegitimates who live with the putative father, excluding them from the normal means of proof, and thus the statute is under-inclusive. On the other hand, children of separated or divorced parents who may never see their father, and whom the lat-

126. Shapiro v. Thompson, 394 U.S. 618 (1969); *See generally* Note, *supra* note 66, at 1130.
127. Table I, Appendix.
128. LA. CIV. CODE ANN. art. 918 (1952).
129. 23 AM. JR. 2d *Descent and Distribution* § 10 (1966); *In re* Pakarinen, 287 Minn. 330, 178 N.W.2d 714 (1970).
130. Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-353 (1949).

ter never intended to inherit, would be presumed to be within the statutory language. As such the statute is over-inclusive. However, the under-inclusive, over-inclusive doctrine is a shakey foundation upon which to launch an attack against such statutes since under and over-inclusiveness has been upheld in giving legislative reasoning the benefit of the doubt.[131] Yet, when a suspect criterion or fundamental right is involved, under-or-over-inclusiveness is much less desirable due to the importance of the rights sacrificed, as well as the possibilities of prejudice.[132]

Another angle of attack, assuming that it is reasonable to presume that intestates intended to exclude their illegitimate children from taking through intestacy provisions, is the argument that court enforcement of the discriminatory intent of such decedents constitutes invalid "state action" under *Shelley v. Kraemer*:[133]

> [*Shelly* and similar cases reveal instances] in which the states have made available to such individuals the full coersive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willingly and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners [illegitimates] between being denied rights of property of other members of the community and being accorded full enjoyment of those rights on an equal footing.[134]

As such, the *Shelley* court would not allow the law to deprive Negroes housing by upholding prejudices of apartment owners. Professor Harry Krause analogizes the *Shelley* facts to the prejudices of the father against his illicit offspring in this manner:

> It may also be true that the majority of fathers would not wish their bastard child to take under the laws of intestacy as if they were legitimate, so that the legislated presumption in favor of the legitimate child finds support in the actual intent of the majority of intestates. *However, the question remains whether state law may express a prejudice, real though it may be, which rests on a pattern of discrimination that had been practiced with the encouragement of the church and the state until it became part of the 'normal' intent of the majority.*[135] (Emphasis added).

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131. Railway Express Agency v. N.Y., 336 U.S. 106 (1949); Buck v. Bell, 274 U.S. 200 (1940); Note, *supra* note 66, at 1084, 1085.
132. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Carrington v. Rash, 380 U.S. 89 (1965). *See generally* Note, *supra* note 66, at 1086, 1087.
133. Shelley v. Kraemer, 334 U.S. 1 (1948).
134. *Id.* at 19.
135. Krause, *Equal Protection For The Illegitimate*, 65 MICH. L. REV. 477, 501-502 (1967).

It would seem further that this basis would not sit well with any concept of responsibility of the father for his "mistake," nor with the interests of the state in reducing the large number of illegitimates on the welfare rolls.[136]

2. Discouraging Promiscuity

Some states have advanced the proposition that the discrimination against the child will reflect upon the conscience of the parents, thereby causing them to curtail their illicit conduct. Discrimination against a child on this basis can hardly stand beneath the pillars of equal protection and due process. To punish one in order to establish guilt feelings in another is repugnant to any concept of fairness. Secondly, the statute is totally unrelated to its purpose as evidenced by the great increases in the number of illegitimate children born each year in the past decade—from 240,200 in 1961 to 339,200 in 1968. The illegitimacy rate per 1000 births has almost doubled in that span.[137] The concept of any relation of inheritance statutes to discouraging promiscuity is doubtful according to most writers in light of this evidence.[138]

3. Promotion of Marriage and Family Unity

The comments applicable to the "promiscuous discussion" above retain equal validity when applied to this purpose.[139] The growing rate of illegitimacy and unwed, divorced, or deserted mothers seems to refute the "promotion of marriage" concept.[140] Nevertheless, the idea of familial unity is particularly important to Louisiana as pointed out by the majority in *Labine*: "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life. . . ."[141] Punishment of those who have no control over their status for this purpose can be questioned in light of fundamental fairness, but a more forceful argument seems to lie in the reality that Louisiana has not escaped the general deemphasis of the family as the basis of all relationships. For at least two decades, the population growth has lagged far behind the illegitimacy rate in Louisiana, and the increasing divorce rate is not foreign to that state.[142] Basing the discrimination of children upon the latter two bases does not fit into today's realities, rather, it is based upon ancient English and Roman Familial concepts.

