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INHERIT THE WHIRLWIND: THE ILLEGITIMATE CHILD AND THE NEED FOR STATUTORY EQUAL PROTECTION

Less than twenty years ago, Justice Frankfurter commented on the role of law in relation to children, saying:

Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children.¹

It would seem that illegitimate children are worthy of fair treatment under the law as are other children, if only from a humanistic viewpoint. The Fourteenth Amendment,² which is more than a mere humanist statement, is really a commandment that all persons are to be considered as equal in the eyes of the law, and this concept includes children. As Justice Frankfurter implied, legalistic perversions will occur and rise up to harm children, if they are not protected. It is one such perversion of the law which prevents the illegitimate child from participating equally with legitimate children in intestate successions. The interests of society are too great to permit such detrimental action against children, while permitting the parents—especially the father, who is usually the aggressor in the sexual relationship—to evade their societal and parental duties. The interests of children cannot be relegated to a secondary position behind social vengeance directed toward the immoral, and a child must not be persecuted because of the unwillingness of the law to face reality.

However, the disestablishment of illegitimates from the right to inherit is rooted deep in the antiquity of the common law, having been settled even at the time of Bracton: "Illegitimates born of unlawful intercourse, of persons between whom there could be no marriage, are completely excluded from every benefit of secular law."³ Even the limitation implied by Bracton, as to illegitimates whose parents could have lawfully wedded, seems to have disappeared by the time Lord Coke wrote that "A BASTARD is in law quasi nullius filius, because he cannot be heir to any."⁴ This, of course, is the basis of Blackstone's oft-repeated maxim that, as to the illegitimate, "[his] rights are very few, being only such as he can *acquire*, for he can *inherit* nothing, being looked on as the son of nobody. . . ."⁵ The law of the twentieth century, however, is still that of the thirteenth, except where limited by legislative or once rare judicial action.⁶

1. May v. Anderson, 345 U.S. 528, 535, 536 (1953) (Frankfurter concurring).

2. U.S. Const. amend. XIV, sec. 1. " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 2 Bracton, *De Legibus et Consuetudinibus Angliae*, f. 63 (S. Thorne trans. 1968).

4. Coke, *Institutes* *146.

5. W. Blackstone, *Commentaries* *458. Emphasis in original.

6. "Generally speaking, except in specific respects provided for by statute, a child born out of wedlock is still nullius filius." Anonymous v. Anonymous, 174, Misc. 906, 22 N.Y.S. 2d 598, 603 (1940). See also Metropolitan Life Insurance Company v. Thompson, 250 F. Supp. 476, 479 (E. D. Pa. 1966): "Perhaps the time will come when enlightened legislators will remove the bar sinister. Perhaps someday there will be a legislative recognition that none of this is the fault of the child, who did not even ask to be born illegitimate and to exist as the child of no one. But that day has not yet arrived. . . ."

In *Cope v. Cope*, 137 U.S. 682 (1891), one of the two cases concerning illegitimate children prior to the 1960's,⁷ the Court was asked to invalidate a Utah Territorial statute which provided, contrary to common law, that mothers of illegitimate children and those illegitimate children could inherit from the father as if legitimate, upon satisfaction of paternity, by a competent court. *Cope* grew out of the Anti-Polygamy Act of 1862,⁸ and led Justice Brown to state prophetically that

While this statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity. . . . [I]t 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. . . . [T]o hold it to be invalid is to treat the child as in some sense an outlaw. . . .⁹

In 1968, this view was enlarged upon in *Levy v. Louisiana*,¹⁰ an action by illegitimate children for the wrongful death of their mother. Writing for the majority, Justice Douglas stated:

Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our Constitutional regime can he be denied rights which other citizens enjoy?¹¹

Following this concept, that illegitimates are not "non-persons," the Court in *Levy* and the companion case of *Glonn v. American Guarantee and Life Insurance Co.*¹² ruled that the Equal Protection Clause prohibited discrimination, at the very least in tort claims, on the basis of illegitimacy.

The actual constitutional basis for the decision in *Levy* is clouded by references to two different tests of equal protection: That utilized in considering legislative enactments or state action in the realm of social and economic activity—the police power—as in *Morey v. Doud*,¹³ and that used in inspecting an alleged invasion of a basic civil right, as in *Skinner v. Oklahoma*.¹⁴ The *Morey* test requires that "a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found."¹⁵ The civil rights test is far stricter, being concerned with the invocation of a basic civil right. Thus, strict scrutiny of the alleged invasion is necessary in order to prevent either intentional or unintentional "invidious discriminations" in violation of the Equal Protection Clause.¹⁶ In *Skinner* the right to procreate was held to be basic; other cases have held that a basic civil

7. The other case was *Stevenson's Heirs v. Sullivan*, 18 U.S. (5 Wheat.) 207 (1820).

8. 12 Stat. 501 (1862).

9. 137 U.S. at 684-685.

10. 391 U.S. 68 (1968).

11. *Id.* at 71.

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

13. 354 U.S. 457 (1957). The *Morey* test is found at 354 U.S. at 463-464.

14. 316 U.S. 535 (1942).

15. 354 U.S. at 465.

16. 316 U.S. at 541.

right exists, among others, to vote,¹⁷ to marry,¹⁸ to have counsel at a criminal trial,¹⁹ to travel,²⁰ and to get an education.²¹ Moreover, certain general classifications are inherently suspect, requiring close and careful examination.²² In both situations the Court has applied the test that where "the classification touches on [a] fundamental right . . . , its constitutionality must be judged by the stricter standard of whether it promotes a *compelling state interest*."²³

Thus, the crucial question is whether *Levy* and *Glon*a depended upon the "rational basis" test, or on the "compelling state interest" standard.²⁴ For before the right of the illegitimate can be protected, the nature and seriousness of those rights must be ascertained. Because of the confused application of the law in *Levy* and *Glon*a, much confusion has been generated as to the status of the rights of illegitimates.²⁵ It is submitted, however, that at least inferentially *Levy* required the conclusion that a classification based on illegitimacy is constitutionally suspect, and that if no compelling state interest can be demonstrated to require approval of such statutory classifications, that classification must fail.²⁶

However, the vitality of *Levy* has been seriously undermined, and its application severely limited by *Labine v. Vincent*, 91 S. Ct. 1017 (1971). In *Labine*, the decedent, Ezra Vincent, was survived only by alleged collateral relations, and an illegitimate Negro daughter, who had been formally acknowledged as Vincent's daughter in compliance with Louisiana law.²⁷ The daughter, through her natural tutrix, sought to inherit on the same basis as a legitimate child, and that the relevant state statutes unconstitutionally violated the Due Process and Equal Protection Clauses.²⁸ The U.S. Supreme Court ruled, in affirming the lower state courts, that "absent a specific constitutional guarantee"²⁹ the fact that regulation of successions is a reserved state power does not permit the Supreme Court to invalidate such laws.³⁰ Much emphasis was placed upon the fact that there was a supposedly insurmountable barrier in *Levy*

17. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Carrington v. Rash*, 380 U.S. 89 (1965).

