

3-15-1974

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Recommended Citation

Clayton W. Plotkin and John Vodonick *Illegitimate Children and Constitutional Review*, 1 Pepp. L. Rev. Iss. 2 (1974)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol1/iss2/5>

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Illegitimate Children and Constitutional Review

INTRODUCTION: AUTHORS' STATEMENT OF PURPOSE OF THE COMMENT

The status of the illegitimate child, as a secondary citizen, is readily apparent in the state of the law of the several jurisdictions in the United States. While the states have been gradually doing away with most archaic classifications and restrictions, which result mainly from common law influences, the illegitimate child is precluded by law from sharing with legitimate offspring in the intestate distribution of the property of one or both of his natural parents in the overwhelming majority of American jurisdictions today.

It is the opinion of the authors that such preclusion by the states violates the rights of the illegitimate under the Equal Protection Clause of the Fourteenth Amendment of the United States.

The purpose behind this Comment is to supply authority for the position of the authors. We begin by exploring the status of illegitimates at common law, and the reasons which were advanced to support this status. We continue by setting forth certain criteria by which the Supreme Court of the United States approaches Equal Protection arguments and, then, undertake to isolate and discuss those tests used by the court to determine the rights of illegitimates. The conclusion of this Comment applies those tests used by the Supreme Court to reach the result that preclusion of the illegitimate from intestate distribution of the property of one or both of his natural parents violates the rights of the illegitimate under the Equal Protection Clause.

AN HISTORICAL SURVEY OF THE RIGHTS OF ILLEGITIMATES AT COMMON LAW

The rights of an illegitimate at Common Law were very few, being only such as he could acquire. The illegitimate at Common Law could inherit nothing and was looked upon as the son of nobody. The illegitimate was sometimes called 'filius nullis,' (the son of no one) and sometimes 'filius populi' (the son of the people).¹

1. I BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 459 (Cooley 4th Ed. 1899) (Hereinafter cited as BLACKSTONE.)

The Common Law precluded the illegitimate from intestate inheritance from both his mother and his father; moreover, the illegitimate was not entitled to any support from his father until such right was created by statute in the form of the so-called "Poor Laws."² The method in which English law provided for the maintenance of illegitimates through enactment of the "Poor Laws," was similar to paternity actions in many United States jurisdictions today.³ The giving of an oath and the posting of security with subsequent trying of the issue of fatherhood was, in substance, an action to establish paternity and impose upon the putative father a duty to support the child. If this form of adjudication and proof was sufficient to create a duty of support upon the putative father, why wasn't it sufficient, then, to create a right of intestate inheritance in the illegitimate child? To answer this question, we must turn now to the reasons behind the advent of the duty and right of support.

Prior to the enactment of the "Poor Laws," the parish, wherein the mother of the illegitimate resided, was one of the few benefactors available for support of the child.⁴ The financial burden of support placed upon the parish resulted in the influence of the church being exerted upon the law-making policy of the civil authorities. This influence was exemplified through the enactment of the "Poor Laws."⁵ Thus, as a result of an economic burden being placed upon one of the mightiest institutions of the day, a right of support by his putative father was created in favor of the illegitimate. The removal of an economic burden, which had been borne by one of the powers of Common Law England, gave birth to a right in favor of the illegitimate. Perhaps, if such an economic burden had been placed upon an influential interest group of the day by reason of the illegitimate's failure to succeed to his father's estate by intestacy, the form of the Common Law in this area would have taken a different course also.

The influence of the Church did not prevail in the area of inheri-

2. BLACKSTONE at 459.

3. "When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact." *Id.* at 459.

4. *Id.* at 459.

5. *Id.* at 459.

tance. While it was one of the major policy-making powers of the times, the Church suffered a defeat in its attempts to have the English Law adopt the Canon Law method of legitimization.⁶ This great legislative defeat occurred in 1236 at the Merton Parliament when the Bishops of England requested that the Law of England be conformed to the Canon Law custom of "Mantle Children."⁷ This custom enabled illegitimate children of a couple who were being married to be legitimated by placing the children under the cloak which was spread over their parents during the marriage ceremony.⁸ The Church met defeat in this power struggle when it came up against the Barons of England who did have an economic interest involved. The Barons refused to abandon the English Law by unanimously joining in the proclamation "nolumus legis Angliae mutare" (we do not wish to change the English Rules).⁹

The economic reasons supporting the Barons' refusal to adopt the Canon Law must be considered in light of the concepts of Feudalism which were entrenched in the Common Law. The preoccupation of feudal England with the ownership of land gave rise to the concepts of primogeniture and the fee tail, the innovations which Blackstone viewed as causing the position of the illegitimate child to become more perilous.¹⁰ Those who formulated these policies did not want to give illegimates any rights in the estate of the deceased father. So long as the illegitimate was limited to succession to the property of the heirs of his body only, he would pose no obstacle to the legitimate's rights of succession from the common father.

Another economic factor concerned the escheatment of the illegitimate's property upon his death. If the illegitimate were to die lacking issue of his body, his property, both real and personal, would escheat to his lord.¹¹ Perhaps this too weighed heavily on the minds of the Barons of Merton.

