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F. Charles Petrillo

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F. CHARLES PETRILLO*

I. INTRODUCTION

In *Labine v. Vincent*,[1] the United States Supreme Court upheld the constitutionality of a Louisiana law which barred a publicly acknowledged illegitimate child from sharing with collateral relatives in the estate of his intestate father.[2] The state succession law survived attack from both due process and equal protection arguments. Stated briefly, *Labine* held that state intestacy legislation was peculiarly of state concern. A state could validly make rules to protect and strengthen family life, as well as regulate the disposition of intestate property. By logical extension, *Labine* would hold that a state could distinguish between the inheritance rights of the illegitimate and legitimate child from their father.[3]

Nearly all states permit an illegitimate child to inherit from or

*BA, 1966, Wilkes College; J.D., 1969, Dickinson School of Law; member of Pennsylvania Bar; staff attorney with Luzerne County Legal Services Association, Inc.

1. 91 S.Ct 1017 (1971).

2. *Id.* at 1018, 1020-21. See note 66 *infra* and accompanying text.

3. The facts of *Labine* involved a contest between an illegitimate child and collateral heirs over the proper distribution of the estate of the deceased father of the child. But, both the opening sentences of the majority and dissenting opinions in *Labine* considered the broader implications of whether a state could properly distinguish between the inheritance rights of illegitimate and legitimate children. *Id.* at 1018, 1022.

through the maternal line.[4] But, any relaxation of an illegitimate's common law disability from inheritance must depend on statutory grace.[5] In the absence of legislation, an illegitimate is still not permitted to inherit from or through the paternal line.[6] A few states completely bar an illegitimate from inheriting from his father.[7] Other states permit an illegitimate to inherit from his father in limited situations where proof of paternity is established,[8] or where inheritance follows under local law after the father has acknowledged the illegitimate child as his own.[9] Only three states have abrogated any distinction between legitimate and illegitimate children for purposes of inheritance.[10]

Recently, equal protection and due process arguments have been raised to challenge state legislation which discriminates against the illegitimate child. The initial wedge which provided this constitutional attack was *Levy v. Louisiana*,[11] and *Glona v. American Guarantee & Liability Insurance Co.*[12] *Levy* invalidated a Louisiana statute which denied an illegitimate a right of recovery under wrongful death legislation for the tortious death of his mother.[13] Conversely, *Glona* invalidated the same statute which

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4. A survey of 50 states may be found in Note, 26 BROOKLYN L. REV. 45 (1961). A listing is also found in Knause, *Bringing The Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966).

5. 10 AM. JUR. 2d *Bastards* § 146 (1963).

6. *Id.*

7. GA. CODE ANN. tit. 113, §§ 904, 905 (1935); HAWAII REV. STATS. § 577-14 (1968); KY. REV. STATS. § 391.090 (1969); PA. STATS. ANN. tit. 20, § 1.7 (1950).

8. *E.g.*, IND. STATS. § 6-207 (1965); TENN. CODE ANN. § 36-234 (Supp. 1964); WIS. STAT. ANN. § 237.06 (Supp. 1970).

9. CAL. PROB. CODE § 255 (1961); COLO. REV. STATS. § 153-2-8 (1963); FLA. STATS. ANN. § 731-29 (1964); IDAHO CODE § 14-104 (1948); IOWA CODE ANN. § 633.222 (1964); KANS. STATS. ANN. § 59-501 (1964); MINN. STATS. ANN. § 525.172 (1969); MONT. REV. CODE § 91-404 (1947); NEB. REV. STATS. § 30-109 (1964); NEV. REV. STATS. § 134.170 (1967); N.M. STATS. REV. § 29-1-18 (1953); N.Y. EST., POWERS AND TRUST L. § 4-12 (McKinney 1967); OKLA. STATS. ANN. tit. 84, § 215 (1970); S.D. COMP. LAWS tit. 29-1-15 (1967); UTAH CODE ANN. § 74-4-10 (1953); WASH. REV. CODE § 11-04-080 (1951); WIS. STAT. ANN. § 237.06 (Supp. 1970).

10. ARIZ. REV. STAT. ANN. § 14-206A (1956); N.D. CENT. CODE § 56-01.05 (1969); ORE. REV. STAT. §§ 111.231, 109.060 (1957).

11. 391 U.S. 68 (1968).

12. 391 U.S. 73 (1968).

13. LA. CIV. CODE ART. 2315 (West 1970):

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.
>
> The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or

had been interpreted to deny a mother a wrongful death recovery for loss of an illegitimate child.[14] Commentators on *Levy* and *Glona* correctly presaged the subsequent broad case attack on state legislation regarding the illegitimate child.[15]

Levy and *Glona* were undoubtedly successful in modifying current state rules regarding the illegitimate child in the areas of wrongful death,[16] support,[17] and even inheritance.[18] *Labine*, however, is clearly a temporary setback, but the widely split five-four decision will undoubtedly be raised again.[19] This is particularly true since *Labine* can easily be charged with the "inexact analysis" and "analytical deficiencies" which plagued *Levy* and *Glona*.[20]

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child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article the words "child," "brother," "sister," "father," and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

14. Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 68, 74 n.3 (1968).

15. Gray and Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L.R. 1 (1969) [hereinafter cited as Gray]; Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969) [hereinafter cited as Knause].

16. *E.g.*, Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969); Armijo v. Wesselius, 73 Wash. 2d 16, 440 P.2d 471 (1968).

17. R. v. R., 431 S.W.2d 152 (Mo. 1968). See note 48 *infra* and accompanying text.

18. Citing *Levy*, the Supreme Court of North Dakota held that a state statute denying the right of an illegitimate child to inherit from his mother was unconstitutional in Michaelsen v. Undhjem, 162 N.W.2d 861 (N.D. 1968). See note 58 *infra* and accompanying text. Following this decision, the state legislature of North Dakota removed any distinction between the legitimate and illegitimate child for inheritance purposes from either the natural mother or natural father. N.D. CENT. CODE § 56-01.05 (1969).

19. Of course, the Supreme Court's decision in Labine v. Vincent, 91 S.Ct 1017 (1971), does not preclude a state court from interpreting a local inheritance statute favorably to the illegitimate child. *E.g.*, Michaelsen v. Undhjem, 162 N.W.2d 861 (N.D. 1968). We shall discover that the majority opinion in the 5-4 *Labine* decision is difficult to support when rationally dissected. The hope is, naturally, that the issue will be raised again in the federal courts. But, the analysis to be presented in this Article can be fruitfully applied by local courts.

20. The quoted remarks where made of the decisions of Levy v. Louisiana, 391 U.S. 68 (1968) and Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) in Knause, *supra* note 15, at 342. The dissenting opinion in *Labine* attacks the majority opinion for its failure to analyze or refusal

This Article will first examine the *Levy* and *Glona* decisions. Those cases and their progency were the basis for direct constitutional challenge of the illegitimate child's plight under intestacy legislation in *Labine*. *Labine* will be thoroughly reviewed. Supporting reasons for the result reached by *Labine* will be specifically detailed to determine whether a proper basis exists for the result reached by *Labine*.

II. LEVY AND GLONA: THE OPENING WEDGE

Levy v. Louisiana[21] was a survival and wrongful death action under Louisiana law against a physician who apparently failed to properly diagnose and treat the fatal illness of a mother of five illegitimate children. The state courts uniformly denied a cause of action to the illegitimate children.[22] *Glona v. American Guarantee & Liability Insurance Co.*[23] also involved the Louisiana wrongful death statute which was the subject of *Levy*. In *Glona* the illegitimate child of a Texas resident was fatally injured in an automobile accident in Louisiana. Here, also, the courts uniformly denied a cause of action to the mother of the deceased illegitimate child.[24]

In an opinion by Justice Douglas, writing for a majority of six in both *Levy* and *Glona*, it was generally held that the denial of tort recovery under Louisiana law was also denial of equal protection to illegitimate children in *Levy*,[25] and a similar denial to a parent of an illegitimate child in *Glona*.[26] In *Levy* it was found

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.
>
> We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.[27]

In *Glona* it was held that equal protection of the laws was denied the mother when wrongful death recovery was precluded

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to analyze the issue before the Court. Labine v. Vincent, 91 S.Ct. 1017, 1025 (1971).

21. 391 U.S. 68 (1968).

22. The facts may be found in Brief for Appellant at 4-5, Levy v. Louisiana, 391 U.S. 68 (1968); Gray, *supra* note 15 at 2. The lower court's dismissal of the suit was affirmed by the court of appeals. *In re* Vincent, 192 So. 2d 193 (La. App. 1966), *cert. denied*, 250 La. 25, 193 So. 2d 530 (1966), *prob. juris. noted*, 389 U.S. 925 (1967).

23. 391 U.S. 73 (1968).

24. Glona v. Am. Guar. & Liab Ins. Co, 379 F.2d 545 (5th Cir. 1967), *cert. granted*, 389 U.S. 969 (1967).

25. Levy v. Louisiana, 391 U.S. 68, 71 (1968).

26. Glona v. Am. Guar. & Liab. Cas. Co., 391 U.S. 73, 75-6 (1968).

27. Levy v. Louisiana, 391 U.S. 68, 72 (1968).

merely because the mother's child was born out of wedlock. The Court did not find substance in the contrary argument that permitting recovery would encourage illegitimacy.