18. *Loving v. Virginia*, 388 U.S. 1 (1967).

19. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963).

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

21. *Id.* at 633 (dictum).

22. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Brown v. Board of Education*, 347 U.S. 483 (1954) (race); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry); *Douglas v. California*, *supra* (economic status).

23. *Shapiro v. Thompson*, *supra*, at 638. Emphasis in original.

24. See Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477 at 487 (1967); Comment, *The Expanding Rights of the Illegitimate*, 3 Creighton L. Rev. 135 (1969); Note, 21 Case W. Res. L. Rev. 292 (1970). Note, 35 Brooklyn L. Rev. 135 (1968).

25. *Strahan v. Strahan*, 304 F. Supp. 40 (W. D. La. 1969) (rational basis); *R. v. R.*, 431 S.W.2d 152 (Mo. 1968) and *Estate of Jensen*, 162 N.W.2d 861 (N. D. 1969) (compelling state interest).

26. *Levy v. Louisiana*, *supra*, at 71-72.

However that may be, we have been extremely sensitive when it comes to basic civil rights [citing cases], and have not hesitated to strike down an invidious classification. . . . Why should the illegitimate child be denied rights because of his birth out of wedlock? . . . Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. . . . 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. L.S.A. Civil Code art. 203.

28. L.S.A. Civil Code arts. 202, 206, 919.

29. 91 S.Ct. at 1021.

30. *Id.*

to recovery by illegitimates. Such does not exist in the field of successions. Thus Vincent's daughter could have inherited "had he bothered to follow formalities of executing a will."³¹

The decision in *Labine* was bitterly opposed by the four dissenters, speaking through Justice Brennan³² on several grounds. First, noted Justice Brennan, the Court impliedly stated that state action could not be regulated merely because it was action in a sphere in which a state *may* act.³³ For example, a state has full power to regulate education, but that is not to say that state-required segregation is permissible merely because it is the exercise of an admitted state power. As Justice Brennan pointedly noted,

It is precisely state action which is subjected by the Fourteenth Amendment to its restraints. It is to say the least bewildering that a court that for decades has wrestled with the nuances of the concept of "state action" . . . in this case holds that the state action here, because it is state action, is insulated from these restraints.³⁴

In so noting, Justice Brennan highlighted the most vulnerable point of the *Labine* decision: That it is "unprincipled" in the sense that there is no constitutional principle to support it.

Justice Brennan further discussed the concept of "biological distinction" first developed in *Levy*, in which it was noted that an illegitimate was biologically no different than a legitimate. Despite the *Labine* Court's distinction that a concubine and a wife are alike biologically yet different socially,³⁵ and analogizing from that to the differences between a bastard and a legitimate, the dissent noted that the biological test should be continued.³⁶

The majority further placed great weight upon the fact that Louisiana, because of its Civilian jurisprudence, places great emphasis on the ordering of familial relationships; some relations are legal and emphasized, and others are legally ostracized.³⁷ It is this concept which is at once the most beguiling, in that obviously a state should foster public morality, which is the most disturbing in its impact. For the general premise that public morality must be served does not justify, at the very least, irrational inroads upon personal rights; at the most, such infringements of personal rights are to be allowed only upon a showing of strong interests of the state. Specifically, the *Labine* Court refused to note the legal implications of their decision in four different but related spheres:

- (1) Such a classification violates equal protection of a fundamental human right to belong to a family;³⁸
- (2) Such a classification is made on the impermissible basis of ancestry;³⁹

31. *Id.*

32. 91 S.Ct. at 1022.

33. 91 S.Ct. at 1025-26.

34. 91 S.Ct. at 1026.

35. 91 S.Ct. at 1020-21.

36. 91 S.Ct. at 1027.

37. 91 S.Ct. at 1021.

38. See text at page 7, *infra*.

39. See text at page 8, *infra*.

(3) This classification operates as a vehicle for racial discrimination;⁴⁰ and

(4) Sanctions on the basis of a status over which the members of a class have no control are not permitted.⁴¹

There is no state interest in such classifications, moreover, which can be asserted so as to sustain such a classification.⁴²

I. *Children, Marriage, and the Right to a Family.*

While "there is no federal law of domestic relations,"⁴³ the Supreme Court has sanctioned the application of state law in resolving such questions. But the importance of the right to have a family has been held to be paramount to state law, where necessary: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."⁴⁴ But if it is proper to heed the needs of children, to the point where "sin" may not be punished at their expense,⁴⁵ and to judicially note the right to marry, as in *Loving*, it is apparent that the next logical step is to recognize the right to have parents, especially a father. Even more than a wife or a husband, parents are "vital personal rights essential to the orderly pursuit of happiness."⁴⁶ This concept is inherent in the *Levy* decision: An illegitimate mother is nonetheless a mother, despite the illegitimacy of the children. Similarly and inescapably, a child is irretrievably related to its father. Sociologically, this concept is well established: "[N]o child should be brought into the world without a man—and one man at that—assuming the role of sociological father."⁴⁷ It has even been suggested that the purpose of marriage is "not the legitimation of sex, but the legitimation of parenthood."⁴⁸ The very right to have a father is recognized, as to a child born in wedlock; it is even recognized to the benefit of the child born out of adultery.⁴⁹ Thus, the presumption of legitimacy of children born during a marriage of the mother has been stated in Louisiana courts to be "the strongest presumption known in law."⁵⁰ Not only does this presumption limit the sources of family conflict, but it also protects children by conferring upon them a father by judicial fiat.