Other reasons for the illegitimate's inability to inherit by intestacy have been advanced by Blackstone and Kent. Kent attributes the common law rule to a policy of morals:

6. HOOPER, *THE LAW OF ILLEGITIMACY* 27 (1911).

7. 2 F. POLLOCK AND F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 397-98 (2d Ed. 1898) (Hereinafter cited as POLLOCK).

8. POLLOCK at 397-98.

9. 2 HALSBURY'S *STATUTES OF ENGLAND* 8 (1st Ed.).

10. BLACKSTONE at 459.

11. "A bastard being, in the eye of the law, nullius filius, he has no inheritable blood, and is incapable of inheriting as heir, either as to his putative father, or his mother, or to anyone else, nor can he have heirs but of his own body." 2 KENT, *COMMENTARIES ON AMERICAN LAW* 222 (8th Ed. 1854) (Hereinafter cited as KENT).

This rule of the common law so far at least as it excludes him (the illegitimate) from inheriting as heir to his mother, is supposed to be founded partly in policy, to discourage illicit commerce between the sexes.¹²

Blackstone attributes the rule to a policy of care and maintenance of the child, and to evidentiary problems:

A bastard by our English laws, is one that is not only begotten, but born, out of lawful matrimony. . . . And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light, abstractly from any religious view. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong: this end is, undoubtedly, better answered by legitimating all issue born after wedlock . . . 1. Because of the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man, whereas, by confining the proof to the birth, and not the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of the child. . . .¹³

The rigor of the common law rule has been alleviated in all of the American jurisdictions.¹⁴ This has been accomplished by legitimation statutes. Every one of the fifty states has a statute which enables parents of illegitimate children to legitimate them.¹⁵ Most of those statutes allow subsequent legitimation of illegitimate children, resulting in their being on equal par with legitimates when it comes to intestate inheritance. In the absence of subsequent legitimation, the child is precluded from intestate succession. It would appear that the common law rule has been only partially alleviated in the United States, and that further change is needed.

At this time, the most advanced legislation is to be found in two jurisdictions: Arizona and Oregon. These states, by statute, provide that all children are the legitimate children of their natural parents and allow them to inherit as such.

Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock.¹⁶

12. KENT at 222.

13. BLACKSTONE at 455-56.

14. Vernier and Churchill, *Inheritance By and From Bastards*, 20 IA. L. REV. 216 (1935).

15. Ester, *Illegitimate Children and Conflict of Laws*, 36 IND. L.J. 163, 164-65 (1961).

16. ARIZ. REV. STAT. § 14-206 (1956).

The legal status and legal relationships and the rights and obligations between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married.¹⁷

In other states, legitimation may result from the subsequent marriage of the child's parents,¹⁸ or the subsequent marriage plus some form of acknowledgement of paternity of the father.¹⁹ While the methods of legitimation vary from state to state, the three methods set out appear to be the most common.

Hesitation by the majority of the states to allow illegitimates to inherit by intestacy appears to be based on traditional deference to the Common Law and problems of proof of paternity. Current innovations, backed by burden of proof safeguards, could well remove this proof problem and place the illegitimate on an equal standing with legitimate offspring.

Having illustrated the reasons for the common law rule which precluded the illegitimate from intestate inheritance from his natural parents, it is now the authors' intention to set forth our argument for changing the common law rule. We feel that this can be brought about only by the action of the United States Supreme Court. The theory by which this state of the law should be changed is that of Equal Protection of the Law. This comment now turns to the application of this argument and begins by setting forth certain tests which are used by the Supreme Court in undertaking an Equal Protection analysis.

AN ANALYTIC SYLLOGISM OF EQUAL PROTECTION²⁰

Recent treatment by the Supreme Court of the subject of illegitimacy has been less than satisfying.²¹ The major opinions have in some cases been contradictory and in almost all cases have been

17. ORE. REV. STAT. § 109.060 (1959).

18. E.g., ALASKA STAT. § 25.20.050 (1962); CAL. CIV. CODE § 215 (West 1972); CONN. GEN. STAT. ANN. § 45-274 (Supp. 1971); FLA. STAT. ANN. § 742.091.

19. COLO. REV. STAT. ANN. § 153-2-8 (Supp. 1971); ILL. REV. STAT. Ch. 3, § 12 (1965); MASS. GEN. LAWS ANN. Ch. 190, § F; MO. REV. STAT. § 474.070.

20. An in depth analysis of the Equal Protection Clause is beyond the scope of this comment; see generally, Frank and Munro, "The Original Understanding of 'Equal Protection of the Laws,'" 50 COLUM. L. REV. 131 (1950); Karst, *Invidious Discrimination: Justice Douglas and the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969); Tussman and Tenbroek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 341 (1949); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

21. See notes 39, 45 and 47 *infra*.

analytically naked. We can commiserate with Prof. Krause in his observation:

It is regrettable . . . and may mar the new law of illegitimacy for some time to come . . . that the Supreme Court did not choose to document its epochal decision more carefully.²²

Fortunately, it is possible to determine at times how the Supreme Court analyzed a particular situation by looking at the outcome of the case in light of previous cases dealing with the same problem. Since one of the purposes of this comment is to state the current Constitutional position of the illegitimate child, it is necessary to determine the analytic process the court went through in reaching their major decisions. This can only be done by putting the decisions dealing with illegitimacy in context with an Equal Protection syllogistic framework. Thus, a brief review of the analysis of Equal Protection is necessary to the discussion at hand.