> It would be, indeed, farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the "sin," which is, we are told, the historic reason for the disability.[28]

Detailed analysis of either *Levy* and *Glona* would be duplicative since other commentators have carefully and precisely scrutinized both opinions.[29] There is agreement that Justice Douglas' holding is unclear since the constitutional standard applied by the majority for its result is not explicitly stated. At least four possible grounds can be established. First, there is the traditional constitutional standard applied to economic legislation as to whether the classification of illegitimacy bears a rational relation to the purposes of the statute.[30] Briefly stated, illegitimacy has no relation to a tortious injury whether inflicted on the mother of an illegitimate child, or directly on the illegitimate child.[31] A second possible ground is that the Louisiana statute encroached on basic civil rights. The statute inhibiting recovery to illegitimates ". . . involve the intimate, familial relationship between a child and his parent."[32] A third ground which may invalidate the Louisiana statute is that the legislation creates a suspect classification based on race and ancestry.[33] Finally, there is a substantial due process argument available to invalidate the Louisiana statute. The legislation sought denial of recovery rights to a person[34] on the basis of a

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28. Glona v. Am. Guar. & Liab. Cas. Co., 391 U.S. 73, 75 (1968).

29. Knause, *supra* note 15; Gray *supra* note 15.

30. Justice Douglas noted that great latitude is permitted legislatures in making classifications regarding economic legislation. Levy v. Louisiana 391 U.S. 68 (1968), *citing* Morey v. Dodd, 354 U.S. 457, 465-466 (1959), and Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). The question was then raised whether a corporation could be denied a right of recovery for a wrong simply because the incorporators of the business were all bastards. The question was not answered, except by the dissenting opinion which labeled Justice Douglas' analogy as "far-fetched." Levy v. Louisiana, 391 U.S. 80 n.8 (1968).

31. Levy v. Louisiana, 391 U.S. 68, 72 (1968).

32. *Id.* at 71.

33. *Id.* at 71, *citing* Harper v. Bd. of Elections, 383 U.S. 663, 669 (1966), and Brown v. Bd. of Education, 347 U.S. 483 (1942). See Gray, *supra* note 15, at 4-5.

34. Levy v. Louisiana, 391 U.S. 68-70(1968):

> We start from the premise that illegitimate children are not

condition of illegitimacy over which the child had no control.[35]

Justices Harlan, Stewart, and Black dissented to both *Levy* and *Glona* in a single opinion.[36] Two reasons were given to justify the dissenting opinion's support of the Louisiana statute. First, there is disagreement with the majority opinion that the classification between a legitimate and illegitimate child is "inherently suspect."[37] Merely because a majority of the Court could draw a better classification does not mean the existing state classification is unconstitutional.[38] Second, the dissent argued that a rational purpose was served when a state requires the formalities of marriage and acknowledgement of an illegitimate before wrongful death recovery may be permitted.

> Louisiana has chosen . . . to define these classes of proper plaintiffs in terms of their legal rather than their biological relation to the deceased. . . .
> The Court today, for some reason which I am at a loss to understand, rules that the State must base its arbitrary definition of the plaintiff class on biological rather than legal relationships. Exactly how this makes the Louisiana scheme even marginally more "rational" is not clear, for neither a biological relationship nor legal acknowledgement is indicative of the love or economic dependance that may exist between two persons.[39]

The majority opinion in *Glona* answered Justice Harlan's second argument by stating

> To say that the test of equal protection should be "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of the State to draw such "legal" lines as it chooses.[40]

Nevertheless, Justice Harlan's dissent possibly has some validity with respect to the fact situation in *Glona*. There, the mother who sought recovery arguably could have met the formal requirements of marriage important to Justice Harlan.[41] In *Levy*, a different fact situation prevailed. The plaintiffs there were illegitimate children who had no opportunity to comport with formality or acknowledgement. Their disadvantage resulted solely from the fact of illegitimate birth over which they had no control.[42]

"nonpersons." They are humans, live and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

35. *Id.* at 71.

36. *Id.* at 76.

37. The different rights accorded an illegitimate child who was acknowledged and one who was not was "hardly" one of those suspect classifications covered by the equal protection clause. *Id.* at 81.

38. *Id.*

39. *Id.* at 79.

40. *Id.* at 75-6.

41. Knause, *supra* note 15, at 343 n.24. *See* Glona v. Am. Guar. & Liab. Ins. Co., 379 F.2d 545, 546 n.2 (5th Cir. 1967).

42. This, of course, would violate substantial due process. For ex-

Difficulty with the rationale of *Levy* and *Glona* immediately appeared. On remand the Supreme Court of Louisiana approved the characterization of the reasoning process of the United States Supreme Court in *Levy* and *Glona* as "brute force."[43] Moreover, the Louisiana court, probably by accident, assumed that *Levy* and *Glona* applied to a *parent-child* setting rather than only to the mother-child relationship found in either *Levy* or *Glona*.[44] Whether the father-child relationship is open to constitutional attack is, as expected, a major focus of post-*Levy* litigation.[45]

III. POST-LEVY LITIGATION: CONFLICTING RESULTS

a. *Support*

One initial area of challenge following *Levy* and *Glona* is the illegitimate child's right of support from his father. In *Baston v. Sears*,[46] the Ohio Supreme Court held that in the absence of legislation an illegitimate could not compel support from his father. *Baston* would limit *Levy* only to the mother-child relationship. Also, the marriage contract is essential to require consent of the father to support an illegitimate child. Finally, any change in the relationship of an illegitimate to its father is a matter for the state legislature.[47]

In *R. v. R.*,[48] the Missouri Supreme Court reached a result con-

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ample, the status of narcotics addiction could not be a criminal offense, since addiction could be contracted involuntarily. Robinson v. California, 370 U.S. 660, 667 (1962). *But see* Powell v. Texas, 392 U.S. 514 (1968), where the Supreme Court would not apply *Robinson* to a public drunk charge. But, this was a 5-4 decision. The concurring opinion of Justice White would indicate that *Robinson* should apply to a chronic alcoholic with an irresistable urge to drink alcohol. 392 U.S. 514, 548-49 (1968). In short, the facts of *Powell* would not lend itself to the *Robinson* rationale. See note 136 *infra*. *See also* NAACP v. Overstreet, 384 U.S. 118, 123-26 (1966).

43. Levy v. Louisiana, 216 So. 2d 818, 820 (La. 1968), *citing* Glona v. Am. Guar. & Liab. Ins. Co., 361 U.S. 73, 76 (1968) (dissenting opinion).

44. The United States Supreme Court has held that, as alleged in the petition in 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.

Id. (emphasis added). See Knause, *supra* note 15, at 339 n.8.

45. *E.g.*, Bastion v. Sears, 15 Ohio 2d 166, 239 N.E.2d 62 (1968); R. v. R., 431 S.W.2d 152 (Mo. 1968).

46. 15 Ohio 2d 166, 239 N.E.2d 62 (1968). Argument in *Bastion*, however, preceded the decision in Levy v. Louisiana, 391 U.S. 68 (1968). See Gray, *supra* note 15, at 23.

47. Bastion v. Sears, 15 Ohio 2d 166, 168, 239 N.E.2d 62, 64 (1968).

48. 431 S.W.2d 152 (Mo. 1968).

trary to the Ohio court in *Baston* and granted an illegitimate a right to support from his father. The Missouri decision obviously rested on a broader reading of *Levy*:

> [T]he principles applied by the United States Supreme Court would render invalid state action which produces discrimination between legitimate and illegitimate children insofar as the right to compel support by his father is concerned . . . .[49]

Analytically, the Missouri court is correct. Limiting the *Levy* opinion only to the mother-child relationship is not the real issue. As stated by a leading authority on the illegitimate:

> [A]n illegitimate's claim against his father does not rest on an analogy to his claim against his mother. Rather, it rests on comparison with the *legitimate* child's rights against his father, and, more specifically, on the answer to the question whether 'legislation denying to the illegitimate rights [against his father] that are granted to those of legitimate birth is . . . related to proper public concern with respect to which legitimate and illegitimate children are not situated similarly.'[50]

b. *Wrongful death actions*

The immediate preceding analysis is supported by *Schmoll v. Creecy*.[51] There, the Supreme Court of New Jersey considered whether illegitimate children could bring a wrongful death action for loss of their father. The New Jersey wrongful death statute referred to the state's intestacy statute to determine the "beneficiaries" of a wrongful death recovery. The intestacy statute did not permit an illegitimate to inherit from or through the father unless the child was legitimated during the father's lifetime. The New Jersey court found it impossible to determine whether the thesis of the United States Supreme Court in *Levy* and *Glona* applied to intestate devolution.[52] This was not pivotal, however, since the wrongful death statute merely referred to the intestacy statute to identify beneficiaries in the tort action. Despite this reference, *Schmoll* found that claimants take under the wrongful death statute, not the intestacy legislation.[53] The court found that

> legitimacy is irrelevant to the tortfeasor's liability, and hence it is invidious to grant a remedy to the legitimate and withhold it from the illegitimate child. Under that

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49. *Id.* at 154. See also Munn v. Munn, 450 P.2d 68 (Colo. 1969); Storm v. None, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (Family Ct. 1969).

50. Knause, *supra* note 15, at 340-41.

51. 54 N.J. 194, 254 A.2d at 523 (1969).

52. *Id.* at 200, 254 A.2d at 528.

