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Equal Protection for Illegitimate Children in State Welfare Programs

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Case Notes

Equal Protection for Illegitimate Children in State Welfare Programs

No one will deny that for centuries society has placed a heavy burden upon those children branded as "illegitimate." The United States Supreme Court has made another step in its efforts to lighten this burden in *New Jersey Welfare Rights Organization v. Cahill.*[1] The scope of this note is to evaluate the significance of this case in light of previous decisions and to arrive at the present state of the law as it deals with illegitimacy and the Equal Protection Clause.

The *Cahill* case dealt with a New Jersey statute entitled "Assistance to Families of the Working Poor."[2] The specific aspect of the statute that was challenged provided that welfare benefits would be limited to only those qualified families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both . . . "[3] The basis of the action was that the statute invariably discriminated against the illegitimate in practical application.[4] At first, a single judge of the United States District Court for the District of New Jersey dismissed the class action because

1. 411 U.S. 619 (1973).
2. N.J.S. 44:13-1 *et seq.*
3. N.J.S. 44:13-3(a).
4. 411 U.S. 619 (1973).

no substantial constitutional question was presented.[5] The United States Court of Appeals remanded the case to a three judge court for determination of the equal protection question.[6]

After upholding the statute, the decision of the three judge court was reversed by a majority of the Supreme Court with Chief Justice Burger concurring in the result and Justice Rehnquist dissenting.[7]

In reviewing the history of the development of the Equal Protection Clause, it is intersting to note that one legal writer felt that the Court avoided constitutional questions in the area of illegitimacy as it relates to welfare legislation.[8] For example, in the area of social welfare, discrimination against illegitimates was first held to be merely against "federal public welfare policy" expressed in the Social Security Act.[9] However, the court began to deal with the constitutional issues in *Levy v. Louisiana.*[10] This case held that illegitimate children could not be barred from suing for the wrongful death of a parent when such right was given to legitimate children.[11] One legal writer observed that *Levy* was the opening wedge in the long accepted discrimination against illegitimate children.[12] *Levy* was cited as authority for the *Cahill* decision.[13]

The next step in the development of the law in this area was *Davis v. Richardson.*[14] *Davis* held that giving legitimate children priority in receiving benefits under the Social Security Act was "invidious discrimination."[15] Citing *Gomez v. Perez,*[16] the majority in *Cahill* recalled that once the right of support from the natural father is given to a legitimate child, there is no constitutional justification for denying the same right to the illegitimate child.[17]

However, the case most heavily relied upon by the majority in *Cahill* was *Weber v. Aetna Casualty and Insurance Co.*[18] *Weber* dealt with a workman's compensation statute that gave prior-

5. *Id.* at 620n.
6. 448 F.2d 1247 (1971).
7. 411 U.S. 619 (1973).
8. Annot., 388 A.L.R.3d 613, 634 (1971).
9. King v. Smith, 392 U.S. 309, 324-26 (1968).
10. 391 U.S. 68 (1968).
11. 411 U.S. 619, 620 (1973).
12. Petrillo, *Labine v. Vincent: Illegitimacy, Inheritance and the Fourteenth Amendment,* 75 Dick. L. Rev. 377, 378 (1971).
13. 411 U.S. 619, 620 (1973).
14. 342 F. Supp. 588 (D. Conn. 1972), *aff'd,* 409 U.S. 1069 (1972).
15. *Id.* at 593.
16. 409 U.S. 535 (1973).
17. 411 U.S. 619, 621 (1973).
18. 406 U.S. 164 (1972).

ity to legitimate children for the primary benefits under the statute, leaving only the residual benefits, if any, to the illegitimate children by classifying them as "other dependents."[19] Although the Court in *Weber* held that the discrimination was less than it was in *Levy,* it was "impermissible discrimination."[20] There was some implication in *Weber* that classifications based upon illegitimacy were subject to strict scrutiny.[21] But, as pointed out by Justice Rehnquist's dissent in *Weber*, the majority did not expressly state that illegitimacy was a "suspect" classification, but rather formulated a "hybrid standard."[22] The majority in *Cahill* included the following quote from *Weber*:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relation to individual responsibility or wrong doing. Obviously, no child is responsible for his birth and penalizing the illegitimate is an ineffectual—as well as unjust—way of deterring the parent.[23]

The three judge court that first decided the constitutional question in *Cahill*[24] used many of the cases cited by the Supreme Court, but reached a different conclusion. The lower court stated that *Weber* has impliedly made illegitimacy a "suspect" classification by subjecting it to "strict scrutiny."[25] But the lower court cited two cases, *Labine v. Vincent*[26] and *Dandridge v. Williams*[27] that the majority of the Supreme Court did not consider in their opinion.