Under its most basic interpretation, the Equal Protection Clause of the Fourteenth Amendment forbids any scheme of statutory classification which bears no reasonable relationship to a legitimate state purpose.²³ When utilizing this traditional standard of review, the court will presume the Constitutional validity of the legislative enactment; and, thus, the burden of negating all possible reasonable relationships to a valid legislative purpose will fall upon the party seeking to strike down the statute.²⁴ It must be noted that in order to be considered "legitimate," the state purpose in enacting the classificatory scheme need only be within the valid Police Power of the state to legislate for the promotion of the general Health, Welfare and Morals of its Citizenry.²⁵ Thus, seldom will a discriminatory scheme have an invalid purpose. But, if such a scheme were to have for its purpose simple inequality, it would be unconstitutional by definition.²⁶

When a classification is drawn along lines upon which the court

22. H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 66 (1971).

23. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Graham v. Richardson*, 403 U.S. 365 (1970); *Morey v. Dowd*, 354 U.S. 457 (1957).

24. *Middleton v. Texas Power & Light Co.*, 249 U.S. 152 (1918); *Morey v. Dowd*, *supra* note 23; *McGowan v. Maryland*, 366 U.S. 420 (1961) (separate opinions Frankfurter, J. and Harlan J.).

25. Cf. *Nebbia v. New York*, 291 U.S. 502 (1934); *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26 (1888).

26. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

has fastened the characterization of "suspect,"²⁷ the analytic process which is Equal Protection undergoes elemental changes. No longer will a valid state purpose support such a classification; where the lines are suspect, the scheme must be rationalized by a "compelling" state interest.²⁸ Moreover, when examining the relationship between a suspect classification, and the legislative purpose for which it is ostensibly maintained, the court will utilize strict scrutiny.²⁹ When utilizing its "strict scrutiny," the court will demand a greater degree of relevancy in the relationship involved. Procedurally, the effect of a scheme being based upon a suspect classification is to reverse the usual presumption of constitutionality and place the burden of justifying the classification upon the State.³⁰

A statutory scheme that distinguishes between two or more classes in order to achieve some legislative objective will invade some interest of those classes since the only reason for any classification is to treat classes differently in relation to some common interest in order to effect some purpose. When the interest invaded by the scheme of classification is held by the court to be important enough, the analysis under Equal Protection will be much the same as that applied in dealing with a suspect classification. Thus, in dealing with a classification that invades an important personal right, the court will utilize strict scrutiny in examining the degree of relevancy between the classification and the state purpose sought to be promoted by the classification.³¹ Such an invasion can only be justified by a compelling state purpose;³² and upon the State rests the burden of justifying that invasion.³³

Under the Equal Protection analysis of a classification that invades an important personal right, the characterization of which interests are to be given such elevated status becomes the doctrinal issue. Under the view propounded by Mr. Justice Black, only those rights expressly enumerated within the four corners of the

27. *Loving v. Virginia*, 388 U.S. 1 (1967) (Black); *Yick Wo v. Hopkins*, *supra* 26 (Asian); *Graham v. Richardson*, *supra* 23 (Alienage); *Hernandez v. Texas*, 347 U.S. 475 (1954) (National Origin); *Cf. Reed v. Reed*, 404 U.S. 71 (1971) (Women).

28. *Id.*

29. *See Korematsu v. U.S.*, 323 U.S. 214 (1944).

30. *Loving v. Virginia*, *supra* note 27; *In re Antazo*, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

31. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

32. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

33. *Cf. Carrington v. Rash*, 380 U.S. 89 (1965); *In re Antazo*, *supra* note 30.

Constitution may be granted such exalted status.³⁴ While the view principally held by Mr. Justice Douglas would simply grant that status to any interest which the court felt was important enough.³⁵

The recent trend of the court has been to expand the concept of Equal Protection through the utilization of the concept of the fundamental interest.³⁶ Professor Karst argues that the willingness of the majority of the court to create new "fundamental" or "important" personal interests and suspect classifications has in effect developed a new analysis of "invidious" discrimination which has adopted some of the features of the now discredited doctrine of substantive due process.³⁷ Under this new analysis of Equal Protection, the court will balance the relative weights of the classification plus the invaded interest against the state purpose sought to be achieved. Under this analysis, if the weight of the classification plus the interest invaded is substantially great, there is a possibility that no state purpose can be compelling enough to justify the scheme.³⁸

THE SUPREME COURT DEALS WITH ILLEGITIMACY:

LABINE V. VINCENT³⁹

Treating the subject of discrimination of illegitimate children within statutes of intestacy may seem to be moot in light of the 1970 decision of *Labine v. Vincent*. In *Labine*, Rita Vincent, the acknowledged illegitimate child of a Louisiana intestate, contested the provisions of the Louisiana Civil Code which denied her the right to inherit her natural father's estate upon an equal basis with legitimate children.⁴⁰ Through her guardian, she argued that a

34. Cf. *Adamson v. California*, 322 U.S. 46 (1946); *Griswold v. Connecticut*, 381 U.S. 479 (1964) (dissenting opinions Black, J.).

35. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Educ.*, *supra* note 31.

36. Karst, *supra* note 20.

37. Traditionally the only type of discrimination which is constitutionally infirm is "invidious discrimination," e.g., *Morey v. Dowd*, *supra* note 23.

38. E.g., *Harper v. Virginia St. Bd. of Elections*, *supra* note 31; *Skinner v. Oklahoma ex rel. Williamson*, *supra* note 35; see Karst, *supra* note 20 at 732-49.

39. 401 U.S. 532 (1970).

40. LA. CIV. CODE ANN. Art. 206: "Illegitimate children though duly acknowledged, cannot claim the rights of legitimate children;" LA. CIV. CODE ANN. Art. 919: "Natural children are called to the inheritance of their

statutory scheme which barred an illegitimate from sharing in her father's estate constituted invidious discrimination against a particular class of children and was, thereby, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Mr. Justice Black, writing for a majority of five, did not agree with the conclusion of unconstitutionality advanced by the guardian of Rita Vincent. The holding in *Labine* adopted the surprising approach of refusing to apply any Equal Protection analysis at all:

But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of Constitutional interpretation because the Justices of this court believe they can provide better rules.⁴¹

In essence, the court exempted the Statutes of Intestate Succession from constitutional review.⁴² This is a rather novel proposition of law, considering that as late as 1961 the Supreme Court affirmed the propositions that the Tenth Amendment did not immunize areas in the law pertaining to the devolution of property from Federal regulation,⁴³ or constitutional review.⁴⁴ This theory is supportable only upon the premise that specific state action may be reviewable for some purposes and may not be reviewable for other purposes.

To fully understand the true import of *Labine*, and place it in perspective, it is necessary to fill the void in which it stands with respect to its contemporaries. This contextual analysis will be undertaken by a contemporary Supreme Court analysis of those cases involving illegitimate children.⁴⁵

In 1968, with the decision of *Levy v. Louisiana*,⁴⁶ and its companion case *Glonn v. American Guarantee and Liability Insurance Company*,⁴⁷ the Supreme Court drastically altered the scope of permissible discrimination between legitimate and illegitimate children. In *Levy/Glonn*, the Court was presented with provisions of the Louisiana Wrongful Death Statute which provided that the relationship of illegitimate child/mother would not support an action

natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State."

41. 401 U.S. 532, 537 (1970).

42. *Id.* at 541, 548-49.

43. *United States v. Oregon*, 366 U.S. 643 (1961).

44. *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

45. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Weber v. Aetna Cas. and Sur. Co.*, 496 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973).

46. *Id.*

47. *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

based on wrongful death.⁴⁸ In a holding articulated by Mr. Justice Douglas, the Court subjected the statutory classification scheme to Equal Protection analysis and found it to be constitutionally infirm.

As discussed, the Court normally places the burden of negating a rational purpose underlying a discriminatory scheme upon the opponent of the scheme. However, in *Levy/Glona*, it appears that the Court placed the burden of justifying the scheme upon the state. Only four possible rationalizations were dealt with, as opposed to a review of the many rebuttals that would have been necessary had the burden been upon the State's opponent. Such a shifting of burden only takes place in cases of suspect classifications or classifications that affect important personal rights.

The possible state interests reviewed by the Court were the following: 1) the fact that the child of the deceased was illegitimate might have some bearing on the primary cause of action held by the decedent⁴⁹ as would contributory negligence of the deceased⁵⁰ or of the Plaintiff-Beneficiary;⁵¹ 2) the fact that the child was illegitimate would have some relationship to the legislative purpose of the wrongful death statute,⁵² as would a lack of suffering prior to the death of the deceased;⁵³ 3) a classification based upon illegitimacy would have some relationship to the legitimate purpose of promoting legitimate relationships;⁵⁴ or, 4) making such

48. LA. CIV. CODE ANN., Art. 2315: "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 the deceased in favor of: (1) the surviving spouse and child or children of the deceased . . ."; "Our jurisprudence is well established that 'child' means legitimate and putative children for the wrongful death of a parent," *Levy v. State*, 192 So. 2d 193, 195 (1966).

49. *Levy v. Louisiana*, *supra* note 45, at 72.

50. *Little v. United States*, 290 F. Supp. 581 (E.D. La. 1968).

51. *Abate v. Hirdes*, 9 La. App. 688, 121 So. 755 (1929).

52. *Levy v. Louisiana*, *supra* note 45, at 72; the Louisiana wrongful death action allows recovery for, among other things, the loss of support that the decedent would have given the beneficiary, e.g., *Gray v. Nathan*, 221 So. 2d 859 (La. App. 1969); in *Levy* the court specifically pointed out that under Louisiana Law both parents are under a duty to support their illegitimate child, 391 U.S. 68, 73 note 5 (1968).