53. No satisfying explanation by the court is given for this sleight-of-hand. See also Knause, *supra* note 15, at 551 n.50a. *But see In re* Estate of Ortiz, 60 Misc. 2d 756, 303 N.Y.S.2d 806 (Sur. Ct. Kings Co. 1969).

thesis, it can be of no moment whether that parent was the mother or the father.[54]

c. *Proof of paternity legislation*

Some states permit an illegitimate child to inherit from his father where proof of paternity is properly established-usually during the lifetime of the intestate.[55] Litigation has considered the difference between the status of the legitimate and illegitimate child where the latter requires proof of paternity before inheritance is allowed. Courts have, however, rejected an illegitimate child's argument that he is denied equal protection by requiring proof of paternity. Broadly stated, proof requirements are "reasonable," and are necessary to prevent fraudulent claims.[56]

d. *Inheritance under intestacy legislation*

Before the Supreme Court held in *Labine v. Vincent*[57] that states could properly limit the inheritance rights of illegitimates under intestacy statutes, a few cases considered the same issue by utilizing the analysis and result of *Levy*. The first intestacy situation to which *Levy* was applied was in North Dakota where an illegitimate was denied a right to inherit from the mother. The state supreme court in *Michaelson v. Undhjem*[58] held under *Levy* that

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54. Schmoll v. Creecy, 54 N.J. 194, 201, 254 A.2d 525, 529 (1969). *But see* Sanders v. Tillman, 245 So. 2d 198 (Miss. 1971).

55. See note 8 *supra* and accompanying text. See also Knause, *Bringing The Bastard Into The Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 854-56 (1966).

56. A state statute requiring an illegitimate to demonstrate proof of heirship did not deny equal protection in Burnett v. Camden, 255 N.E.2d 650 (Ind. 1970). Similarly, to require an illegitimate child to show written declaration of paternity was not unconstitutional. *In re* Estate of Pakarinen, 178 N.W.2d 714 (Minn. 1970); *In re* Estate of Breole, 178 N.W.2d 896 (Minn. 1970). See also *In re* Estate of Kirkby, 299 N.Y.S.2d (Sur. Ct. N.Y.C. 1969). And, in Tridential Ins. Co. v. Hernandez, 63 Misc. 2d 1058, 314 N.Y.S.2d 188 (Sup. Ct. Spec. Term N.Y. Co. 1970), the father of two illegitimate children left insurance proceeds but no named beneficiary. The father had acknowledged in writing the fathering of the children. But, there was no order of filiation entered in court, as required under New York law. The insurance company interpleaded the two children and the parents of the deceased. The court granted the proceeds of the policy to the children having found no rational purpose in excluding illegitimate children from the estate of their father. This was especially true in view of the undisputed formal acknowledgments of paternity. See also Matter of Anonymous, 60 Misc. 2d, 163, 302 N.Y.S.2d 688 (Sur. Ct. Nassau Co. 1969). Where the father fails to act during his lifetime, the court will not act after death. Sanders v. Tillman, 245 So. 2d 198, 201 (Miss. 1971).

57. 91 S.Ct 1017 (1971).

58. 162 N.W.2d 861 (N.D. 1968).

the local statute denying an illegitimate the right to inherit was unconstitutional. *Michaelson* apparently grounded its result on a due process principle:

> 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 § 56-01-05, which is based on such status . . . is unreasonable.[59]

Subsequent to *Michaelson*, the state legislature of North Dakota passed an intestacy statute which removed all distinction between legitimate and illegitimate children.[60]

Other courts have not been as generous as North Dakota when reviewing the constitutionality of intestacy legislation where the illegitimate child is concerned. In *Pettiford v. Frazier*,[61] an illegitimate child appealed to the Supreme Court of Georgia from a lower court order that she was not entitled to inherit from the estate of the intestate father. The state intestacy statute permitted an illegitimate child to inherit only from the mother.[62] While another state statute permitted the father to legitimate an illegitimate child,[63] the father here did not comply with the statute. The state supreme court upheld the order of the lower court. The court, without extended discussion or even citing *Levy* or *Glona*, found that denial of a right of inheritance did not constitute unconstitutional abridgement of privileges or immunities of a United States citizen, nor was it a denial of equal protection of the laws.

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59. *Id.* at 878.

60. N.D. CENT. CODE § 56-01.05 (1969).

> Every child is hereby declared to be the legitimate child of his natural parents, and is 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.

The statute which was the subject of litigation in *Michaelsen* read

> Every child born out of wedlock is an heir of the person who in writing signed in the presence of a competent witness acknowledges himself to be the father of such child. In all cases such child is an heir of his mother. He inherits the father's or mother's estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. He, however, does not represent his father or mother by inheriting any part of the estate of the kindred of his father or mother, either lineal or collateral, unless before his death his parents shall have intermarried and his father after such marriage shall have acknowledged him as his child or adopted him into his family. In that case such child and all the legitimate children in such family are considered brothers and sisters and on the death of any one of them intestate and without issue the others, subject to the rights in the estate of such deceased child of the father and mother respectively, as is provided in this code, inherit his estate as his heirs in the same manner as if all the children had been born in wedlock. The issue of all marriages null in law or dissolved by divorce are deemed to have been born in wedlock.

N.D. CENT. CODE § 56-01-05 (1960) (repealed).

61. 226 Ga. 438, 175 S.E.2d 549 (1970).

62. GA. CODE ANN. § 113-904 (1935).

63. GA. CODE ANN. § 74-103 (1935).

Strahan v. Strahan[64] was a federal diversity case where the court sustained the constitutionality of a Louisiana intestacy statute which provided that an illegitimate child could not inherit as against legitimate heirs from his intestate parents. The court held the local intestacy legislation was not arbitrary or without a reasonable basis. There was a vital state interest in the stability of land titles which evidently would be harmed by inheritance claims of illegitimates.[65]

While *Strahan* was being litigated in a federal district court in Louisiana, that state's court system was considering the plight of the illegitimate child under Louisiana intestacy law in *Labine v. Vincent*.[66] There, the intestate died leaving brothers and sisters, and an illegitimate daughter. Intestate publicly acknowledged the daughter as his own. But, acknowledgement only resulted in a right of support to the child from the father during his lifetime. When the father died intestate, state law permitted brothers and sisters to inherit to the exclusion of the acknowledged illegitimate child.[67]

The illegitimate child of intestate argued before the Louisiana courts that the state inheritance statute was unconstitutional. Plaintiffs claimed the statute violated equal protection and due process guarantees since the illegitimate was denied inheritance rights solely because of his illegitimacy.[68] The Louisiana court recognized the persuasiveness of the constitutional argument under *Levy* and *Glona*.[69] Nevertheless, the state court found these decisions did not alter the state's ". . . great latitude in making classifications, so that differences and distinctions in treatment offend the constitutional guarantees only when the variations are arbitrary and without rational basis."[70] Also, the regulation of descent and distribution of estates are peculiarly state functions.[71]

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64. 304 F. Supp. 40 (W.D. La. 1969).
65. *Id.* at 42.
66. Succession of Vincent, 229 So. 2d 449 (La. App. 1969).
67. See discussion of Louisiana law, *id.* at 450-2. See Labine v. Vincent, 91 S.Ct 1017-18 (1971).
68. Succession of Vincent, 229 So. 2d 449, 451 (La. App. 1969).
69. *Id.*
70. *Id.*, *citing* Morey v. Doud, 354 U.S. 457 (1957), and United States v. Burnison, 339 U.S. 87 (1950).
71. *Id.*, *citing* United States v. Burnison, 339 U.S. 87 (1950), and Harris v. Zion's Savings Bank & Trust Co., 317 U.S. 447 (1943). *But see* Labine v. Vincent, 91 S.Ct 1017 (1971). The majority opinion in *Labine* would evidently hold that exclusive power to regulate disposition of estates is reserved to the states. 91 S.Ct 1017, 1021. However, the dissenting opinion in *Labine* notes the following:

> The only context in which this statement might have relevance would be in the context of the question, not presented in this case,

The Louisiana court found a rational basis in the existing state inheritance legislation since it encouraged marriage and the legitimacy of children. Also, reasonableness was found in the stability of land titles which would be upset if inheritance rights were accorded illegitimate children.[72] These, the court held, were sufficient reasons to disallow inheritance rights to an illegitimate child regardless of how ". . . unfair it may be to punish innocent children for the fault of their parents, . . ."[73]

IV. LABINE BEFORE THE SUPREME COURT

A. *The majority view*

Following denial of certiorari by the Supreme Court of Louisiana, the United States Supreme Court, on appeal, affirmed the result of the state court in *Labine v. Vincent*.[74] Justice Black wrote the sharply divided decision. The majority opinion found that appellant's reliance on *Levy* and *Glona* was "misplaced."[75] The rationale of those recent cases would not be extended to nonapplicable state intestate laws. The Court certainly realized that a state could not distinguish between the legitimate and illegitimate child where state law allowed wrongful death recovery. But, *Levy* involved a state-created statutory right which attempted to totally exclude recovery to illegitimate children who were also injured by a tortious act inflicted on a parent. Yet, "*Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring."[76]

Labine found that certain relationships among people are . . . socially sanctioned, legally recognized and gives rise to various rights and duties."[77] Some state rules regarding these relationships, moreover, may be more rational than others.