If it is a basic civil right of the adulterous bastard to have a family,⁵¹

40. See text at page 11, *infra*.

41. See text page 17, *infra*.

42. See text at page 18, *infra*.

43. *DeSylva v. Ballantyne*, 351 U.S. 570, 580 (1956).

44. *Loving v. Virginia*, 388 U.S. 1, 12.

45. 392 U.S. 309 (1968).

46. *Loving v. Virginia*, *supra*.

47. Malinowski, *Parenthood, The Basis of Social Structure*, in *The New Generation* 137 (V. Calverton & S. Schmalhausen eds. 1930).

48. Goode, *Illegitimacy in the Caribbean*, in *Readings in Modern Sociology* 158 (A. Inkeles ed. 1966).

49. See e.g. *Murphy v. Houma Well Service*, 413 F.2d 509 (5th Cir. 1969); *George v. Bertrand*, 217 So.2d 47 (La. App. 1968); *Feazel v. Feazel*, 222 La. 113, 62 So.2d 119 (1952). See also *Succession of Soloy*, 44 La. Ann. 433, 10 So. 872, 876:

The sanctity with which the law surrounds marital relations and the regulation and good fame of the spouse and of the children born during the marriage is of such inviolability that the mother and the children can never brand themselves with declarations of adultery, illegitimacy, and bastardy, and their true character is not permitted lightly to be thus aspersed, however true in themselves the stern and odious facts may be.

50. *Id.*

51. See Y.B. 32-3 Edw. I p. 63 (Selden Society ed.) for an anachronism that continues to the present day, as in cases cited in note 49.

how can it be said that all other illegitimates have *no* right to a family relationship including a father? Both kinds of children should have an equal right to a father and a mother, for the right to a family is one of the most elemental rights a man can possess.⁵² *More important even than the right to citizenship in the nation*⁵³ *is the right to citizenship in the family.*

II. Discrimination on Grounds of Ancestry.

Illegitimates are punished for the criminal acts, such as fornication, of their parents. So stated, such action is closely analogous to the common-law corruption or attain of blood,⁵⁴ whereby the attainted could neither inherit nor be inherited from. Such a person was an illegitimate testator: "[B]y an anticipation of his punishment, he is already dead in law." Although his children were not considered illegitimate, the same consequences attached to them as if they were. The same is true of illegitimate children today, for when born out of wedlock they suffer the legal effects of a limited corruption of their parent's blood, for they cannot inherit from them. In reality, it may be said that there are no illegitimate children, only illegitimate parents,⁵⁵ who, like the attained felon, cause their children to suffer for their sins. Thus, there is a discrimination on the basis of a taint in the parents' blood, depriving the child of the right to inherit because of his parents' promiscuity. This discrimination is also better described as one based on ancestry, for the discrimination depends on who the child's parents were.

Absent exigent circumstances that compel such discrimination, such action is impermissible. In both *Hirabayashi v. United States*⁵⁷ and *Korematsu v. United States*⁵⁸ the Court permitted directives of the Western Military District regarding curfew and relocation of resident Japanese and American citizens of Japanese ancestry in the early days of World War II. But in the process the Court evinced considerable distaste for such actions:

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are found-

52. Compare *Skinner v. Oklahoma*, *supra*, and *Loving v. Virginia*, *supra*, with *Labine v. Vincent*, *supra*, (Brennan dissenting) at 1030-1031:

Given the importance and nature of the decision to marry, cf. *Boddie v. Connecticut*, 400 U.S. _____, 91 S.Ct. 780, 27 L.Ed.2d _____ (1971), I think that disinherit the illegitimate child must be held to "bear no intelligible proper relation to the consequences that are made to flow" from the State's classification. *Giona v. American Guarantee Co.*, 391 U.S. 73, 81, 88 S.Ct. 1512, 1514-1515, 20 L.Ed.2d 441 (1968) (Harlan, J., dissenting).

53. *Trop v. Dulles*, 356 U.S. 86 (1958).

54. See *King v. Smith*, 392 U.S. 309, 334 (Douglas, J., concurring); *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 289 (1968) (Douglas, J., concurring). See also *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Col.L.Rev. 212, 213-214 (1966).

55. W. Blackstone, *Commentaries* *380.

56. See e.g. *Saks v. Saks*, 198 Misc. 667, 71 N.Y.S.2d 797 (1947); *Woodward's Estate*, 230 Cal.App. 113, 40 Cal.Rptr. 781 (1964).

57. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

58. *Korematsu v. United States*, 323 U.S. 214 (1944).

ed upon the doctrine of equality.⁵⁹

Justice Jackson, dissenting in *Korematsu*, rejected the validity of the "relocation" as "an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice. . . ." ⁶⁰ Thus, only a compelling reason such as national emergency or war could justify discrimination on grounds of ancestry. Such a reason was lacking in *Oyama v. California*.⁶¹ In that case the California Alien Land Law prohibited ownership of farm land by aliens ineligible for citizenship. Petitioner was the infant son of such an alien, who had purchased the land in his son's name. The Supreme Court refused to allow the land to escheat to the state, as provided by the Alien Land Law, on the grounds that the son was being punished for the father's fault in being an ineligible alien. It is perhaps significant that the Court, in *Korematsu*, *Hirabayashi*, and *Oyama*, spoke primarily in terms of "ancestry" and *not* in terms of "national origin." Thus, what may have seemed to be limited to situations involving discrimination on grounds of national origin was broadened to prohibiting discrimination on the basis of ancestry, *including* the concept of national origin.