53. Cf. *Walker v. Joseph P. Geddes Funeral Serv.*, 33 So. 2d 570 (La. App. 1948).

54. *Glona v. American Guar. & Liab. Ins. Co.*, *supra* note 47, at 75.

a classification serves the state interest of discouraging fraudulent claims.⁵⁵

The Court summarily disposed of the first two possible state interests by stating that the status of the children's birth had no relationship to the harm done to the mother and that they were as dependent upon her for support as any child.⁵⁶ Looking to the third objective of the statute, Mr. Justice Douglas scoffed:

Yet we see no possible rational basis (*Morey v. Dowd*, 354 U.S. 457, 463-66) for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy would be served. It would, indeed, be farfetched to assume women have illegitimate children so they can be compensated in damages for their death.⁵⁷

It is interesting at this point to note that Mr. Justice Douglas relied upon *Morey v. Dowd*⁵⁸ as authority for the application of the test of rational relationship. Since *Dowd* is the one case that has struck down a state economic regulatory scheme on Equal Protection grounds in the past thirty years, it would appear that Mr. Justice Douglas felt confident enough in this analysis not to seek the refuge of authority supporting a more stringent analysis.⁵⁹ When first examining *Levy/Glona*, it appears that Mr. Justice Douglas based his entire analysis upon the traditional standard of equal protection used today primarily only in the area of economic regulation; he speaks only in terms of the lack of rational relationship to the various state purposes examined. However, closer examination of the *Levy* opinion reveals additional clarification of the Court's view of the type of scheme that was involved.

First, the burden of justifying the classification appeared to have been cast upon the state⁶⁰ as is the case of review of a suspect classification or when a classification invades a fundamental or important interest.⁶¹ Moreover, Mr. Justice Douglas refers to the statute as one which invades a "basic civil right."⁶² Secondly, the classification involved was ultimately held by the Court to constitute "invidious discrimination,"⁶³ a term which Mr. Justice Douglas uses to describe a particular type of discrimination which operates against a disadvantaged group to deprive the group of an interest

55. *Id.* at 76.

56. *Levy v. Louisiana*, *supra* note 45, at 72.

57. *Glona v. American Guar. & Liab. Ins. Co.*, *supra* note 47, at 75.

58. 354 U.S. 457 (1957).

59. *See, e.g.*, cases cited in notes 27, 29, 30, 31 and 33 *supra*.

60. *See* p.271 *supra*.

61. *See* p.272 and notes 30 and 33, *supra*.

62. 391 U.S. 68, 71 (1968).

63. *Id.* at 72.

of great importance and which is not justified by a compelling state interest.⁶⁴ As his authority for utilizing this standard, Mr. Justice Douglas relied upon *Harper v. Virginia Board of Elections*,⁶⁵ the case which more than any other developed this particular analysis and in which Mr. Justice Black vigorously dissented.⁶⁶ Finally at trial, Plaintiffs sought compensatory damages for two elements of harm: a) the damages to them for the loss of their mother, and b) damages for pain and suffering which vested in their decedent prior to her death and survived to her children.⁶⁷ Analyzing the purpose of the wrongful death statute, Mr. Justice Douglas characterized it as allowing compensation for the loss of support,⁶⁸ but made no distinction in the award of damages to only those sought to compensate for that loss of support. In other words, the holding of *Levy* must have either characterized the cause of action which survived to the children for pain and suffering as support, or stated that the survivorship of that cause of action was important enough to outweigh the state interest involved.⁶⁹

The *Levy/Glona* decisions were decided in 1968, a full three years prior to *Labine*. Less than a year after handing down *Labine* the Court dispelled some of the fog generated by those two cases in opposition by rendering *Weber v. Aetna Casualty and Surety Company*.⁷⁰ In *Weber* the Court was afforded the opportunity to review the Louisiana Workmen's Compensation scheme which denied the right of dependent illegitimate children to participate in benefits for the accidental death of a parent upon an equal basis with dependent legitimate children.⁷¹ Caught between the conflicting authority of *Levy/Glona* and *Labine*, the Court elucidated its past decisions and provided a firmer basis for future review of classifications between children based upon status of birth. *Labine* was distinguished on two points, first:

that decision reflected in major part, the traditional deference to a state's prerogative to regulate the disposition at death of property within its borders.⁷²

64. See p. 273 and note 35, *supra*.

65. *Harper v. Virginia Bd. of Elections*, *supra* note 31.

66. *Harper v. Virginia Bd. of Elections*, *supra* note 31 (dissenting opinion); Karst, *supra* note 20, at 718-20.

67. 391 U.S. 68, 69-70 (1968).

68. See p. 276 and note 56, *supra*.

69. See p. 282 and note 93, *infra*.

70. 406 U.S. 164 (1972).

71. *Id.* at 167-68.

72. *Id.* at 170.

This is in deference to Mr. Justice Black's view of non-review. However, in bolstering the rationale of *Labine's* theory of not reviewing a subject traditionally within the prerogative of the State, the Court added that the State had a substantial interest in such classifications which bore upon the problem of intestate succession:

Yet the substantial state interest in providing for the stability of land titles and in the prompt and definitive determination of the valid ownership of property left by decedents.⁷³

It would appear that, rather than adopting the Black view, the Court chose to interpret its prior holding as based upon an Equal Protection analysis which sustained the validity of the scheme.