> But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition

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of the power of Congress to regulate the devolution of property upon the death of citizens of the various States. In such a case, the question would indeed be whether the Constitution commits such power exclusively to the States. It so happens that this Court, in an opinion written by my Brother BLACK, has held that the Constitution does *not* commit the power to regulate intestate succession exclusively to the States. *United States v. Oregon*, 366 U.S. 643, 649 (1961) ("The fact that this [federal] law pertains to the devolution of property does not render it invalid. Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power.")

91 S.Ct 1017, 1025-26 n.16.

72. Succession of Vincent, 229 So. 2d 449, 452 (La. App. 1969).
73. *Id.*
74. 91 S.Ct. 1017 (1971).
75. *Id.* at 1019.
76. *Id.*
77. *Id.* at 1021.

> of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the people of that State. Absent a specific constitutional guarantee, it is for that Legislature not the life-tenured judges of this Court, to select from among possible laws.[78]

Further, the majority found no "insurmountable barrier" to the illegitimate child, as in *Levy*, if inheritance to him were to occur. First, the intestate could have willed one-third of his property to the child if he had bothered to execute a will. Second, inheritance to the child would have followed if intestate had married the mother. Third, the intestate could have stated his intention to legitimate the illegitimate child for inheritance purposes in his acknowledgement of paternity.[79]

Obviously, the majority did not offer any penetrating analysis to support the state intestacy scheme. Nor were the reasons offered by the state court in its opinion explicitly affirmed by the majority in *Labine*. It may well be stated that no analysis at all was effectively offered by the majority. Apparently, a state intestacy scheme is valid simply because it is a local matter, almost regardless of the consequences of the scheme.

B. *The dissenting view*

Compared to the majority opinion, the *Labine* dissent wrote a lengthy and certainly more analytical opinion under the hand of Justice Brennan. The dissent limited its opinion to the facts before it. The minority would clearly find discriminatory state action, not allowed under the equal protection clause of the fourteenth amendment, where a publicly acknowledged illegitimate child is treated differently than a legitimate child under a local intestacy scheme.[80]

The dissent found at least two grounds where the state intestacy scheme discriminated against the illegitimate child. First, under the civil law scheme of Louisiana's intestacy legislation, a legitimate child was a "forced heir" and could not be totally excluded, even by will, by his father. An illegitimate child, on the other hand, was excluded from inheritance, unless the father affirmatively inherited the child.[81] Second, the Louisiana descent and distribution scheme did not purport to represent the "presumed in-

78. *Id.*
79. *Id.*
80. *Id.* at 1022.
81. *Id.* at 1023-24.

tent" of the intestate. It was clear "state action" which excluded an illegitimate from paternal inheritance where the intestate left other collateral relations. The state action should certainly be subject to an equal protection test of a "rational basis," which, on several grounds, the dissent found was lacking.[82] Under the view of the dissent, the majority's emphasis on the state's power to pass inheritance laws was not the issue. If the majority were correct, any subject of local control would be immune from control of the fourteenth amendment. Rather, the issue is ". . . whether the State has legislated without the invidious discrimination that is forbidden by the Fourteenth Amendment."[83]

Faced with a lack of analysis to support the majority result,[84] the dissent undertook its own analysis to determine whether a rational basis existed to support the Louisiana intestacy scheme. Several views were taken by the dissent. First, there was an identity of biological, spiritual, and family interest between the father and both the illegitimate and legitimate child. For this reason, each type of child should be treated the same with respect to the father.[85] Second, the state could validly insist on certain formalities to counter proof questions and possible fraud. But, where the child is formally acknowledged, as in *Labine*, this justification for distinction between the legitimate and illegitimate child is not present.[86]

Third, the state may well have a valid interest in the formality of marriage. But, the state interest in the formality of marriage is an attempt to impose reciprocal obligations on the parties to the marriage. Also, the formality of marriage is fully within the control of the parties to the marriage. Both elements apply to the relationship of one parent to another parent. Neither element applies to the relationship between parent and child.[87] Fourth, the Louisiana scheme could be viewed as a local attempt to effectuate the general intent of parents not to provide inheritance to an acknowledged illegitimate child. But, even the state court, in its opinion below, found the statutory scheme to be a furtherance of state, not private, goals.[88] One could, however, entertain the presumption that the state descent legislation sought to implement private wishes. Yet, certainly, a father who publicly acknowledges an illegitimate child presumably would not balk at permitting such a child to also inherit from the father.[89]

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82. *Id.* at 1029.
83. *Id.* at 1025.
84. *Id.* at 1027:
> In short, the Court has not analyzed, or perhaps simply refused to analyzed, Louisiana's discrimination against acknowledged illegitimates in terms of the requirements of the Fourteenth Amendment.

85. *Id.*
86. *Id.* at 1028.
87. *Id.*
88. Succession of Vincent, 229 So. 2d 449, 452 (La. App. 1969).
89. Labine v. Vincent, 91 S.Ct. 1017, 1029 (1971).

The dissent finally stated the central problem: the state descent scheme clearly punished children for the parents' action. There was certainly standing constitutional authority that distinctions due to ancestry cannot stand.[90] Also, as a matter of due process, the illegitimate child should not be disadvantaged because of a circumstance of birth over which he had no control.[91] The result reached by the majority was simply affirmation of a "moral prejudice of bygone centuries."[92]

The majority in *Labine* does not offer a satisfying analysis which would justify its result. Certainly, *Levy* and *Glona* provided strong indicators that attack on the illegitimate child's plight under intestacy legislation was feasible. Some courts cited these earlier cases to broaden the rights of the illegitimate child under local law, including the area of descent and distribution.[93] The dissent in *Labine* raises compelling doubts as to the continued constitutionality of discriminatory legislation directed to the illegitimate child under current intestacy legislation. By itself, the due process issue of whether an illegitimate child can properly be punished for the conduct of his parents by denying the child inheritance appears unassailable. As it stands, *Labine* may well result in halting recent progress achieved by some local courts concerning the awakening of rights regarding the illegitimate child. If such a result is the practical effect of *Labine*, then certainly the Supreme Court could have rested its decision on a more substantial and satisfying opinion than we have presently.

In terms of available case law, the issue raised by *Labine* is novel. The "family-unit" principle which supports the result of that decision has been raised only recently in post-*Levy* litigation.[94] The "family-unit" principle and its corollaries will now be examined to determine whether possible supporting reasons for the *Labine* result are sound, and can withstand further fourteenth amendment challenge.

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90. *Id.* at 1030.
91. *Id.*
92. *Id.* at 1022.
93. *E.g.*, Michaelsen v. Undhjem, 162 N.W.2d 861 (N.D. 1968). See also notes 46-60 *supra* and accompanying text.
94. Constitutional objection to the illegitimate child's plight under local legislation is novel. See notes 96-100 *infra* and accompanying text. The "family-unit" principle signifies the varying state interests which has generally been cited to support treatment of the illegitimate child which is usually more harsh in terms of legal rights than treatment accorded the legitimate child. The state cases usually claim a valid local interest in discouraging illegitimacy or encouraging marriage to justify the separate legal status of the illegitimate child. See notes 101-09 *infra* and accompanying text.

Evidently, there is no case support prior to *Labine* which has directly considered the constitutionality of intestate statutes which arguably discriminate against the illegitimate child.[95]

Interesting language which at least recognizes the unfair result of discriminatory intestate statutes may be found in *Cope v. Cope*.[96] There, the Supreme Court considered the validity of a Utah territorial statute which provided for inheritance by an illegitimate child from the estate of his father if proof of paternity was shown regardless of acknowledgement of paternity by the father.[97] It was argued that the territorial statute conflicted with antipolygamy legislation of Congress. The Supreme Court recognized that the statute was in derogation of common law and would be strictly construed. But, distribution of estates and rights of succession were exclusively questions of local concern.[98] *Cope* upheld the validity

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95. Statements approaching a due process argument have been raised in support proceedings. In Saks v. Saks, 189 Misc. 667, 668, 71 N.Y.S.2d 797, 798 (Dom. Rel. Ct. 1947), it was stated:

> Parenthetically, it may be said that to call a child illegitimate because it was born either out of wedlock or conceived by one other than the husband of its mother is incongruous. Certainly the child is not at fault. Unfortunately, illegitimacy is regarded as a stigma upon the child. The stigmatization should be applied to the mother or to both the mother and father rather than to the child.

See also the dissenting opinion of *In re* Cady's Estate, 257 App. Div. 129, 12 N.Y.S.2d 750 (3d Dept. 1939), *aff'd without opinion*, 281 N.Y. 688, 23 N.E.2d 18 (1939):

> [I]f the majority are correct in their decision . . . , we have the anomalous situation of the blood uncle of an illegitimate child of his predeceased sister being entitled to inherit from such natural nephew, but the nephew may not inherit from the uncle, even though he be . . . the only living blood relative and the only issue, legitimate or otherwise, of his mother. I do not believe that the statutes intend such an inhuman result, whereby the one who bears the stain of the bar sinister in all too critical society must have imposed upon him the additional punishment of disinheritance while the relative of the mother may profit by her transgression.