Thus, differentiation on the basis of ancestry may be considered a penumbral concept prohibiting discrimination against a person because of his condition of birth, be it racial,⁶² ancestral,⁶³ or biological.⁶⁴ All of these perpetuate, unless prevented, prejudice against a person for a condition he did not choose. This point was critically examined by Justice Brennan, who approved such conclusions, in citing *Hirabayashi* and noting:

It is certainly unusual in this country for a person to be legally disadvantaged on the basis of factors over which he had no control.⁶⁵

As Justice Brennan notes, *Labine* is unusual; it may almost be termed a judicial anomaly in light of the case law developed after *Levy*. While few courts did more than intone "equal protection" in following *Levy*, because of its unclear decisional basis, several state courts pointedly refused to allow limitations on an illegitimate's rights, on grounds of ancestry.⁶⁶ Progress in this area has been largely due to more humanitarian ideals; in *Armijo v. Wesselius*,⁶⁷ the Supreme Court of Washington ruled, *before Levy*, that:

Society is becoming progressively more aware that children deserve

59. *Hirabayashi v. United States*, *supra*, at 100. See also concurring opinion of Mr. Justice Murphy at 320 U.S. 109, 110-111:

The result [of this case] is the creation in this country of two classes of citizens for the purpose of a critical and perilous hour -- to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

60. 323 U.S. at 242.

61. 332 U.S. 633 (1948).

62. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

63. *Hirabayashi v. United States*, *supra*.

64. *Giona v. American Guarantee and Life Insurance Co.*, *supra*.

65. 91 S.Ct. at 1030.

66. *Armijo v. Wesselius*, 73 Wash.2d 716, 440 P.2d 471 (1968); see also *Saks v. Saks*, *supra*; *Estate of Jensen*, *supra*; *Woodward's Estate*, *supra*.

67. *Armijo v. Wesselius*, *supra*.

proper care, comfort, and protection even if they are illegitimate. The burden of illegitimacy in purely social relationships should be enough, without society adding unnecessarily to the burden with legal implications having to do with the care, health, and welfare of children.⁶⁸

This observation is especially pertinent; to discriminate on the basis of ancestry, that is, that one's parents performed illegal acts, is ill-founded enough, for it operates to deny a child the right to be free from punishment for acts he did not commit. But to discriminate on the basis of ancestry so as to deny a child the necessities of life, through succession to his father's estate, is damning. It is as critical and invidious as racial discrimination, for by its very nature it renders a child less capable of social maturity in a complex society. Both may have profoundly harmful effects on the child, who is incapable of remedying his social stigma. At the very least, if society is not yet mature enough to refuse to punish children for their parents' acts, the law should be.

III. Racial Discrimination and Illegitimacy.

As noted above, there is a strong similarity in the effect on a child of ancestral discrimination and the effect of racial discrimination. This may not be a chance coincidence; the fact is that today illegitimacy is a racial problem. The Negro population, comprising approximately ten per cent of the national population,⁶⁹ has more than one and one-fifth as many illegitimate births in number as were born to the white population.⁷⁰ Subsequent adoption, which legitimizes the child, takes place in about seventy per cent of the white illegitimacy cases; for Negroes the comparable figure is between three and five per cent.⁷¹ Over two-thirds of all illegitimate children will thus remain illegitimate. Of that group, more than eighty per cent are black. *Considered as a whole, the problem of illegitimacy and its disabilities falls at least twenty times more severely on Negroes than it does on whites.*⁷² What appears on its face to be a neutral classification, status of birth, becomes in effect significantly racial in nature.

There are grounds for supposing that this effect may be part of a historical design to discriminate against the Negro. While it is not here suggested that legislators today intend the particular end of maximizing the disabilities of racial minorities, the problem of illegitimacy among blacks may be a direct result of the black codes and slave laws of the

68. 73 Wash.2d at _____, 440 P.2d at 473.

69. 1970 World Almanac 356. The population percentage for Negroes was 8%, but in view of higher birth rates for Negroes, an approximation of 10% would seem appropriate.

70. U.S. Bureau of Labor Statistics, Department of Labor, Report No. 375, *The Social and Economic Status of Negroes in the United States* 77 (1969); U.S. Bureau of the Census, Department of Commerce, *Statistical Abstract of the United States* 49, 50 (1970). According to the Bureau of Labor Statistics, the rate of illegitimacy among both blacks and whites is accelerating. In 1940 the rate was 16.8% of all live births among blacks. In 1967 it was 29.4%. Bureau of the Census data show that in 1968 there were 339,000 live illegitimate births, of which 183,900 (54+%) were black. It is interesting to note that this means that while something like 5% of all white births are illegitimate, an epidemic 31% of all Negro births are.

71. U.S. Bureau of Public Assistance, Department of Health, Education and Welfare, *Illegitimacy and Its Impact on the Aid to Dependent Children Program* 35-36 (1960).

72. Applying adoption figures, 1.5% of white children will not be legitimated by birth in wedlock or subsequent adoption; 29% of blacks will remain illegitimate.

antebellum South. Slaves, comprising the majority of the black population, were then considered either to be real or chattel property.⁷³ Being property, slaves were incapable of contracting marriage, except where it was possible with the consent of the master.⁷⁴ Thus, they were effectively deprived of the opportunity for any family relationship whatsoever.⁷⁵ Additionally, it appears that slaves and Free Negroes were even beyond the pale of enforceable morality: In Virginia, penalties were assessable for polygamy only against whites,⁷⁶ only whites were forbidden by law to marry within certain degrees of affinity,⁷⁷ and "open and gross lewdness and lasciviousness" was an offense contrary to public policy only if whites were involved.⁷⁸ Adultery and fornication were criminal only as to free persons.⁷⁹ The Negro was usually allowed immorality where he had the choice; most often he did not have the choice and regardless of his wishes was compelled to live as a non-moral object. The two hundred and forty-six years of slavery in the United States may have indeed so ingrained illegitimacy and so-called "immortality" into the structure of Negro domestic relations as to render a massive black illegitimacy problem inevitable. Such is the case today; it is significant that the parties involved in *Levy* and *Labine* are black. One hundred years after the abolition of slavery, illegitimacy remains as a badge of servitude for the Negro. In a recent case, *Jones v. Mayer Co.*,⁸⁰ the Supreme Court said:

For this court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Civil Rights Cases*. . . .⁸¹

Continuation of the effects of slavery on the parental structure of the Negro family, in order to frustrate the admitted 'same right to inherit as whites,' would be to permit the very modes of discrimination that the Thirteenth and Fourteenth Amendments were intended to root out of the law. It is in this respect that the *Labine* decision is so unfortunate; for the cases are legion⁸² which hold that discriminatory state action, regardless of the power of the state to act generally in that field, is con-

73. Goodell, *The American Slave Code* (1853) (Arno Press and N.Y. Times reprint 1969) 23-42. While a prominent abolitionist tract of its era, it does describe the state of the law concerning slaves in the pre-Civil War South.