Secondly, *Labine* is characterized as involving a situation in which the deceased father could have easily remedied the position of his illegitimate daughter either by legitimating her or by making a testamentary disposition to her.⁷⁴ In *Weber* the deceased father could have done nothing to alleviate his daughter's disfavored position vis á vis the Workmen's Compensation scheme. It is submitted that this argument is weak in as much as the issue would not have arisen had the child been legitimated. Moreover, in both cases the Court was not concerned with the operation of the statute upon fathers but upon disfavored children.

The Workmen's Compensation scheme in issue in *Weber* was analogized by the Court to the statutory recovery for wrongful death in *Levy* since both were created to provide close relations and dependents of a deceased with a means of compensation for his death.⁷⁵ Thus, *Levy* was held by the Court to control the issues in *Weber*, not *Labine*.

The *Weber* decision goes to great pains to restate the Equal Protection analysis used in the case, possibly, in reaction to criticism of its earlier holdings in *Levy/Glona* and *Labine*.⁷⁶ As expressly stated by the *Weber* court, strict scrutiny is used in examining fundamental personal rights. Inferentially, the fundamental personal rights the Court refers to in *Weber* are the same referred to in *Levy*: the right to support.⁷⁷

The possible state purposes for the classification issue in *Weber* (promoting legitimate family relationships, distinction in degree of

73. *Id.*

74. *Id.* at 170-71.

75. *Id.* at 171.

76. See *Labine v. Vincent*, 401 U.S. 532 (1970) (Brennan J., dissenting opinion); KRAUSE, note 22 *supra*.

77. 406 U.S. 164, 172-73 (1972).

dependency between legitimate and illegitimate children, alleviation of probative problems) were all negated as not being compelling enough to justify the classification.⁷⁸ Thus, the Court applied Equal Protection “. . . to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, *compelling or otherwise*.”⁷⁹ (Emphasis added).

Clearly in *Weber*, the Court utilized its strict scrutiny which is only used in cases dealing with suspect classifications or as invading important personal interests.⁸⁰

The three decisions favoring the illegitimate child, *Levy*, *Glona* and *Weber*, were simply interpreted by the Court in *Gomez v. Perez*⁸¹ as holding “that a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.”⁸² The Court continued to say that when a state created a right to needed support on behalf of legitimate children that there was *no* constitutionally sufficient justification for denying such an essential right to illegitimate children. Thus, it may be doubtful whether even a justification characterized as “compelling”⁸³ could rationalize such a classification. It appears that the Court again has emphasized that a classification based upon illegitimacy is suspect, and that when such a classification invades an interest that can be characterized as support, it will have invaded an important personal right.

Summarizing the principles derived from the *Levy/Glona* line of decisions we find that:

- 1) A classification based upon illegitimacy is suspect.
- 2) Interests which relate to support are essential personal rights.
- 3) The state interest in promoting legitimate relationships probably has no rational relationship to a classification based upon illegitimacy where that classification operates affirmatively upon the illegitimate children themselves.

78. *Id.*

79. *Id.* at 176 (emphasis added).

80. *See* p. 272 and notes 29 and 31, *supra*.

81. 409 U.S. 535 (1973).

82. *Id.* at 538.

83. *See* p. 273 *supra*.

- 4) The state interest in alleviating probative problems is not such a compelling justification as will justify a classification based upon illegitimacy.
- 5) Any classification based upon illegitimacy will be subject to close scrutiny upon constitutional review.
- 6) In order to justify a classification based upon illegitimacy, the state must bear the burden of justifying the classification by a compelling state interest.

In opposition to the collection of principles derived from the *Levy/Glona* line of cases is the principle of *Labine v. Vincent*; that is, any classification created under the rubric of "providing for intestate succession" is immunized from constitutional review.⁸⁴

It appears that the analytic factors involved in the two lines of opposition are indistinguishable. Can the principles derived therefrom be reconciled? The position of the authors is that they cannot.

CONCLUSION

It is the position of the authors that the basis for the holding in *Labine v. Vincent* was erroneous and contrary to the accepted interpretation of the Constitution and, more particularly, the Equal Protection clause. Thus, the issue dealt with in *Labine* should be re-examined and subjected to some Equal Protection analysis.⁸⁵

It would appear that the Court, subsequent to *Labine*, discovered that the principles set forth by Mr. Justice Black conflicted with those held by the then majority. In *Weber* the Court returned to the line of reasoning held prior to *Labine* and attempted to distinguish Mr. Justice Black's view in light of the result reached in *Weber*.⁸⁶ Mr. Justice Powell, speaking for the Court in *Weber*, attempted to fit the *Labine* decision into one of the tests of Equal Protection as understood by the majority, dealing with a substantial state interest. From Mr. Justice Black's view of no review whatsoever, the Court had now advanced the Equal Protection argument to the stage of judicial review overwhelmed by a substantial state interest. This, coupled with Mr. Justice Powell's reliance on *Levy*, results in the Court utilizing a strict scrutiny standard as if dealing with a classification which invades a fundamental right—a far cry from *Labine*.⁸⁷

84. 401 U.S. 532, 537 (1970), see pp. 273-74, *supra*.