257 App. Div. at 131-2, 12 N.Y.S.2d at 753.

In another support case, the Texas Court of Civil Appeals considered a Kentucky judgment which obligated a Texas father to support his illegitimate child. Texas law did not require a father to support his illegitimate child. The Texas intermediate appellate court would not enforce the judgment in Texas since this would deny the father equal protection of the law. This court judgment was reversed. Bjorgo v. Bjorgo, 391 S.W.2d 528 (Tex. Civ. App. 1965), *rev'd*, 402 S.W.2d 143 (Tex. 1966). Knause, *Equal Protection For The Illegitimate*, 65 MICH. L. REV. 477, 484 (1967). *Cf.* State *ex rel.* Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W.2d 56 (1970). Here, the failure of Wisconsin statutes to grant parental rights or notice of hearing to putative father prior to termination of parental rights does not violate equal protection clause of the fourteenth amendment. As for the putative father, the ". . . law does not recognize him at all. . . ." The only exception is for support purposes. *Id.*, *citing* Thomas v. Childrens Aid Society, 12 Utah 2d 235, 364 P.2d 1029 (1961).

96. 137 U.S. 682 (1891).

97. *Id.* at 684.

98. *Id.* But see note 71 *supra*, noting a contrary view in United States v. Oregon, 366 U.S. 643, 649 (1961).

of the Utah legislation and stated:

> It is true that a peculiar state of society existing at the time this act was passed, and still existing in the Territory of Utah, renders a law of this kind much wider in its operation than in other States and Territories; but it may be said in defense of this act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents' sins. To recognize the validity of the act in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than upon the child; while to hold it to be invalid is to treat the child as in some sense an outlaw and a *particeps criminis*.[99]

Between *Cope* and *Labine*, however, few instances appear where the inequity of discrimination against the illegitimate child is discussed in terms which touch upon an equal protection or due process argument.[100]

A. *The Family-Unit Principle: Identifying The Rationale*

One commentator has listed several reasons or state "interests" which arguably support legislation which discriminate against the illegitimate. The state discrimination discourages promiscuity and protects the "family unit."[101] In addition, there is the problem of uncertainty of paternity, and the favored position of the legitimate vis-a-vis the illegitimate with regard to an actual relationship with the father.[102] An additional consideration grants weight to the father's choice in accepting the responsibility of legitimating a child by marriage or acknowledgement.[103] These reasons, however, are basically restatements of a common theme which seeks to encourage the marital state.

The "family unit" principle was certainly the heart of *Labine*.[104] It was also one reason given by the Louisiana court to jus-

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99. *Id.* at 685 (emphasis original).
100. See note 95 *supra*.
101. Knause, *Equal Protection For The Illegitimate*, 65 MICH. L. REV. 477, 491 (1967).
102. *Id.* at 489.
103. *Id.* at 495. See also *In re* Brennan, 270 Minn. 455, 134 N.W.2d 126 (1965), where the court stated that the
> overwhelming percentage of fathers of out-of-wedlock children are not interested in their children, in recognizing them, in supporting them, in legitimizing them, or especially in seeking their custody.

104. To permit a state to deny to the illegitimate child a right to inherit from his father would "strengthen family life." *See* Labine v. Vincent, 91 S.Ct. 1017, 1021 (1971).

tify denial of wrongful death recovery to illegitimate children in *Levy*.[105] The protection of title claims is a similar state interest,[106] stated differently, but still grounded on a "family unit" principle.

The family unit doctrine is probably the historical reason for discrimination against the illegitimate child. He is the product of "sin."[107] The underlying sociology may well be the English belief in strict monogamy and the church influence on marital sanctity.[108] There eventually emerged the twin "legal" fears of difficulty of proof of the real father, and fear of fraudulent claims which would effect estates.[109] And, as illustrated earler, this common law prejudice has subsequently become ingrained in our own state legislation.[110]

B. *The Fourteenth Amendment: A Basic Examination*

Before applying fourteenth amendment scrutiny to intestacy legislation regarding the illegitimate child,[111] it is appropriate to outline certain basic tenents.

Historically, the fourteenth amendment was a necessary response to certain Reconstruction legislation which otherwise might have a dubious constitutional foundation. A two-fold purpose has been ascribed to the amendment. First, certain basic civil rights were most probably the immediate object of the amendment's passage. Second, the general language of the amendment could also encompass a broader elastic application of the amendment to a changing social order.[112]

Of course, some disparate treatment of persons is inevitable as no absolute equality in application of law is possible. The constitutional requirement is that the classification is reasonable.[113]

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105. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 80 (1968).

106. Strahan v. Strahan, 304 F. Supp. 40, 42 (W.D. La. 1969), *citing* American Land Co v. Zeiss, 219 U.S 47 (1910); Succession of Vincent, 229 So. 2d 449, 452 (La. App. 1969).

107. Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S 73, 75 (1968). *See generally* Note, 26 BROOKLYN L. REV. 45, 47 (1961).

108. Note, 26 BROOKLYN L. REV. 45, 47 (1961).

109. *Id., citing* 1 BLACKSTONE, COMMENTARIES 455 (1845 ed. Chitty). See also Knause, *Protection For The Illegitimate*, 65 MICH. L. REV. 477, 498-500 (1967).

110. See notes 4-9 *supra* and accompanying text.

111. See text at p. 398 *infra*.

112. Note, 82 HARV. L. REV. 1065, 1069 (1969), *citing* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59-63 (1955).

113. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

F.S. Foyster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Mere classification itself, however, does not deprive a group of equal protection. Carrington v. Rash, 380 U.S. 89 (1965). Equal protection, though, does not re-

And, there are certain "natural" classifications such as age and sex which will be upheld when related to a proper legislative purpose.[114] Beyond these natural classifications, other classifications will be upheld when there factors are present. First, the classification itself is a rational one having a reasonable relation to the object of the legislation. Second, the purpose of the classification must be geared to a proper legislative purpose. Third, within each class all persons must be treated equally.[115]

One commentary states the following general rule with regard to application of equal protection in economic and tax legislation:

> When taxation or regulation of economic activity is all that is involved, a state has wide discretion in assessing the problems to be dealt with and in deciding what classifications are reasonable. Unless it is "palpably arbitrary," a classification is likely to be upheld, and if any state of facts which would sustain the classification's rationality can be reasonably conceived, its existence must be assumed. Indeed, a permissive approach which does not require every classification to be drawn with mathematical nicety seems a practical necessity if the process of legislation is not to be hopelessly stymied.[116]

A classification may also be objectionable if there is "under-inclusion" or "over-inclusion." A legislative classification must benefit or burden all those who are similarly situated.[117] If a statute benefits or burdens only a portion of those persons similarly situated it is "under-inclusive."[118] The logical complement of "under-

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quire equality in law where inequality in fact exists. Special burdens may be imposed upon defined classes for permissible ends. Rinaldi v. Yeager, 384 U.S. 305, 309 (1966).

114. *E.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (statute limiting working hours for women). *See generally* 16 AM. JUR. 2d *Constitutional Law* § 507-516 (1964).

115. See note 113 *supra*. *See generally* 16A. C.J.S. *Constitutional Law* § 489 (1956).

116. Note, 82 HARV. L. REV. 1065, 1083 (1969).

117. *Id.* at 1084-1085.

118. For example, in Skinner v. Oklahoma, 316 U.S. 535 (1942), a state statute permitted compulsory sterilization of recidivists of certain crimes. The list of crimes included larceny, but not embezzlement. The Court struck down the statute since no rational distinction between the two cited crimes warranted the difference in treatment. *But see* Buck v. Bell, 274 U.S. 200 (1927). *See also* Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) (administrative convenience would not justify inexactness). In *Rinaldi*, a "reimbursement" statute required jailed but successful appellants to pay the state for furnished transcripts. The same statute did not apply to those who were fined, placed on probation or given suspended sentences. The statute was under-inclusive. The policy of reimbursement bore no relation to the dissimilar treatment.

inclusion" is "over-inclusion." Here, the statute not only includes all those similarly situated with respect to the purpose of the statute, but other persons not so similarly situated are also benefited or burdened by the statute.[119]

The "reasonable" classification test, however, does not apply where certain "suspect" classifications are the object of legislation. With respect to race,[120] ancestry,[121] and alienage,[122] the classification requires more than a rational relation to the purpose of the legislation. For example, in *Korematsu v. United States*[123] emergency World War II legislation which ordered Japanese-Americans removed from the West Coast was immediately "suspect" and subject to "rigid scrutiny." Probably, this particular legislation was upheld solely because of wartime exigency. Similarly, an "overriding statutory purpose"[124] appears required where racial classifications are applied. Moreover, while economic legislation may enjoy a certain presumption of validity, the reverse is true where "suspect" classifications exist.[125]

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119. An unconstitutional bill of attainder was found in United States v. Brown, 381 U.S. 437 (1965). There, it was a criminal offense for a member of the Communist Party to serve as an officer of a labor union. The statute was too narrow in defining the class, and too broad in treating all members of a class alike. *Id.* at 464 (dissenting opinion). The "inclusion" principles are also due process standards of "exactness" required, when possible, in legislation. Aptheker v. Sec. of State, 378 U.S. 500, 510-12 (1964).

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when that end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S 479, 488 (1960) (invalidating state statute requiring teachers in state schools to file affidavits of organizational associations). Further examples are Talley v. California, 362 U.S. 60 (1960); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Irvington, 308 U.S 147 (1939); Lovell v. Griffin, 303 U.S 444 (1942).

120. Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Bd. of Elections, 383 U.S 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Bd. of Education, 347 U.S. 483 (1954).

121. Herabayashi v. United States, 320 U.S. 81, 100 (1943). See note 161 *infra* and accompanying text.

122. Oyama v. California, 332 U.S. 633 (1948).

123. 323 U.S. 214 (1944).

124. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (statute prescribing punishment for interracial co-habitation held invalid).

125. No rational factors can be assumed to uphold classifications based on race or ancestry which are arbitrary *per se*. Such classifications must be *necessary*. *Id.* *But see* Hirabayashi v. United States, 320 U.S. 81 (1943), where wartime exigency evidently upheld World War II curfew orders which applied to persons of Japanese ancestry. Rules affecting a basic civil right are strictly reviewed. Harper v. Bd. of Elections, 383 U.S. 663, 669 (1966). Stated differently, in suspect or fundamental areas, a "compelling state interest" must support classifications. Shapiro v. Thompson, 394 U.S. 618, 634 (1969). See McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH L. REV. 645 (1963). See also Brief of *Amicus Curiae* and American Civil Liberties Union, at 3, Labine v. Vincent, 91 S.Ct. 1017 (1971).

Not only are certain classifications "suspect," but recent cases have denominated certain classifications as involving "fundamental"[126] interests. These "fundamental" interests include voting,[127] procreation,[128] criminal procedural rights,[129] and education.[130] Since "fundamental" interests are found in rather sporadic fashion, it is not easy to discern any common theme. It is clear, however, that, as with "suspect" classifications, legislation which impinges on a "fundamental" interest will fall in the absence of a compelling state interest.[131] A balancing test evidently is applied.

> [U]nder the fundamental interest theory a classification may be held invalid even though it is not invidious and even though it is reasonably related to a legitimate public purpose. A court applying this theory will weigh the benefits flowing from pursuit of the state's objective against the detriments resulting from the impairment of a basic personal interest. If the state's objective is not important enough to justify impairment of the individual's interest, the classification will fall. Here the focus is on the injustice created by unwarranted state interference with a fundamental interest at least as strongly as on the injustice engendered by inequality.[132]

In summary, a classification must be reasonable, bear a substantial relation to the object of the legislation and treat equally all those within the classification. Whether the classification is "under-inclusive" or "over-inclusive" is a factor. A classification is treated more strictly, however, where a "suspect" classification is present. Finally, a classification bearing on a "fundamental" interest must survive balancing the interest which is impinged against the objective of the legislation.

In addition to equal protection, a substantive due process principle is also important when considering legislation regarding the illegitimate child.[133] A law should not deny a person a right based on

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126. Note, 82 HARV. L. REV. 1065, 1127-31 (1969).
127. Harper v. Bd. of Elections, 383 U.S. 663 (1966).
128. Skinner v. Oklahoma, 316 U.S. 535 (1942). See note 118 *supra*. Similarly, there is the ". . . importance and nature of the decision to marry." Labine v. Vincent, 91 S.Ct 1017, 1030-31 (1971) (dissenting opinion), *citing* Boddie v. Connecticut, 91 S.Ct 780 (1971). In *Boddie*, the Court held that indigent plaintiffs could not be precluded from filing divorce actions for lack of funds to pay court and advertising costs.
129. *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).
130. *E.g.*, Brown v. Bd. of Education, 347 U.S. 483 (1954). It is more difficult to tag certain educational interests as "fundamental" without some racial concern. Note, 82 HARV. L. REV. 1120, 1129 (1969).
131. Note, 82 HARV. L. REV. 1065, 1120-1 (1969).
132. *Id.* at 1132.
133. In Bolling v. Sharpe, 347 U.S. 499 (1954), it was stated: "[T]he

a condition over which he has no control.[134] An example is *Robinson v. California*[135] where the Supreme Court held unconstitutional a state act which punished as a crime the possibly involuntary status of narcotics addiction.[136] The involuntary status of illegitimacy also results in some "penalty" under state law.[137]

VI. The Fourteenth Amendment Applied to Labine

When the Supreme Court held in *Labine v. Vincent* that a state may limit the inheritance rights of an illegitimate child, it was stated that ". . . there is nothing in the vague generalties of the Equal Protection and Due Process Clauses . . ."[138] which would compel a contrary conclusion. Evidently, the certainty of the majority that the fourteenth amendment had no application under the facts of *Labine* is the reason no fourteenth amendment analysis is given to support its holding. Unfortunately, there appears little other analysis to support the holding.[139] The majority simply stated that

> the power to make rules to establish, protect, and strengthen family life in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State.[140]

The dissent in *Labine* properly answered the majority's statement:

> [N]o one questions Louisiana's power to pass inheritance laws. Surely the Court cannot be saying that the Fourteenth Amendment's Equal Protection Clause is inappli-

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concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Id.*

134. In Labine v. Vincent, 91 S.Ct 1017 (1971), the dissenting opinion cited the lower court's holding that discrimination against an illegitimate child supported two state interests. First, punishment of the child might encourage the parents to marry. *Id.* at 1029. Of interest here is the "zone of privacy" concept in Griswold v. Connecticut, 381 U.S. 479 (1965). Here, the Court would not permit governmental intrusion into the sexual affairs of consenting adults. Labine v. Vincent, 91 S.Ct at 1029-30. Second, the state court found disinheritance of an illegitimate child would serve the state's interest in stability of land titles. *Id.* at 1030 n.30. But, this state interest was inapplicable in *Labine* where the father publicly acknowledged illegitimate child as his own. *Id.*

Also, to deny a right because of the stigma of legitimacy can be characterized as a form of a bill of attainder. Smith v. King, 392 U.S. 309, 336 n.5 (concurring opinion).

135. 370 U.S. 660 (1962).

136. Similarly, chronic alcoholism is a disease which cannot be punished as a crime. Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966). *Accord*, Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966). A due process violation may occur when a vagrancy statute imposes a penalty on unfortunate individuals. Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967); Alegata v. Commonwealth, 231 N.E.201 (Mass. 1967); Fenster v. Lery, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

137. See text at 401-2 *infra*.

138. Labine v. Vincent, 91 S.Ct 1017, 1021 (1971).

139. See note 84 *supra* and accompanying text.

140. Labine v. Vincent, 91 S.Ct. 1017, 1021 (1971).

> cable to subjects regulated by the States—that extraordinary proposition would reverse 104 years of constitutional adjudication under the Equal Protection and Due Process Clauses. It is precisely state action which is subjected by the Fourteenth Amendment to its restraints.[141]

The dissent applied its own fourteenth amendment analysis to the subject at hand.[142] The dissent's view has been briefly considered earlier.[143] Perhaps, it may be helpful to presently consider an independent application of the fourteenth amendment to intestacy legislation regarding the illegitimate child.

The appellants in *Labine* conceded that the state had great latitude in making classifications where economic legislation is concerned.[144] The reasonableness test was not argued. The appellants drew an analogy between illegitimacy and "suspect" classifications.[145] Such an approach would doubtlessly require strong justi-

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141. *Id.* at 1025-26.
142. *Id.* at 1027-31.
143. See text at p. 389-91 *supra.*
144. Brief for *Amicus Curiae* and American Civil Liberties Union at 2, Labine v. Vincent, 91 S.Ct 1017 (1971).
145. Brief for *Amicus Curiae*, and Center on Social Welfare Policy and Law at 4, and Brief for *Amicus Curiae*, and American Civil Liberties Union at 3-6, Labine v. Vincent, 91 S.Ct. 1017 (1971). The latter brief states:

> The illegitimate child is claiming a "fundamental right or liberty" or "a basic civil right of man."[1] The child's interest in a legal relationship with its father goes far beyond economics, although it has economic incidents of which inheritance is one. The child's claim centers on his father and extends to his second-class status in our society—a society in which illegitimacy is a "psychic catastrophe"[2] and in which recovery in tort is granted for a false allegation of illegitimacy.[3] Indeed, the psychological effect of the stigma of bastardy upon its victim[4] is comparable to the damaging psychological effects upon the victims of racial discrimination.
>
> The analogy to racial discrimination goes deeper. Although illegitimacy, on its face, seems to be a neutral criterion, it actually operates far more severely upon Negroes as a class than it does upon whites. First, disproportionately more black children than white children are born out of wedlock. The black illegitimacy rate recently stood at a national average of 29.4 percent, whereas the white rate stood at 4.9 percent. U.S. NEWS AND WORLD REPORT, March 30, 1970 at 30. This means that our law of illegitimacy has the effect of denying more than one in four black children a legal relationship with its father. Second, a far higher percentage of white illegitimates than black illegitimates find parents through adoption. The white adoption rate has been estimated to be 70 percent whereas the black adoption rate ranges between 3 and 5 percent. *Bureau of Public Assistance, U.S. Department of Health, Education, and Welfare, Illegitimacy and its Impact on the Aid to Dependent Children Program* 35-36 (1960); *cf.* Hylton, *Trends in Adoption*, 1958-1962, 44 *Child Welfare* 377 (1965). This means that an overwhelming percentage of children affected by laws discriminating on the basis of illegitimacy are black—and it is thus no coincidence that the children involved in *Levy* and in this case are black. In the brief for the N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND NATIONAL OFFICE FOR THE RIGHTS OF THE

fication for the intestacy legislation under view if the analogy were permitted. It may, however, be appropriate to apply the "rational" equal protection test to intestacy legislation regarding

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INDIGENT as *Amici Curiae* at 20, Levy v. Louisiana, 391 U.S. 68 (1968), this matter was illustrated pointedly:

> Applying the national percentage on white adoptions (70%) and non-white adoptions (4%) to the 1965 Louisiana illegitimacy figures (1,158 white, 8,276 Negro); only 347 white children remain unadopted, whereas 7,945 Negro children remain unadopted. *This means that 95.8 percent of all persons affected by the operation of the Louisiana Wrongful Death Act are Negroes.* For all practical purposes this means that the criterion of illegitimacy as used under the Louisiana Wrongful Death Act is synonymous with a *racial* classification.