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136. Table III, Appendix.
137. Table II, Appendix.
138. *Supra* note 135, at 491-492; Tucker, *supra* note 9, at 642; Comment, *The Status of Illegitimates in Louisiana*, 16 LOYOLA L. REV. 87, 90-91 (1969).
139. Krause, *supra* note 1, at 348-349.
140. Table III, Appendix.
141. Labine v. Vincent, 401 U.S. 532, 536 (1971).
142. Table IV, Appendix.

4. Burden of Proof

Perhaps the most compelling argument on its face is the proposition that it is impossible to ascertain the true father of an illegitimate by any means of proof, and therefore, the illegitimate child should not be allowed to introduce evidence to establish paternity for inheritance purposes. Rather, the only means of assuring proof is to require acknowledgment by the parent for such purposes.[143] This approach is tantamount to requiring a will specifically naming such children as heirs, as a condition to inheritance. Such a concept is contrary to the provisions of intestacy as to legitimates in every state where the offspring is entitled to inherit absent specific language in a will excluding the child. Objections to this reasoning on the basis of furthering the father's intent have been disclosed above, and the concepts of fundamental fairness, the responsibility of the father for his deeds, and the idea that the offspring should receive his natural bounty are equally forceful in questioning this purpose.

Another proposition is advanced that to allow such children to sue in a judicial proceeding to establish paternity will open a pandora's box of proof problems and fraudulent claims. This reflects a distrust of our judicial system as to its ability to handle problems of proof. This argument would seem to negate paternity proceedings to establish a right of support from the alleged father, a universal practice. In addition, several states have found that utilizing the conventional court procedure to establish paternity for inheritance purposes has not prompted a plague of spurious claims.[144]

Nevertheless, the Minnesota Supreme Court stated in *In re Pakarinen's Estate* that:

> [W]here a reputed father denies paternity, no method of proof we are now aware of exists by which fatherhood can be established. Nothing—not a blood test, not a judgment of paternity after trial, *nor a voluntary plea of guilty to a charge of paternity in open court*—proves with *absolute certainty* the paternity of the father. And while a written attested declaration of paternity does not provide absolute proof, it does offer the *most persuasive proof* available (short of marriage to the mother) of the pivotal element: and unequivocal acknowledgment of paternal affection and concern for the illegitimate child. (Emphasis added).[145]

Yet what the child is claiming is a right to the familial relationship

143. *In re* Pakarinen's Estate, 287 Minn. 330, 178 N.W.2d 714, 718 (1970), *cert. denied*, 402 U.S. 903 (1971).

144. Iowa has long allowed commonplace evidence admissible to establish paternity under its code provisions. Britt v. Hall, 116 Ia. 564, 90 N.W. 340 (1902) (Letters); *In re* Wise's Estate, 206 Ia. 939, 221, N.W. 567 (1928) (Neighborhood reports); Robertson v. Campbell, 168 Ia. 47, 149 N.W. 885 (1914). (Generally reputed to be the father).

145. *In re* Pakarinen's Estate, 287 Minn. 330, 178 N.W.2d 714, 718 (1970).

with his father, thus it seems of little importance whether the father feels affection or concern for his "mistake." A strong argument can be made that such a line is arbitrary and unreasonable in light of the interest denied the child and therefore is violative of due process. Since it is difficult to draw the line, a solution would seem to lie in allowing a child his day in court giving him a chance to establish his biological relationship.

Secondly, in light of recent refinements in tissue typing and antigen blood grouping tests, the possibility of holding a non-father liable in a paternity suit may have disappeared as a realistic concern. The rate of error has dropped to .00095 per cent in determining the contributor of the sperm.[146] Today such tests are viewed as reliable, simple, reproducable, and dependable:

> The suggested test should eliminate past difficulties in establishing paternity. In a civil action, the proof needed to sustain that action is that quantity of evidence which produces a reasonable assurance of the existence of the ultimate fact. It is not necessary to produce that quantum of proof called for in a criminal action, in which one must establish a position beyond a reasonable doubt and preclude any hypothesis except the one asserted. The proposed antigen test, along with other evidence, should be more than sufficient to establish reasonable assurance of paternity and arguably could meet the criminal standard.[147]

The burden of proof is naturally greater for an illegitimate just by the nature of the birth, but it seems illogical to place unduly burdensome and unreasonable proofs of paternity upon the whim of any particular state.