74. *Id.* at 104-112. See also Code of Alabama, title 5, chap. 5, art. I, sec. 1946 (1852): "Marriages may be solemnized between free white persons, or between free persons of color . . ."; Louisiana Civil Code, art. 182 (1838): "Slaves cannot marry without the consent of their masters, and their marriages do not produce any of the civil effects which result from such contracts." See also generally Revised Statutes of Missouri, Chap. 115 (1845); Code of Virginia, Chap. 108 (1860); Statute Laws of Tennessee, "Marriage" 1741, Chap. 1, sec. 7 (1836); Revised Code of North Carolina, Chap. 107, sec. 61 (1855).

75. Goodell, *supra*, at 112-113. See also Louisiana Civil Code, art. 183 (1838): "Children born of a mother then in a state of slavery, whether married or not, follow the condition of their mother; they are consequently slaves and belong to the master of their mother."

76. Code of Virginia, Chap. 196, sec. 1 (1860).

77. *Id.*, sec. 2.

78. *Id.*, sec. 6.

79. *Id.*, sec. 7.

80. 392 U.S. 409 (1968).

81. 392 U.S. at 441. Emphasis added.

82. See e.g. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

stitutionally impermissible. Yet in *Labine* the Court stated that since the legislature has the power to make laws relating to intestate successions, only a specific constitutional guarantee can invalidate the state law. The fallacy in the reasoning is that denial of equal protection violates a specific guarantee. In failing to examine the rationality of the state action, the *Labine* decision utterly neglects to attempt to discover whether there was a violation. Indeed, it appears that the Court reasoned that state action in itself was rational, or otherwise it would be unconstitutional, and since it must have been rational, there was no need to examine it for its constitutionality. Such cyclical sophistry is unfortunate.

It may be suggested, however, that there is no indication of intentional discrimination in the law of succession on the grounds of race, and that consequently there is no discrimination because of the reserved right of the states to legislate in the area of successions. There is some substance to this argument, since the Louisiana Civil Code, derived from the Code Napoleon of 1804, much antedated the emancipation of the southern blacks in 1864.⁸³ The fallacy of this argument is that a law valid on its face may be still discriminatory in operation. In striking down the Oklahoma "grandfather clause" in 1915, the Supreme Court recognized this point, saying,

It is true [that the Oklahoma statute] contains no express words of an exclusion from the standard which it establishes of any person on account of race . . . but the standard itself inherently brings that result into existence. . . .⁸⁴

Justice Frankfurter also commented on the seemingly nondiscriminatory law in *Lane v. Wilson*,⁸⁵ when he observed that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination."⁸⁶ Such is obviously the situation in the case of intestate succession; sophisticated and seemingly neutral on its face, in operation it perpetuates the unequal treatment of Negroes who, overwhelmingly, are the class of illegitimates affected. Judge Wisdom, of the Fifth Circuit, pointedly noted the role of the courts in examining such racially oriented statutes; in holding the Louisiana "constitutional interpretation test" invalid, as a precondition to voter registration, he suggested that "[t]he legislative purpose and inevitable effect of a law non-discriminatory on its face may be decisive in determining the unconstitutionality of a law."⁸⁷ That in effect the succession statutes are discriminatory is obvious: Where one black child in four born each year is denied the right to inherit from its father, while less than one white child in twenty-five is so affected,⁸⁸ a prima facie case of racial discrimination is made out.⁸⁹

83. See note 28, *supra*.

84. *Guinn v. United States*, 238 U.S. 347, 364 (1915); see also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

85. 307 U.S. 268 (1939).

86. *Id.* at 275.

87. *Louisiana v. United States*, 225 F.Supp. 353, 362 (D.W.La. 1963), *aff'd* 380 U.S. 145 (1965).

88. See data at note 70, *supra*.

89. See e.g. *Gaston County v. United States*, 395 U.S. 285 (1969).

As Judge Wisdom noted, legislative purpose often plays a significant role in ascertaining the constitutionality of a statute. This has been interpreted in the past to mean that discriminatory intent is necessary to invalidate laws as violative of the Equal Protection Clause.⁹⁰ But the role of intent has lessened as an essential prerequisite, becoming rather an indicator of discrimination which supplements other indicia of unequal treatment. In the case of *Hobsen v. Hansen*,⁹¹ Judge J. Skelly Wright eloquently affirmed this change:

Orthodox equal protection doctrine can be encapsulated in a single rule: governmental action which without justification imposes unequal benefits is unconstitutional. The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the held of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous to private rights and the public interests as the perversity of a willful scheme.⁹²

Indeed, it appears that a form of inferred intent is to be found from the surrounding facts where specific intent is lacking. Where the socio-economic conditions of Negroes are demonstrably due to past discrimination, resulting in their inability to meet standards which whites are generally capable of meeting, a *de facto* discrimination has been held to exist.⁹³ In *Gaston County v. United States*,⁹⁴ a state voting literacy test was struck down, with the Supreme Court noting that it was reasonable to assume that whites would always succeed in literacy more often and with greater ease than blacks, due to the past history of discrimination in education. In *Griggs v. Duke Power Co.*,⁹⁵ Chief Justice Burger similarly rejected the use of employment advancement tests and requirements of educational attainment for job promotions on the grounds that if Negroes fared badly on such tests, it is due to prior educational discrimination, even lacking discriminatory administration of the tests and qualifications. From these cases it is manifest that lack of discriminatory intent is irrelevant where present inequality in treatment of minority groups grows out of past patterns of discrimination and the resulting curtailment in economic, cultural, and educational development.

Seen in this context, the discriminatory use of intestacy statutes cannot be allowed. It is thus unfortunate that the Supreme Court has not analyzed the effect of such laws, for while it may, conceivably, be "ra-

90. *Snowden v. Hughes*, 321 U.S. 1 (1944). But see *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 65 (5th Cir. 1962): "It is not necessary to go so far as to establish ill will, evil motive, or absence of good faith, but that objective results are largely to be relied on in the application of the constitutional test."