In this light it is plain that the case should be governed by the standard set forth in *Shapiro*. *Compare* Levy v. Louisiana, 391 U.S. 68, 71 (1968), where the Court termed the criterion of illegitimacy "invidious" and spoke of the "intimate, familial relationship between [an illegitimate] child and his own mother.

[1] The illegitimate's demand for relief from discrimination has gained world-wide recognition as a basic human right. In January, 1967, a subcommission of the Commission on Human Rights of the United Nations adopted a statement on "General Principles on Equality and Non-Discrimination in Respect of Persons Born Out of Wedlock" which demands that "every person, once his filiation has been established, shall have the same legal status as a person born in wedlock." Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, *Study of Discrimination against Persons Born out of Wedlock: General Principles on Equality and Non-Discrimination in Respect of Persons Born out of Wedlock*, U.N. Doc. E/CN. 4 Sub. 2/L 453 (13 Jan. 1967).

[2] "In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal. . . . To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." Fodor, *Emotional Trauma Resulting From Illegitimate Birth*, 54 ARCHIVES OF NEUROLOGY AND PSYCHIATRY 381 (1945).

[3] The following is an abbreviated list of defamatory epithets compiled in a leading text-book on torts: ". . . immoral or unchaste, or 'queer' . . . a coward, a drunkard, a hypocrite, a liar, a scoundrel, a crook, a scandalmonger, an anarchist, a skunk, a bastard, a ennuch . . . because all of these things obviously tend to affect the esteem in which he is held by his neighbors." Prosser, *Torts*, 757-58 (3rd ed. 1964).

[4] In Jenkins, *An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children*, 64 AM. J. SOCIOLOGY 169 (1958), the author investigated whether there were significant differences in the "adjustment" of legitimate and illegitimate Negro school children. All children in the (unfortunately rather small) sample were recipients of Aid to Dependent Children's funds and otherwise lived in comparable economic and social circumstances. "Adjustment" was considered to be reflected in I.Q., age-grade placement, school absences, academic grades, teacher's rating, and personal and social adjustment as measured by the California test of personality. Jenkins reported that:

> "Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences. . . .
>
> The second discernible pattern was that the older group of illegitimate children consistently made a poorer showing than the younger group, in comparison with the legitimate children. A possible explanation for this is that, as these children grow older and are able to internalize fully the concept of illegitimacy and as they become in-

the illegitimate child.[146] It will be remembered that in *Levy v. Louisiana*[147] the opinion did approach a test whether the classification of illegitimacy bore a rational relation to the purpose of the Louisiana wrongful death act. The purpose of wrongful death legislation is to protect minors from loss of benefits had the parent lived. *Levy* held that the tortfeasors should be responsible for such loss regardless of whether the offsprings are legitimate.[148] In the *Labine* setting it could be argued that denying an illegitimate child inheritance from his father can be justified. Such a result bears a rational relationship to the state policy of deterring illegitimate births or, conversely, encouraging the marital state.[149] A soaring illegitimacy rate, however, argues to the contrary.[150] It is not rational to presume non-married parents will conform to desired social conduct before having illicit sexual conduct. The parents are not concerned that a potential child will share the burden of discriminatory state law.[151]

Even if the reasonableness of a state policy of encouraging marriage were accepted, it is still not permissible to punish the in-

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creasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory." *Id.* at 173.

146. The majority in *Labine* did not ground its result on any equal protection or due process analysis. It was stated, however, that ". . . 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 and of directing the deposition of property left within the State." Labine v. Vincent, 91 S.Ct. 1017, 1019 n.6 (1971).

The dissent in *Labine* would similarly hold that the state intestate scheme is not supportable under a "rational basis" standard. Therefore, the dissent was not compelled to consider whether illegitimacy is a "suspect" classification which requires stronger justification to support it. *Id.* at 1027 n.19.

147. 391 U.S. 68, 71 (1968).

148. *Id.*

149. *In re* Vincent, 229 So. 2d 449, 452 (La. App. 1969). See also Strahan v. Strahan, 304 F. Supp. 40, 42 (W.D. La. 1969). In Minor v. Young, 149 La. 583, 589, 89 So. 757, 759 (1921), the court stated that the reason local law limits the right of inheritance of an illegitimate child ". . . is not to punish the off-spring of those contravening . . . rules of morality, but to raise a warning barrier before the transgressor, prior to the act, of the consequences of his conduct; in other words, like all other penal laws, they seek to prevent rather than revenge."

150. Deterring illegitimacy may be a valid state goal. But if the means to achieve goal are ineffective, then the means are not reasonable. McGowan v. Maryland, 366 U.S. 420, 425 (1961). In 1950 the number of illegitimate births was 141,000 or 3.9% of the population. In 1967 the number was 318,100 which was 9.0% of the population. U.S. Bureau of the Census, *Statistical Abstract of the United States* (1969).

151. It is doubtful that any fair connection lies between the child's discriminatory legal treatment, and the statute's purpose of promoting favorable sexual conduct through marriage of the parents. Knause, *supra* note 15, at 347.

nocent child for the wrongful conduct of parents.[152] In *Levy*, it was "invidious" to discriminate against the illegitimate child because ". . . no action, conduct, or demeanor of (the illegitimate children) is possibly relevant to the harm that was done the mother."[153] Such state action has been characterized as ". . . a form of bill of attainder."[154]

A second purpose of intestacy legislation which denies inheritance to the illegitimate child is the state policy underlying intestacy legislation in fairly distributing intestate property. It has been stated, however, that "[a]t minimum, *Levy* establishes that a state cannot decide constitutionally that illegitimate children are less deserving merely because of their condition of birth."[155]

If "presumed intent" were a third plausible purpose of intestacy legislation, then the question is raised whether state law should be allowed to enforce private prejudice. Arguably, a state should not necessarily presume a discriminatory intent by the father of an illegitimate child. If a father intends to exclude an illegitimate from sharing in his estate, the father has the simple alternative of providing for this result by will.[156] But, in point of fact, the father of an illegitimate probably does not want the child to share in the father's estate. Whether the state should enforce this prejudice in the form of intestacy legislation is another question. This argument would rest on *Shelly v. Kraemer*[157] where the Supreme Court held that equal protection would not permit state enforcement of private covenants which restricted ownership of land to caucasions.

The presumed intent theory has a further constitutional infirmity. The presumption that the father would desire to exclude an illegitimate child as an heir is probably grounded on a further

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152. See notes 134-6 *supra* and accompanying text.

153. 391 U.S. 68, 72 (1968).

154. Smith v. King, 392 U.S. 309, 336 n.5 (1968) (concurring opinion).

155. Gray, *supra* note 15, at 24.

156. Knause, *supra* note 15, at 355. See also Knause, *Protection For The Illegitimate*, 65 MICH. L. REV. 477, 502 (1967):

> It should be noted that "freedom of disposition" would not be affected if the presumption against the illegitimate were eliminated, since the father would be free to disinherit the illegitimate child by will, as he is now free to do with respect to his illegitimate child.

In Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 851 (1963), the court permitted an action against a father for fathering an illegitimate child. *Quare* whether this example ". . . lends further support to the conclusion that the father's choice to confer upon or withhold from his extra-marital offspring a legitimate status is not a reasonable criterion on which the state may base a classification." Knause, *Equal Protection For The Illegitimate*, 65 MICH. L. REV. 477, 497 (1967). See notes 88-89 *supra* and accompanying text.

157. 334 U.S. 1 (1948). This argument was advanced to the *Labine* Court. Brief of *Amicus Curiae*, and Center On Social Welfare Policy Law at 6, Labine v. Vincent, 91 S.Ct 1017 (1971).

presumption: an illegitimate child does not usually have an actual living relationship with the father similar to the legitimate child. Stated differently, unlike the legitimate child, the illegitimate child is often not dependent on the father for support. Such a view is under-inclusive. It does not consider the illegitimate child who does share a living relationship with the father. The view is also over-inclusive. It does not consider the legitimate child who does not share a relationship with his father. The legitimate child benefits under intestacy legislation while the illegitimate child is generally excluded as an heir.[158]

Even if the intestacy legislation under view would be sustainable under a "rational" test, the task is far more difficult if a classification of illegitimacy is "suspect."[159] Illegitimacy has been likened to racial or ancestry classifications which are "constitutionally suspect."[160] In *Hirabayashi v. United States*[161] it was stated that ". . . distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[162] Such a classification is based solely on prejudice for which there is no constitutionau justification.[163]

The appellants in *Labine* strongly argued that an analogy between the illegitimate and a minority race existed because both groups suffer widespread social and psychological discrimination.[164] Furthermore, there was a basic civil right in the illegitimate child's right to a family relationship with his father.[165]

The analogy between the prejudice accorded racial classifica-

158. Knause, *Protection For The Illegitimate*, 65 MICH. L. REV. 477, 495 (1967).

159. See note 145 *supra*. A state may claim certain local interests are being protected by an arguably discriminatory statute. But, in determining whether the equal protection clause is applicable, the facts and circumstances behind the state law will be considered, as well as the interests of those persons disadvantaged by the law. Kramer v. Union Free School District, 395 U.S. 621, 626 (1969). Prejudice is the ultimate basis of discrimination against both the illegitimate child and the member of a certain race. By itself, history of discrimination should not be justification to support a law. *Compare In re* Vincent, 229 So. 2d 449, 452 (La. Ct. App. 1969) *with* Labine v. Vincent, 91 S.Ct. 1017, 1031 (1971) (dissenting opinion).