Closely related to the proof argument is the state's interest in quiet land titles. It is evident that if paternity is to be established during the father's lifetime this argument vanishes, since fraudulent suits which would tie up property probate proceedings would be excluded. Furthermore, such fears in this area have not been realized in those states that do allow paternity actions.

CONCLUSION

The call for judicial action and state action to change discriminatory practices is prolific, encompassing this general theme:

> It seems only fair that the natural offspring of decedents should be the object of their bounty in the state's estate

146. Note, *Illegitimacy: Equal Protection and How to Enjoy It*, 4 GA. L. J. 383, 403 (1969).
147. *Id. See generally* Comment, *Blood Grouping Tests and The Presumption of Legitimacy*, 4 U. RICH. L. REV. 297 (1970).

> plan. Illegitimate offspring are no less deserving of their natural parents' bounty because of a mere accident of birth then are their legitimate brethren . . . at least from the standpoint of social justice.[148]

Foreign systems seem well on their way to recognizing the illegitimates. Norway and the Latin American countries have embodied the position of total equality first brought forth during the French Revolution.[149] Panama proclaims in its constitution, in language similar to that found in most Latin American constitutions that, "parents have the same duties toward children born out of wedlock as those born in it." All children are equal before the law and have the same hereditary rights in intestate succession,[150] and in Guatemala the ". . . law shall establish the means of proof in investigating paternity. . . ."[151] for this purpose. More recent changes have swept through Europe, including Germany,[152] granting substantial equality to illegitimates, although France embodies the concepts inherent in Louisiana's Code. Even in the latter case, however, France is more cognizant of the illegitimate's rights.[153] And in England, the conclusion of a committee commissioned to study illegitimacy revealed its position on the matter: "[where] paternity is established. . . the extra-marital child should have the same rights to succeed to his father's estate as the father's legitimate children, whether the father is survived by legitimate children or not.[154]

The current libertarian trend of thought has brought forth statutory proposals to establish substantial equality.[155] Basically these statutes embody the following at the very least:

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148. Note, *Uniform Probate Code—Illegitimacy,* 69 MICH. L. REV. 112, 119 (1970).

149. Robbins & Deak, *The Familial Property Rights of Illegitimate Children: A Comparative Study,* 30 COLUM. L. REV. 308, 325 (1936); Stone, *Illegitimacy and Claims to Money and Other Property: A Comparative Survey,* 15 INT'L & COMP. L. REV. 505, 520-527 (1967). This general trend follows the position taken by the United Nations. "[E]very person once his filiation is established, shall have the same legal status as a person born in wedlock." U.N. Doc. of (January 13, 1967) as quoted in Krause, *Bastards Abroad—Foreign Approaches to Illegitimacy,* 15 AM. J. COMP. L. 726 (1967).

150. PANAMA CONST. art. 58 as quoted in Krause, *Bastards Abroad—Foreign Approaches to Illegitimacy,* 15 AM. J. COMP. L. 726, 728 (1967).

151. GUATAMALA CONST. art. 86(2), (3) as quoted in Krause, *supra* note 150, at 728.

152. A thorough discussion of Germany's new law, as a proposal and after it became law can be found in Krause, *supra* note 150, at 730-746, and in Bohndorf, *The New Illegitimacy Law in Germany,* 19 INT'L. & COMP. L. Q. 299 (1970).

153. Stone, *supra* note 149, at 521-522.

154. *Report of the Committee on the Law of Succession in Relation to Illegitimate Persons,* 30 MOD. L. REV. 552, 555 (1967).

155. Note, *Uniform Probate Code—Illegitimacy,* 69 MICH. L. REV. 112 (1970); Bohndorf, *The New Illegitimacy Law in Germany,* 19 INT'L. & COMP. L. Q. 299 (1970); Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy,* 44 TEX. L. REV. 829 (1966).

It is questionable whether it is fundamentally fair within the confines of due process to require this form of statute as a means of implementing the father's desires. Would not a requirement that if a father wishes to disinherit his illegitimate offspring that he expressly state his intention in a will be the only fair means of disinheriting such children?