91. 269 F.Supp. 401 (D.D.C. 1967), *aff'd sub nom. Schmuck v. Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969).

92. 269 F.Supp. at 497. *Accord, Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Local 189, United Papermakers and Paperworkers, AFL-CIO v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. den.* 379 U.S. 919 (1970); *Hawkins v. Town of Shaw*, _____ F.2d _____ (5th Cir. 1971); *Arrington v. Massachusetts Bay Transportation Authority*, 306 F.Supp. 1355 (D. Mass. 1969).

93. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Gaston County v. United States*, *supra*; *Arrington v. Massachusetts Bay Transportation Authority*, *supra*.

94. *Supra*.

95. 401 U.S. at 424 (1971).

tional" to discriminate between concubinage and marriage,⁹⁶ such a seemingly rational discrimination cannot stand when it effects a racial discrimination against children.

IV. *Discrimination Because of an Unavoidable Status.*

There is growing authority for the proposition that people should not be punished when "no action, conduct, or demeanor of theirs is possibly relevant."⁹⁶ Such persons are generally those who are helpless to prevent their condition, and indeed may never have entered it voluntarily. The most common class of situations previously embraced by this concept have been discriminations on account of race,⁹⁷ ancestry,⁹⁸ and economic condition.⁹⁹

Levy and *Glon* extended this inquiry into the problem of illegitimacy when Justice Douglas refused to allow a state to prevent institution of wrongful death actions because of the illegitimacy of the injured party.¹⁰⁰ Two states have similarly ruled that discrimination on account of status of birth is impermissible.¹⁰⁴ In *Dickerson v. Texas Employers' Insurance Association*, a child who could not have prevented his adoption prior to its natural father's death was held to have a right to share in workmen's compensation benefits, the court saying:

We consider the discrimination between the two classes of children in the case at bar to be "invidious" because the effect of it is to take from a defenseless child a substantial right . . . , not because of anything the child did, but wholly because of the act of one or more adults in adopting the child.¹⁰²

Thus, the court found that the uncontrollable status of a child should not prevent him from sharing in rights he would normally have benefited in. Similarly, in *Estate of Jensen*, the North Dakota Supreme Court, in invalidating prohibition of intestate succession to or through illegitimates, minced few words in stating:

This statute, which punishes innocent children for their parents' transgressions, has no place in our system of government, which has as one of its basic tenets equal protection for all.¹⁰³

It is unconscionable, as the North Dakota court recognizes, for a state to effectively outlaw a child from a share in his father's estate, since such is effectuating a penalty *upon the child* for his status. Since the child can never change that status, he can never avoid the punishment, nor can he even mitigate it. To allow such actions on the part of a state cannot be deemed rational. Whatever else might be wrong with illegitimacy, a

96. *Levy v. Louisiana*, *supra*, at 72.

97. See text at page 11.

98. See text at page 8.

99. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Boddie v. Connecticut*, 400 U.S. ____ (1971).

100. See text at n. 96, *supra*.

101. *Dickerson v. Texas Employers' Insurance Association*, 451 S.W.2d 794 (1970) (workmen's compensation); *Estate of Jensen*, *supra* (intestate succession).

102. 451 S.W.2d at 797.

103. 161 N.W.2d at 878.

state should not irrationally punish a status cause by third parties.¹⁰⁴

V. State Interests and Illegitimacy.

Violation of a fundamental right by a state carries the obligation on the part of the government to show a "compelling interest" to justify the intrusion.¹⁰⁵ A regulatory classification, of course, need only be based upon a "rational" basis. Regardless of whether the right to inherit is considered "basic" or merely incidental,¹⁰⁶ there are no justifying reasons for the discrimination against illegitimates in the field of successions as they are treated now.

One leading argument in favor of such restrictions on illegitimates is that they encourage marriage, which is a permissible area of state regulation. Should the bastard be treated equally with the legitimate child, the argument runs, marriage is weakened since no advantage remains to be derived from it. Absent the social stigma of illegitimacy, fewer parents would give their union the permanency that marriage provides. This reasoning, however valid, falls on the grounds that restrictions by a state must not be broader than necessary to achieve the desired objective.¹⁰⁷ Rather than broadly disinherit illegitimates, a sweeping process reminiscent of killing a fly with a sledgehammer, limited and more carefully enforced means already exist, such as penal sanctions for fornication and adultery, which, if vigilantly enforced, would provide strong disincen- tives for avoiding marriage via illicit sexual unions.

Perhaps the most telling counter-argument against the argument that such restrictions encourage marriage is the converse argument: If the bastard is not given the same rights as the legitimate child, marriage is weakened since the father incurs no duties to transmit sufficient wealth to provide for the child, thereby allowing the father to treat his wealth however he wishes, regardless of the child. Even if the father has a statutory duty to support the child, his obligations end with the father's death, while they are perpetuated for his legitimate offspring. The law should not allow a father to shirk his parental duty in the name of "encouraging marriage." Thus, while the state may have an "interest in promoting family life"¹⁰⁸ it cannot be said to be rational for the state to thereby *frustrate* marriage by providing benefits to the father who refuses to marry and legitimate his children.

Justice Brennan in *Labine* directly noted this discrepancy. Moreover,

104. "This Court has generally treated as suspect a classification which discriminates against an individual on the basis of factors over which he has no control." *Labine v. Vincent*, *supra*, at 1027 (Brennan, J., dissenting).

105. *Dunham v. Pilsifer*, 312 F.Supp. 411 (D. Vt. 1970):

A regulatory classification which, in addition to the creation of differential treatment, serves to penalize the exercise of a fundamental right must be justified by a compelling governmental interest. The operational difference is that the court will invalidate a classification which infringes upon a separate fundamental right unless the classification is shown to be necessary in the service of some compelling state interest, rather than just rationally related to some permissible state interest. . . . The "compelling state interest" standard of "active review" calls upon the state to show more than a link of reasonableness. The state must demonstrate the pressing importance of the classification in the context of some necessary governmental objective.

106. See text at n. 81, *supra*.

107. *NAACP v. Alabama*, 357 U.S. 449 (1958).