85. See p. 274 and notes 43 and 44, *supra*.

86. See p. 277, *supra*.

87. See pp. 277-78, *supra*.

If the Supreme Court should decide to re-examine the holding of *Labine v. Vincent*, there are several factors which, the authors submit, merit consideration. The first of these factors with which the Court will have to deal concerns the concept of "suspect classifications."

As discussed, when a classification is drawn along lines on which the Court fastens the characterizations of "suspect," all examinations of the relationship between the classification and the legislative purpose for which it is maintained will be subjected to "strict scrutiny" by the Court.⁸⁸ The use of the "strict scrutiny" yardstick will result in the Court requiring a greater degree of relevancy in the relationship involved.⁸⁹ The classification and the purpose behind it will be weighed. It would appear that the suspect classifications test has been adopted by the Court in the application of the Equal Protection Clause to the rights of illegitimates, and that the Court has gone even beyond the strict scrutiny standard and now applies a standard which asks whether or not the classification is invidiously discriminatory.⁹⁰ The application of this new understanding of what constitutes invidious discrimination of illegitimates should result on their being placed equally before the law with legitimates with regard to intestate succession.

Another factor which will merit the Court's consideration is the concept of "fundamental or important personal rights." Whenever there is a state action which effects such rights, the action falls under the analysis of a suspect classification and is subject to strict scrutiny.⁹¹ Advancing from this stage, what, if any, fundamental personal rights are in peril under a state classification whereby the illegitimate is precluded from sharing in intestate succession?

In the *Levy/Glona* cases, the court held that illegitimate children may not be precluded from recovering under the Louisiana Wrongful Death Statute for the death of a parent by reason of their birth. Later, in *Weber* the Court held that illegitimates may recover for the death of their putative father under the Louisiana Workmen's Compensation Laws. In 1973, in *Gomez v. Perez*, the Court held that the denial under Texas Law of an illegitimate's child's right

88. Cases cited note 27, *supra*.

89. *Id.*

90. Karst, note 20; p. 276, *supra*.

91. Cases cited note 30, *supra*.

to support from the child's natural father violated the Equal Protection Clause. In all of these cases, illegitimate children were denied Equal Protection of the laws as to a certain right characterized as the right to support.

Is the right of an illegitimate child to support, as outlined by the cases cited above, a fundamental personal right deserving the protection of the Equal Protection Clause?

Mr. Justice Douglas in his opinion in *Levy* allowed Plaintiffs' recovery and characterized Wrongful Death actions as compensations for the loss of support. In his opinion, Mr. Justice Douglas alluded to the fact that, through the death of their mother, illegitimate children suffered the loss of their support. Referring to the Louisiana Law whereby both parents are under a duty to support their illegitimate children, the Justice said, "(t)hese children, though illegitimate, were dependent on her; . . . in her death they suffered wrong in the sense that any dependent would."⁹²

In *Weber*, Mr. Justice Powell speaking for the Court, referred to the fact that all of the decedent's children, both legitimate and illegitimate, were equally dependent on the decedent for maintenance and support and suffered equally by his loss. In *Gomez*, in a per curiam opinion, the Court found that the denial of an illegitimate child's right to support from its natural father violated the Equal Protection Clause.

If the fundamental right status has been awarded to the right of support, what distinction can remain for refusing to allow an illegitimate child that support by a different means; that is, intestate succession?

It must be remembered that, in *Levy*, Plaintiffs sought the recovery for not only the loss of their mother, but the pain and suffering that she experienced prior to her death. No distinction was made between these two elements of damages. It would appear that by the decision in *Levy* the illegitimate child was granted a limited right of inheritance by intestacy as to the survival of a cause of action for personal injury in Tort. The Louisiana courts have themselves characterized the basis of such a claim as the Laws of Inheritance and not the Law of Tort.⁹³ Perhaps *Levy* laid the groundwork for a determination of the issue of an illegitimate's right to inherit by intestacy under the Equal Protection Clause. It can be argued that intestate succession is a continuation of a

92. 391 U.S. 68, 72 (1968).

93. *Brown v. T.J. Moss Tie Co.*, 32 So. 2d 848 (La. App. 1948).

parent's duty to support his children, both legitimate and illegitimate.

In any case, regardless of the label attached to the illegitimate's rights, whenever these rights are in issue under the Equal Protection Clause, a summary of the cases cited would seem to indicate that the Court will subject the classification scheme to strict scrutiny, as a suspect classification.⁹⁴ Under this approach, the Court will narrow the allowable legislative latitude and place the burden on the State to justify the classification in issue by showing a compelling state interest.⁹⁵

Any re-examination of the *Labine* issues would necessitate consideration by the Court of the possible state purposes behind the classification. At this point, it would be of value to discuss some of the possible state purposes which have arisen in the past, and which may arise in the future, to justify such a scheme. It is the opinion of the authors that none of these purposes should be considered as advancing a compelling state interest.