Due process is no longer championed by judicial thinkers due to the disfavor the test engendered when it was the basis upon which judges ran rampant through the legislative field of business economics. Note, *supra* note 66, at 1130-1132; Tussman &

1. A means to establish paternity in court, emphasizing the child's interest.
2. Language equalizing an illegitimate to a legitimate child.
3. A strengthening of a father-child relationship.
4. A statute of limitations (to protect state land titles).
5. An assurance that this equality extends to successions.

Whatever the procedural guidelines of such a statute, it should establish at its base the concept of equality—the remainder is merely framework. As such, the North Dakota statute serves this purpose commendably.

Finally, it must be stressed that the United States Supreme Court in *Labine v. Vincent* embodies the extreme position—that illegitimates are not equal under the Consitution. The state, therefore, needs no justification to destroy or limit their rights—not proof, nor paternal intent, nor familial relationship. Somehow the court adopted, rather than the French Revolutionary ideals of 1783, Justinian's Civil Code as the guideline to follow. It should be noted that the historical social stigma, and the pressures induced psychologically, are of great weight upon the illegitimate. The laws of our nation should not be another addition to this load nor a reinforcement thereof. The libertarian concepts of other nations, consistent with the Equal Protection Clause of the Fourteenth Amendment, should be adopted. It seems that this final recommendation should follow—the terms "bastard" and "illegitimate" should be dropped in referring to the child in favor of "extra-marital" or "out-of-wedlock" for it is the parent, not the child, who is illicit.

JAY R. PETTERSON

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tenBroeck, *supra* note 66, at 362. It was condemned for substitution of the judiciary for the legislature in the early 20th Century in cases such as Lockner v. N.Y., 198 U.S. 45 (1905). This demise caused judges to utilize other tests such as equal protection (Tussman & tenBroeck, *supra* note 108, at 362) or various penumbras of the first eight amendments [Griswold v. Conn., 381 U.S. 479 (1965)] even when due process was argued by counsel. In fact, the implementation of a wider ranging review when fundamental interests were at stake arose not in due process but in equal protection. When the tests require the states to make a strong showing to uphold the apparent injustices created by a classification, "[I]t may be the trappings of equal protection." Note, *supra* note 66, at 1132. The old cliche of "half dozen of one, six of the other" may be applicable here, but for the fact that:

> [I]t does not appear . . . that every interest deemed fundamental under the equal protction clause will be protected by the due process clause. It may be, for example, that the due process clause does not require that a state provide a criminal defendant with an appeal as of right, whereas the equal protection clause does require that if the state provides an appeal to some it cannot deny it to others because of their inability to pay even where such a denial can be rationally defended. Note, *supra* note 66, at 130.

APPENDIX

Table I is a compilation of state approaches to paternal intestate inheritance by illegitimates. Eleven states are silent on this matter while three states have expressly provided complete equality to illegitimates with their legitimate biological siblings. The remaining jurisdictions, including the District of Columbia and the Virgin Isles, have granted paternal inheritance through the following devices: Acknowledgment by the father; paternity proceedings establishing the paternal relation, or marriage of the parents. The final column represents the change in statutes since 1958. To date 14 states have liberalized their statutes. See **Illegitimates** 26 Brooklyn L. Rev. 110-120 (1958) for 1958 status.

TABLE I

MEANS OF LEGITIMATION FOR INHERITANCE PURPOSES FROM FATHER BY ILLEGITIMATES

Jurisdiction	Silent	Acknowledgment	Paternity	Marriage	Equality	Legislation Liberal Trend: Status in 1958
	ALA. CODE Tit. 16 § 7 (1958)					Same
Alaska				ALASKAN STAT. Dec. Estate § 13.10.030 (1962)		Silent
Arizona					STAT. ANN. § 14-206 (1956) § 14-206	Same
Arkansas					ARK. STAT. ANN. § 361-141 (1969 Supp.)	Silent
California		CAL. STAT. ANN. Probate § 255 (West 1961)				Same
Colorado		COLO. REV. STAT. ANN. § 153-2-8 (1963)				Same
Connecticut						Same