108. 91 S.Ct. at 1019 n. 6. See also 91 S.Ct. at 1027 n. 18.

he differentiated between encouraging marriage, as an institution between a husband and a wife, and encouragement of marriage at the expense of third parties such as children.¹⁰⁹ He also noted the fallacy in the argument, saying:

Such [discrimination] could encourage marriage only if fathers generally desire to leave property to their illegitimate children; otherwise, disinheritance would not operate as a sanction to encourage marriage.¹¹⁰

These considerations also are similar to the objections to the argument that discouraging promiscuity supports disinheritance of illegitimates. However, while this objective may be laudatory, it is ineffective; in the period 1940 to 1968, the rate for illegitimacy has more than tripled, from 7.1 per 1000 births to 24.1.¹¹¹

Moreover, the conflicting state action in this area defeats the assumption that punishing illegitimacy prevents promiscuity. As mentioned above,¹¹² one of the strongest presumptions of the law is that any child born to a married woman is legitimate.¹¹³ If the policy of the law in discouraging promiscuity is to be consistent, it would seem that the state would attempt to illegitimize the adulterous bastard as well as the illegitimate born out of fornication. It may be answered that the even stronger policy of the state in encouraging family stability overrides such a consistent system. Yet such does not agree with the fact that every state allows divorce on grounds of adultery. The answer is that the state does not wish to promote family stability so much as prevent the illegitimizing of such children born in adultery.¹¹⁴ If the state will not punish promiscuity *within marriage*, at the expense of the children involved, why can it be said to be rational to punish promiscuity at the expense of similarly situated innocent children?

Moreover, "people contemplating sexual intercourse probably do not have intestacy statutes on their minds."¹¹⁵ While it is laudable for a state to attempt to prevent promiscuity, such sweeping and boundless statutes that harm only children and do not punish the parents for their essentially criminally immoral behavior are absurd. In a similar connection, Justice Douglas voiced his disapproval of such measures:

In other words, the Alabama regulation is aimed at punishing moth-

109. 91 S.Ct. at 1028.

110. 91 S.Ct. at 1029.

111. U.S. Bureau of the Census, Department of Commerce, *Statistical Abstract of the United States* 50 (1971).

112. See text at page 8.

113. See note 50, *supra*.

114. In *Murphy v. Houma Well Service*, *supra*, the Fifth Circuit refused to consider *Levy* as controlling, saying:

It is one thing to hold, as did *Levy*, that a state may not constitutionally prohibit recovery by an illegitimate child where the defense was the status of the claimant. . . . It is quite another to say that where competition arises between statutory beneficiaries [some of whom claim the other is illegitimate, though born in wedlock] the Constitution requires full inquiry into biological facts in disregard of settled policies which would uphold family-home against the perils of illegitimizing frequently innocent, nearly always defenseless minors at the hands of unrelated contestants for the spoils of a death claim.

413 F.2d at 512. Emphasis added.

115. Brief for Center on Social Welfare Policy and Law at 6, *Labine v. Vincent*, No. 5257, October Term, 1970.

ers who have non-marital sexual relations. The economic need of the children, their age, their other means of support are all irrelevant. The standard is the so-called immorality of the mother. . . . *I would say that the immorality of the mother has no rational connection with the need of her children under any welfare program.*¹¹⁶

Similarly, it is evident that no rational relation, much less a compelling justification, can be presented by a policy which punishes the children for their father's and mother's offenses against public morality. Such state action merely succeeds in punishing a scapegoat, and an extremely vulnerable one at that: A child.

One argument in favor of intestacy laws is that they are legislative enactments of what would presumably be the intent of the decedent had he left a will.¹¹⁷ A subsequent assumption is that by not writing a will, the decedent intended that intestacy law should apply to the distribution of his estate. Such an assumption may be theoretically useful, but in application to reality its utility is limited by the factor that few laymen know the intricacies of intestacy law; it may be suggested that an illegitimate father who knows of the existence of intestacy laws may assume that where such laws mention succession to his children, his illegitimate children are contemplated as well as those, if any, of his children who are legitimate. Yet a state may validly presume such in its law, subject only to constitutional guarantees.

While a father may, by will, disinherit his child, be he legitimate or illegitimate, one serious question remains: Where a state discriminates against such a child on the basis of their ancestry, race, or status, may the state effectuate that discrimination by attributing it to the presumed intent of the decedent? Such action by the state is prohibited discrimination, regardless of on whom intent to discriminate is placed, and cannot be tolerated.¹¹⁸ In 1967 the Supreme Court, in *Reitman v. Mulkey*¹¹⁹ discussed the problem of state involvement in private discrimination:

This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become involved in private discrimination. "Only by sifting the facts and weighing the circumstances" on a case-by-case basis can a "nonobvious involvement of the State in private conduct be attributed its true significance."¹²⁰

As to illegitimate children, the state is "nonobviously" involved in discrimination *which by statutory fiat it asserts to be based on an individual's intent*. To call such governmental action "private" is to beg the question; were it not for the state-created presumption, there would be no sweeping discrimination against illegitimate children. Whether such intent is considered that of the private person or not is irrelevant; state action has institutionalized that intent and by that institutionalization has discrimi-

116. *King v. Smith*, 392 U.S. 309, 334, 336 (1968) (Douglas, J., concurring). Emphasis added.

117. 1 *Bowe-Parker*: Page on Wills § 1.6 at 20 (3rd ed. 1960).

118. *Shelley v. Kraemer*, *supra*.

119. 387 U.S. 369 (1967).

120. *Id.* at 329.

nated against all illegitimates.¹²¹ To state that private discrimination cannot be prevented,¹²² and that, therefore, the state may validate it constitutionally by legislative enactment is sheer sophistry; such cyclical reasoning should not be permitted to obfuscate the essential intent of the state in presuming the intestate's intent. The state cannot be allowed to discriminate in this sophisticated and subtle manner against a group that it dare not openly inveigh against on racial or other grounds.