Labine upheld an intestate succession statute that prevented illegitimate children from becoming heirs at law. *Labine* recognized the state's right to regulate succession of property and "to make rules to establish, protect and strengthen family life."[28] Other justifications used for upholding classifications, such as this, have

19. *Id.* at 168.
20. *Id.* at 169.
21. *Id.* at 172.
22. *Id.* at 181.
23. 411 U.S. 619, 620 (1973).
24. 349 F. Supp. 491 (D.N.J. 1972).
25. *Id.* at 495.
26. 401 U.S. 532 (1971).
27. 397 U.S. 471 (1970).
28. 401 U.S. 532, 538 (1971).

been that it eliminates difficult proof problems in regard to paternity, and it discourages promiscuity.[29]

Dandridge,[30] which the lower court relied upon in *Cahill*, is one of the pivotal cases in determining the rights of the illegitimate child. A Maryland statute set an absolute maximum on welfare benefits to be received by any particular family, regardless of the size of the family. When a family reached a specified number of children, it could no longer claim welfare benefits in proportion to its size. It was argued that the new born child which caused the family to exceed the specified size was deprived of equal protection of the law. The court held that the classification was based upon the family unit rather than the child, and there was clearly a rational basis for the classification.[31] Note the language of the court:

> . . . the Constitution does not impower this court to second guess state officials charged with the difficult responsibility of allocating limited public funds among a myriad of potential recipients.[32]

The significance of *Dandridge* is the laxity the Supreme Court exercises when there is discrimination against a legitimate child. No doubt *Dandridge* was cited as authority for the lower court decision because the distinction between legitimate and illegitimate children was not realized.

Justice Rehnquist, in his dissent to the Supreme Court's decision in *Cahill*, agreed with the lower court in regard to *Dandridge* being controlling.[33] Justice Rehnquist states:

> It does not seem to me irrational in establishing such a special program to condition the receipt of such grants on the sort of ceremonial marriage that could quite reasonably be found to be an essential ingredient of the family unit . . . The Constitution does not require that special financial assistance be designed by the legislature to help poor families be extended to "communes" as well.[34]

Justice Rehnquist further shows his preference for the rational basis test when he states:

> In the area of economics and social welfare, the Equal Protection Clause does not prohibit the state from taking one step at a time in attempting to overcome a social ill, provided only that the classifications made by the state are rational.[35]

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29. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 489-91 (1966).
30. 349 F. Supp. 491, 495 (D.N.J. 1972).
31. 397 U.S. 471, 487 (1970).
32. *Id.* at 487.
33. 411 U.S. 619, 623 (1973).
34. *Id.* at 622.
35. *Id.* at 622-23.

One question that arises is, why did Justice Rehnquist not use *Labine* to strengthen his position? As previously discussed, *Labine* is probably the strongest recent authority that upholds a classification based upon illegitimacy. It seems logical that the stability of the family justification would fit the *Cahill* situation better than *Labine* itself. One legal writer gives the answer to this question by saying that *Labine* was a five to four decision that was merely a temporary set back in regard to the Constitutional rights of illegitimate children.[36] The fact that neither Justice Rehnquist nor the majority in *Cahill* felt that *Labine* was worth mentioning casts serious doubts about its precendential value.

With *Labine* having apparently fallen by the wayside, the problem of reconciling *Cahill* with *Dandridge* still remains. Both cases dealt with state supported welfare programs. In practical effect, both deprive children of welfare benefits; i.e. the Maryland statute in *Dandridge* deprived the last born child when the family number exceeded the maximum, and the New Jersey statute in *Cahill* deprived children whose parents were not married. Why was the statute in *Dandridge* valid and the statute in *Cahill* invalid?

The only distinction that readily comes to mind is that the latter classification discriminated against illegitimate children as opposed to legitimate children in the former. It seems clear that the court deals with illegitimacy differently. If *Cahill* had used the same test as *Dandridge*, surely some set of facts could be conceived to provide a rational basis for the New Jersey statute.[37] Consider the conclusion of the Supreme Court in *Cahill*:

> . . . for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of the illegitimate children as to those who are legitimate.[38]

Why would this reasoning not apply to the last born child in *Dandridge*? The answer seems clear that where illegitimacy is involved as a classification, a different test is applied.

But what is this new test? The lower court in *Cahill* felt it was the "strict scrutiny" test implied from *Weber*.[39] Justice

36. Petrillo, *supra* n. 14 at 379.
37. 397 U.S. 471, 485 (1970).
38. 411 U.S. 619, 621 (1973).
39. 349 F. Supp. 491, 495 (D.N.J. 1972).

Rehnquist's dissent in *Weber* alleged that the majority spoke of "strict scrutiny" and "rational basis" but in effect applied a hybrid test somewhere in between these two traditional equal protection tests.[40]

Perhaps illegitimacy has been in a state of transition between the rational basis test and the "strict scrutiny" test reserved for "suspect" classifications. In light of the *Cahill* decision, it appears that the transition is nearing completion, if not complete already.

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40. 406 U.S. 164, 181 (1972).