Delaware			DEL. CODE ANN. 13 §§ 1301, 1302, 1303, 1303 (1953)		Silent
D. C.	D. C. CODE ANN. § 19-316 (1967)				Same
Fla.	FLA. STAT. ANN. Bastards § 11 (1969)				Same
Georgia	GA. CODE ANN. § 113-904 (Supp. 1970), § 74-103 (1964)	§ 74-103 (1964)			Marriage Only
Hawaii	HAWAII REV. LAWS § 577-14 (1968)				Marriage Only
Idaho	IDAHO CODE ANN. § 14-104 (1947)				Same
Illinois				ILL. ANN. STAT. Ch. 3 § 12 (Supp. 1971)	Silent
Indiana		IND. ANN. STAT. § 6-207 (195)			Same
Iowa	IOWA CODE § 633.22 (1963)	§ 633.222 (1963)			Same
Kansas	KAN. GEN. STAT. ANN. § 50-501 (1963)	§ 50-501 (1963)			Same
Kentucky			KY. REV. STAT. ANN. § 391.090 (1969)		Same
Louisiana	LA. CIV. CODE ANN. arts. 206, 919 1486, 1493-1495 (1952)				Same
Maine	ME. REV. STAT. ANN. tit. 18 § 1003 (1964)				Silent

Table 1 Continued on Following Pages

Table 1 Continued

Jurisdiction	Silent	Acknowledgment	Paternity	Marriage	Equality	Legislation Liberal Trend: Status in 1958
Maryland		MD. ANN. CODE art. 93 § 1-208	art. 93 § 1-208 (1957)			Silent
Massachusetts	MASS. GEN. LAWS ANN. C. 190 §§ 5, 6 (1958)					Same
Michigan	MICH. COMP. LAWS 702.81 et. seq. (1952)					Same
Minnesota		MINN. STAT. ANN. § 525.172 (1969)				Same
Mississippi					MISS. CODE ANN. § 474 (1956)	Same
Missouri				MO. ANN. STAT. § 474-060 (1956)		Same
Montana		MONT. REV. CODES ANN. § 91-404 (1947)				Same
Nebraska		NEB. REV. STAT. § 30-109 (1964)				Same
Nevada		NEV. REV. STAT. § 134-170 (1967)				Same
New Hamshire	N. H. REV. STAT. ANN. § 361:5 (1955)					Same
New Jersey	N. J. REV. STAT. § 3A: 4-7 (1953)					Same

New Mexico		N.M. STAT. ANN. § 29-1-18 (1953)			Same
New York			NEW YORK STAT. ANN. EPTL 4-1.2 (Vernons 1967)		Silent
North Carolina		N.C. GEN. STA9. 49-10 §§ 29-18, 29-19 (1966)	29-19, 49-10 (1966)		Silent
North Dakota				N.D. CENT. CODE § 56-01-05 (Supp. 1969)	Acknowledgment
Ohio		OHIO REV. CODE ANN. §§ 2105.17,	§§ 2105.17, 2105.18 (1971)		Silent
Oklahoma		OKLA. STAT. ANN. tit. 84 § 215			Same
Oregon			ORE. REV. STAT. § 109.060 (1967)		Same
Pennsylvania			PA. STAT. ANN. tit. 20 § 1.7 (1950)		Same
Rhode Island	R. I. GEN. LAWS ANN. § 33-1-8 (1969)				Same
South Carolina	S. C. CODE ANN. § 19-53 (1962)				Same
South Dakota		S.D. CODE ANN. § 29-1-15 (1969)			Same
Tennessee			TENN. CODE ANN. §§ 31-107, 36-224 (1955)		Silent
Texas	TEXAS CODE ANN. Prob. § 42 (Vernon Supp. 1970)				Same

Table 1 Continued on Following Pages

Table 1 Continued

Jurisdiction	Silent	Acknowledgment	Marriage	Paternity	Equality	Legislation Liberal Trend: Status in 1958
Utah		UTAH CODE ANN. § 74-4-10 (1953)				Same
Vermont		VT. STAT. ANN. tit. 14 § 352				Silent
Virginia	VA. CODE ANN. § 64.1-5 (1950)					Same
Virgin Is.		V.I.C. ANN. 16 § 462 (1964)				Silent
Washington		WASH. REV. CODE ANN. § 11.04.081 (1967)				Same
West Virginia	W.VA. CODE ANN. § 42-1-7 (1966)					Same
Wisconsin		WIS. STAT. ANN. § 237.06 (1969)		§ 237.06 (1969)		Same
Wyoming				WYO. STAT. ANN. § 2-44 (1957)		Same