It has been suggested that one of the possible compelling state purposes behind the classification of illegitimates as being unable to inherit through intestate succession has been to promote the cause of legitimate family relationships. The states have undertaken through their classifications to discourage procreation of children in meretricious relationships. Thus, the states contend that, if illegitimate children are unable to inherit through the laws of intestate succession, there will necessarily be fewer illegitimate births since everyone knows that people have illegitimate children for the purpose of allowing the children to inherit through intestacy. Similar state reasoning advanced in *Levy/Glona* was discarded by Mr. Justice Douglas.⁹⁶ Analogizing the Wrongful Death Claim in *Levy* to the right of intestate inheritance by illegitimates, there appears to be no rational basis to assume that women have illegitimate children so that they may take by way of intestate succession upon her death.⁹⁷ Another possible argument against such reasoning may be raised by the application of the Due Process

94. See p. 278, *supra*.

95. *E.g.*, cases cited in notes 27 and 29, *supra*.

96. P. 276 and note 59, *supra*.

97. *Cf. Gomez v. Perez*, 409 U.S. 535 (1973).

Clause. While discussion of this issue is beyond the scope of this comment, perhaps it is appropriate to raise the question at this time. Does a statutory classification scheme that operates upon a class of individuals in such a way as to punish the class for the transgressions of another class (illegitimate parents) deprive the punished class of due process of the law?

Another state purpose advanced to support the classification of illegitimate children centers around the probative problems which may arise if illegitimates were allowed to inherit through intestate succession. Generally, this purpose has been negated by the Court by referring to the existing state methods of proof⁹⁸ and concluding that any probative problem is not compelling enough to survive strict scrutiny or to deprive illegitimates of a fundamental personal right.⁹⁹

It has been argued that the state purpose in such a classification scheme is to give effect to the presumed intent of the intestate.¹⁰⁰ In other words, the decedent intends to discriminate among his children because they are either illegitimate or because his affection for his legitimate children is stronger. It is submitted that this approach is fallacious inasmuch as it adopts circuitous reasoning. The state may not discriminate for discrimination's sake; therefore, in adopting such intent, the state may not give life to an individual's private discriminatory motives. Much the same are cases in which the state is asked to give judicial life to testamentary trusts based upon racial classifications.¹⁰¹

The remaining state interests advanced to justify discrimination against illegitimate children are the provisions for stability of land titles and quick administration of estates. Assuming that these reasons are compelling enough to allow some sort of classification, it can be argued that these interests can be effectuated in such a manner as not to invade the interests of a disadvantaged group.

In cases involving a suspect classification, the Court in the past has demanded that the state use means other than such a classification to accomplish the policy goals upon which the classification is grounded.¹⁰² Stability of land titles could only be effected if a ruling by the Court were given retroactive effect; to make it prospective only would place illegitimate children on a par with all

98. *Glonn v. American Guar. & Liab. Ins. Co.*, 390 U.S. 73, 76 (1968).

99. *Weber v. Aetna Cas. and Sur. Co.*, 406 U.S. 164, 175 (1971).

100. *In Re Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970).

101. *Cf. Evans v. Abney*, 396 U.S. 435 (1970).

102. *Carrington v. Rash*, 380 U.S. 89 (1965).

other contestants for the estate of a parent. It would not appear that the cause of quick administration of estates would be hindered if illegitimate children were allowed to contest, just as any "hidden heir" is allowed to contest, the administration of the estate. Perhaps legislation limiting the period of presentation of claims to the estate would alleviate this problem in all cases, not only illegitimate ones. In this way, illegitimates would be able to perfect their claims against the estate of the decedent and the administration of the estate could be timely completed.

Therefore, the examination by the Court of other means of achieving these compelling state interests could result in the removal of those state interests as a bar to the illegitimate's right to inherit through intestacy.

A review of the purposes advanced to justify discriminatory schemes based upon illegitimacy vis a vis intestate succession suggests that the reasons for the state's refusal to allow illegitimates to inherit are mere shams. It would appear that the only state interest in this scheme of inequality is that of maintaining the tradition of the Common Law. In these changing times, the states have blindly adhered to the antiquated notions of the Common Law as to the status of the illegitimate and have refused to step into the 20th century. As was stated by Mr. Justice Holmes:

It is revolting to have no better reason for a rule of the law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁰³

If one reviews the reasons for the Common Law rule, it becomes apparent that greed played a dominant factor in the adoption of a rule which precluded an illegitimate child from inheriting by intestacy. The concepts of primogeniture and fee tail saw to it that land remained in the family after the death of the patriarch. The opportunity to acquire land by escheat and the other economic benefits attributed to the Common Law rule aided in its acceptance and perpetuation by the lawmakers of the day.¹⁰⁴ Certainly, the reasons of Common Law England's nobility cannot be expected

103. Holmes, Oliver Wendell, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

104. See generally pp. 266-68, *supra*.

to stand in modern jurisprudence. The application of constitutional protections to all of the Citizenry by the Supreme Court and, in particular, the current expansion of the Equal Protection Clause call for the abandonment of this Common Law anachronism. In order to bring the rights of the "non-marital child" into the light of the 20th century, it will be necessary for the Supreme Court to re-examine the principles upon which it based its holding in *Labine v. Vincent* and to overrule that decision on grounds that it violates the Equal Protection Clause of the Constitution.

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