160. See note 145 *supra* and accompanying text.

161. 320 U.S. 81 (1943).

162. *Id.* at 100.

163. See note 159 *supra*.

164. See note 145 *supra*.

165. Labine v. Vincent, 91 S.Ct. 1017, 1027 (1971) (dissenting opinion). In Levy v. Louisiana, 391 U.S. 68, 71 (1968), the Court tended to characterize wrongful death recovery as a basic civil right which ". . . involved the intimate familial relationship between a child and his own mother."

tions and the illegitimate is attractive. And, again, due process plays a role. In any such classification, there is a loss of benefit solely because of a condition of birth over which the innocent child has no control.[166] Of interest is *Oyama v. California*[167] where the Supreme Court struck down harsh state procedural burdens imposed on a child who sought to prove land title where the additional burden resulted solely because the child's father was an alien ineligible for citizenship.

If illegitimacy is a "suspect" classification, then only a "compelling state interest" will save an arguably discriminatory state statute. Perhaps, then, a state intestacy statute which excludes the illegitimate child can survive a "balancing" test.[168] Is there a state objective which outweighs the policy behind an intestate statute which discriminates against a "suspect" classification? The state court in *Labine* laid great importance on maintaining the certainty of land titles, and also the uncertainties which would result from false claims of parentage.[169] Under the *Labine* facts, the father had acknowledged the child as his own.[170] Only absence of compliance with a formality of state law excluded the child as an heir to his father.[171] The only other heirs to the estate were collateral relatives. Certainly, where there is proof of paternity, as in *Labine*, there is no "compelling" state interest to justify exclusion of the child as an heir because of a fear of false claims by the child to the estate.[172]

Where paternity is not already established, there is still reason to doubt whether certainty of land titles and discouragement of false paternity claims should be sufficient reason to uphold the intestacy legislation which is being considered. Even a valid substantial governmental purpose should not be upheld where there are basic rights involved and a more narrow means is available to achieve the same end.[173] If the state wishes to encourage marriage, it need not punish the innocent child which results from an illicit relationship. It can impose burdens directly upon the parents, rather than the illegitimate child.[174] Also, if proof of paternity is the primary state interest, along with the question of false

166. See notes 134-6 *supra* and accompanying text.
167. 332 U.S. 633 (1968).
168. See note 132 *supra* and accompanying text.
169. See note 134 *supra* and accompanying text.
170. Labine v. Vincent, 91 S.Ct. 1017 (1971).
171. *Id.*
172. *Id.* at 4350.
173. See note 119 *supra.*
174. More direct application of the laws has been suggested in the form of fornication acts and tax incentives for marriage. Knause, *Protection For The Illegitimate*, 65 MICH. L. REV. 477, 495 (1967). This suggestion, however, may eventually conflict with an expanding "zone of privacy" concept which raised its head in Griswold v. Connecticut, 381 U.S. 479 (1965). If sexual conduct between unmarried consenting adults were eliminated as a crime, other impositions would have to be devised to promote the states' interest in marriage. One suggestion is to give the illegitimate child a

claims, then there is presently means available to prove paternity to some degree.[175] Litigation following *Levy* has considered whether equal protection will permit a degree of proof to allow an illegitimate to claim heirship.[176] Some reasonable certainty of paternity is uniformly required.[177] Since protective safeguards are available, it is questionable whether an illegitimate should be unduly excluded as an heir.[178] Additionally, state legislatures could consider a proposal now available in Minnesota which provides for initiation of a proof of paternity proceeding by a state administrator.[179] Heirship could then follow a successful administratively sponsored paternity action.

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value only interest in the estate of his father. Or, give legitimate heirs the option to purchase undivided shares of the illegitimates in the estate. Note, TUL. L. R. 640, 645 n.30 (1970).

175. Bloodtests and related questions of proof are considered at length in Knause, *Equal Protection For The Illegitimate*, 65 MICH. L. REV. 477 (1967). See also Knause, *supra* note 15, at 349-51, and Note, TUL. L. R. 640, 647-8 (1970). Evidently, simply because there is a question of proof does not necessarily require denial of a right of inheritance from the father. *Cf.* Glona v. Am. Guar. & Liab. Ins. Co. 391 U.S. 68, 76 (1968). There, it was argued that a mother of an illegitimate child should not recover for his wrongful death. This would encourage fraudulent claims of motherhood. But, *Glona* stated that this was a problem regarding "burden of proof," which did not apply where the ". . . the claimant is plainly the mother, . . ." *Id.* But, the court will not provide proof of kinship in death where there was none in life. Sanders v. Tillman, 245 So. 2d 198, 201 (Miss. 1971).

176. See note 56 *supra* and accompanying text.

177. Of interest is Murphy v. Houma Well Service, 413 F.2d 509 (5th Cir. 1969). Here, the court upheld the Louisiana presumption of paternity from constitutional attack.

178. This is a due process argument. See note 119 *supra.*

179. MINN. STAT. ANN. § 257.33 (1959).

> It shall be the duty of the commissioner of public welfare when notified of a woman who is delivered of an illegitimate child, or pregnant with child likely to be illegitimate when born, to take care that the interests of the child are safe-guarded, that appropriate steps are taken to establish his paternity, and that there is secured for him the nearest possible approximation to the care, support, and education that he would be entitled to if born of lawful marriage.

See also Knause, *supra* note 15, at 350 n.48:

> A problem with efforts to involve the father is the potential clash with the child's possible interest in being adopted by suitable outsiders. This potential conflict can be alleviated or avoided if the child's best interests are considered decisive. Consider, for example, a provision such as the following [adapted from Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 837 (1966)]:
>
> > If a child born out of wedlock has not been legitimated or if his right of support has not been determined in a paternity action or if he has not been adopted in accordance with the law of adoption, within a period of [one] year beginning with the child's birth, a proceeding to determine paternity shall be brought without delay by [insert name

VII. CONCLUSION

There appears to be substantial difficulty in upholding discriminatory intestacy legislation even under the traditional equal protection standard applied to economic legislation. There are simply too many impediments to rationality when illegitimates are excluded as heirs. Moreover, illegitimacy may be a "suspect" classification. No state interest seems to compel further discrimination against the illegitimate child. This is especially true where the purposes of discriminatory intestacy legislation can be achieved by less drastic legislation. If there is a legitimate state interest to exclude the illegitimate child as an heir, then *Labine* is not authority for such a result. That opinion does not provide any satisfactory answer to the issue raised in that case. Finally, there is a total absence of rationality where the innocent illegitimate child is punished for the acts of a parent.

What has not been considered is the weight of centuries-old prejudice against the illegitimate child which now exists in many state laws. Perhaps a rational dissection of discriminatory legislation is not adequate. Certainly, had *Labine* reached an opposite result, it would have been contrary to popular opinion. *Labine*, however, does not require local courts to limit the inheritance rights of the illegitimate child. Local courts as well as legislatures are still free to determine the construction of descent and distribution statutes.[180] Hopefully, enlightened courts will replace prejudice

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of public authority] on behalf of the child. The court shall dismiss the action if, on the basis of the available evidence, the court is satisfied that the proceeding to determine paternity would not serve the child's best interests.

180. Brief of *Amicus Curiae*, and American Civil Liberties Union at 13-15, Labine v. Vincent, 91 S.Ct. 1017 (1971):

> [A] development of considerable interest is that at its meeting in Dallas in 1969, the National Conference of Commissioners on Uniform State Laws approved the Uniform Probate Code, which gives the illegitimate child inheritance rights equal to that of his legitimate brother. It provides as follows:
>
> § 2-109:
>
> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through or from a person,
>
> (a) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent shall have no effect on the relationship between the child and his natural parents.
>
> (b) In cases not covered by (a), a person born out of wedlock is a child of the mother. That person is also a child of the father, provided:
>
> (1) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
>
> (2) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subparagraph (2) is ineffective to quality the father or his kindred to inherit from or through the child unless the father has openly

with reason and apply a construction to descent and distribution statutes which will remove the disabilities of the illegitimate child from inheriting from his father.

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treated the child as his, and has not refused to support the child.

COMMENT: The definition of "child" and "parent" in Section 1-201 incorporates the meanings established by this section, thus extending them for all puroses of the Code.

Years earlier, the National Conference of Commissioners on Uniform State Laws has gone on record in § 1 of the Uniform Paternity Act, 9B Uniform Laws Ann. 155 (Supp. 1964), in favor of full equality between legitimate children in terms of their right of paternal support. Currently, the National Conference's Committee on a Uniform Legitimacy Act is drafting legislation that will carefully regulate the important question of ascertainment of paternity and reaffirm the equality of rights of support and inheritance previously promised by the Conference. Uniform Legitimacy Act, First Tentative Draft, National Conference of Commissioners on Uniform State Laws, June 1, 1970.

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