Table II reveals a rapid growth in the number of illegitimates born each year as a great increase in the percentage of illegitimate births when compared to total births. Such statistics not only emphasize the extent of the population affected by discriminatory legislation based upon birth state, but also refute any connection between such restrictive legislation and a curtailment of illicit sex. Table III highlights the above as to Louisiana in that, although that state's statutes are the most discriminatory as to illegitimate intestate rights, no effect upon illicit sex has been realized. The deterioration of the family life in the traditional sense can also be said to be dissolving in the wake of increasing illegitimacy. A racial imbalance is also to be noted in that illegitimacy among nonwhites is six times that among whites and creates a double jeopardy for such children. Table IV points to the burden of illegitimacy upon the welfare rolls. It would be to the state's benefit to grant inheritance rights. Table IV is more noteworthy as to the number of children of divorced, separated and deserted women, as such children may inherit from their father in intestacy regardless of the testator's intent. It is difficult to justify the exclusion of illegitimates from paternal intestacy rights on this basis.

TABLE II

ESTIMATED NUMBER OF ILLEGITIMATE LIVE BIRTHS AND RATIOS, BY AGE OF MOTHER AND COLOR: UNITED STATES 1961-68

Age of Mother and Color	1968	1967	1966	1965	1965	1963	1962	1961
Total	339,200	318,100	302,400	291,200	275,700	259,400	245,100	240,200
White	155,200	142,200	132,900	123,700	114,300	102,200	93,500	91,100
All Other	183,900	175,800	169,500	167,500	161,300	150,700	147,500	149,100
Ratio/1,000 Births								
Total	96.9	90.3	83.9	77.4	68.5	63.3	58.8	56.3
White	53.3	48.7	44.4	39.6	33.9	30.7	27.5	25.3
All Other	312.0	293.8	276.5	263.2	245.0	235.9	229.9	223.4

"Vital Statistics of the United States," U.S. Department of Health, Education and Welfare, Public Health Service (Volume I—1968).

TABLE III
LOUISIANA ILLEGITIMACY RATIO—Per Color

	Total	Non-White	White
1940	4,168	3,700	468
1950	5,991	5,444	547
1960	8,248	7,254	994
1961	8,405	7,436	969
1962	8,661	7,567	1,094
1963	8,666	7,516	1,150
1964	9,567	8,441	1,126
1965	9,493	8,336	1,157
1966	9,700	8,391	1,309
1967	9,906	8,508	1,398

An analysis of the data will reveal the following:

From 1940-50, population rose 13.5% while illegitimate births increased 43.8%.
From 1950-60 population rose 21.4% while illegitimate births increased 37.7%.
From 1940-60, population rose 39.0%, while illegitimate births increased 97.9%.
Thus, for at least the last two decades in Louisiana, illegitimate births have been growing at a faster rate than population.
From 1960-67, illegitimate births have grown at a rate of 20.1%.
Comment, **The Status of Illegitimates in Louisiana,** 16 Loyola L. Rev. 114

Louisiana has held itself out for special analysis since its statutes have produced such a wealth of familial legislation. Note the extreme imbalance of black versus white illegitimate births, while there are more whites in Louisiana than blacks.

TABLE IV
ALL AFDC FAMILIES: STATUS OF FATHER, BY NUMBER OF ILLEGITIMATE CHILDREN—1969

Total families	1,591,000
Status of Father	**Total**
Dead	86,500
Incapacitated	177,300
Unemployed, or employed part time, and:	
Enrolled in a work or training program	34,000
Awaiting enrollment after referral to WIN	14,800
Neither enrolled nor awaiting enrollment	26,700
Absent from the home:	
Divorced	222,200
Legally separated	44,800
Separated without court decree	175,200
Deserted	247,700
Not married to mother	453,500

In prison	41,400
Other reason	26,000
Other status:	
Stepfather case	29,100
Children deprived of support or care of mother	11,600
Unknown	200

Looseleaf, Public Services Division, Dept. of Health, Education and Welfare (Wash., D.C. 1969).