VI. Protecting the Illegitimate Child: Necessary Statutory Reform.

Despite the above arguments, it is apparent that judicial reform in the area of illegitimacy and intestacy is unlikely, due to the *Labine* decision. Thus, it is incumbent upon the states¹²³ to rectify the discriminations now imposed upon the illegitimate child. There is nothing difficult in the enactment of statutes which would carefully limit and delineate the manner of proving paternity, which is the most crucial step, and which would require such proof for the child to inherit. For instance, today the means of establishing paternity have broadened from the traditional blood test, which could prove only that the putative father was *not* the father, to the technique of "serotyping" or blood typing¹²⁴ which isolates genetic factors in the blood of the father and the mother and conclusively prove paternity. Use of this technique obviates fears that the wrong man will be held to be the father. Similarly, a state might require that paternity be established within a limited time after the birth of the child, during the life of the father, so as to facilitate immediate discovery of paternity. This would negate fears that a claimant would appear after the death of the putative father, with the consequent difficulty in establishing paternity when that putative father is unable to refute the allegations of the claimant.¹²⁵

In order to protect the illegitimate child from the vagaries of life, which have already been inflicted upon him by negligent parents, it is necessary that the legislatures of the states attempt to rectify their laws. Such statutes may take several forms, but each should attempt to maximize the benefits of children generally, while limiting those benefits only to those who deserve them. However, the concepts of the thirteenth century as to who is deserving should be eliminated, and the maturing ideals of the twentieth century of equality should replace them.

Such statutory reform, it is suggested, must consider several closely related problems. The first, of course, is the central problem of allowing the illegitimate to be treated equally with his legitimate half-siblings in

121. By analogy, if a state were to statutorily and openly discriminate on a racial basis, whether or not the state considered that discrimination to rightly be the presumed intent of its populace would be constitutionally irrelevant; the statute would obviously fall on equal protection grounds.

122. But see *Shelley v. Kraemer*, *supra*.

123. 91 S.Ct. 1025 n. 16.

124. Note, *Illegitimacy: Equal Protection and How to Enjoy It*, 4 Ga.L.Rev. 383 (1970).

125. See generally Krause, *Bringing the Bastard into the Great Society: A Proposed Uniform Act on Legitimacy*, 44 Tex.L.Rev. 829 (1966).

successions to his father's estate. But integral in this problem is determining precisely *what* is an illegitimate child, and exactly who are to be considered as his parents. For it may appear desirable that adoptive parents should alone be considered the "parents" of an adopted child; similarly, it is also desirable that a child born during his mother's marriage, but born due to modern techniques of artificial insemination be considered as the child of his mother's husband.

To that end, the following model state statute is proposed to rectify some of the confusions now presented in the law, as well as correcting such decisions as the *Labine* case:

A MODEL ACT ON ILLEGITIMACY

Be it enacted by the [Legislature] of the State of _____:

Section 1. *Definitions.*

As used in this act —

(1) The term "natural parents" means the natural father and the natural mother of a child, provided that the term "natural parent" shall not include the natural father of a child conceived by any method of artificial insemination which was consented to in a duly notarized affidavit by the spouse of the natural mother who shall be conclusively deemed to be the natural father of the child.

(2) The term "natural child" means any child of its natural parents.

Section 2. *Intestate Successions.*

(1) For purposes of intestate successions under the laws of this State, all natural children shall inherit from and through their natural parents, equally one with the others;

(2) For purposes of intestate successions under the laws of this State, all natural parents shall inherit from and through their natural children, except that any natural parent who grants adoptive rights to any adoptive parent thereby releases any rights that said natural parent may have or may have had to inherit from said child.

Section 3. *Determination of Paternity.*

In any case where natural parents of a child are not married to each other, the paternity of a child for purposes of intestate succession may be determined by any one of the following procedures;

(1) By establishing paternity by an adjudication before the death of the father

[Optional] [or within one year thereafter], by clear and convincing proof;

(2) If the father publicly acknowledges the child as his own, by filing a duly notarized affidavit with the clerk of [the court having probate jurisdiction] at the place of residence of the natural mother, in which the father acknowledges the child as his own;

(3) If the father publicly receives the child as his own into his family, with the consent of his wife if he is married, or otherwise openly and publicly treats it as his own.

Section 1 of this act defines, not children alone, but parents so that each child is the child of its natural parents. In subsection (1), there is a limitation excluding artificial insemination donors from parenthood. This is intended to prevent later claims of the child against the donor, and is in line with decisions concerning legitimacy of adulterous bastards.¹²⁸ Moreover, it prevents the consenting spouse from later disavowing paternity, to the detriment of the child, by requiring a written consent to the insemination. Subsection (2) defines "natural child" so that every child, except as otherwise limited, has a full complement of parents.

Section 2(1) allows all natural children to inherit from their natural parents, regardless of their legitimacy or illegitimacy. Significantly, it allows a child to inherit from its natural parents, even where the child might later be adopted. To do otherwise would violate due process of law,¹²⁸ by divesting a child of a right without giving him a voice in the matter.

Section 2(3) and 2(4) allow the parents of natural, if illegitimate, children the right to inherit from those children, unless the natural parent granted adoptive rights to the child to other and subsequent adoptive parents. Such is reasonable, for it recognizes the fact that parents must support children, and that if children die without other heirs, the parents have a right to share in the child's estate, unless they divested themselves of the duty to raise the child, as where a mother and a father put children up for adoption.

Section 3 provides for determination of paternity in three separate ways. Subsection (1) provides that a paternity proceeding may determine paternity sufficient for intestacy purposes. The optional provision recognizes that "clear and convincing" proof may be presumed to be lacking after the putative father has been dead for more than one year.

Subsection (2) provides a voluntary mode of acknowledgement by the father.¹²⁹

Subsection (3), modeled after the law of the Virgin Islands,¹³⁰ mitigates the effects on a child of a common law marriage, and allows a child to inherit when his father has openly, if not formally, recognized him as his own.

In light of the fact that it appears that a judicial recognizance of the inequality of illegitimate children is unlikely, at least for some time, because of the *Labine* decision, it is incumbent upon the legislatures of the states to rectify the problem by their own acts. Should they fail to do so, the successive problems of immorality and poverty can only be aggravated. It remains to the states, as Justice Frankfurter noted, to note the "special place in life which law should reflect."¹³¹

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126. See n. 49 and 50, *supra*.

128. See e.g., *Dickerson v. Texas Employers' Insurance Association*, *supra*.

129. See e.g., L.S.A. Civil, Code art. 203.

130. Virgin Islands Code Title 16 § 462 (1964).

131. *May v. Anderson*, *supra*.