Michigan Law Review

Volume 65 | Issue 3

1967

Equal Protection for the Illegitimate

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EQUAL PROTECTION FOR THE ILLEGITIMATE

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Clearly, the procreation of illegitimate children cannot be said to be a privilege or immunity of citizens of the United States . . . .

—Miller, J., in *Plunkard v. State* (1887)[1]

ONE in sixteen children is born a bastard.[2] In some urban areas, the incidence of illegitimacy rises to nearly forty per cent of live births.[3] Illegitimacy is a way of life—a second-class way of life,[4] imposed not only by the fact of birth outside a family, but *by law* as well. Legislation within the following principal categories generally disfavors the illegitimate child—*even when his father has been ascertained*:[5]

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1. 67 Md. 364, 370, 10 Atl. 225, 227 (1887).

2. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 47, 51 (1965) shows a total of 4,098,000 live births, and 259,400 illegitimate live births for 1963. Subsequent adoptions improve the picture somewhat:

> Of an estimated 2.5 million surviving children registered as illegitimate at birth from 1940 through 1957, 1 million were white and 1.5 million, nonwhite. . . . Possibly as many as 70 per cent of all white illegitimate children are given for adoption, but only between 3 and 5 per cent of the nonwhite illegitimate children are adopted. Some children are legitimated through marriage of their parents. Although no estimate is available the number is believed to be too small to affect the percentage distribution.

U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ILLEGITIMACY AND ITS IMPACT ON THE AID TO DEPENDENT CHILDREN PROGRAM 35-36 (1960).

3. Chicago (AP)—More than 100,000 babies have been born illegitimately in Cook County during the last 10 years, a city committee said. . . . More than 10 per cent of Cook County births were illegitimate in 1963, compared with an illegitimacy rate of 6.3 per cent 10 years ago. In 1964, one out of seven births in Chicago [was] illegitimate. The illegitimacy rate now ranges between 27.9 and 38.7 per cent in 14 Chicago census areas. The illegitimacy rate is increasing generally, but is increasing faster among whites than among nonwhites.

Champaign-Urbana [Illinois] News-Gazette, Feb. 14, 1966, p. 13.

4. The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undeniable evidence of contramoral forces; in short, a problem—a problem as old and unsolved as human existence itself.

Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOCIOLOGY 215 (1939).

5. Since there is little, if any, discrimination between legitimate and illegitimate children in regard to rights against (and through) their mother, the primary concern here will be with the relationship between the illegitimate and his father, and the relationship between the illegitimate and the government. In the comparison of the rights of the legitimate and the illegitimate child, it is not helpful that the rights of the legitimate child, at least in some states and subject areas, have not been defined with clarity, but often have been handled as an adjunct to the adjudication of the parents' rights, usually in connection with divorce proceedings. See FRIEDMANN, LAW IN A CHANGING SOCIETY 225 (1959). For example, the common law's hesitancy to obligate

Support: In most states, the father is responsible for the support or maintenance of his illegitimate child, but in some he has no support obligation at all.[6] The mother usually also is asked to assist in the support of the child. However, the level at which the child must be maintained is often in the court's discretion; in only a few jurisdictions is it fixed by statute. Although some states provide that a judgment in a paternity action establishes an illegitimate's equality with a legitimate offspring of the father with respect to rights of support,[7] the legitimate child generally has broader rights than his illegitimate brother as to both the level of support and the duration of the obligation.[8]

Inheritance: At common law, the bastard inherited from no one.[9] Although statutes in nearly all states provide that an illegitimate child occupies the same position as a legitimate one with respect to inheritance from his *mother*, the illegitimate child generally cannot, except by will, inherit from his *father* unless the father has formally recognized or acknowledged him. Indeed, even a judgment in a paternity action only rarely gives the child the right to inherit from his father. Furthermore, the intestacy laws do not always provide that the bastard inherits from the mother's family and only rarely do they make provision for his inheritance from the father's

parents to support their *legitimate* children is documented in Greenspan v. Slate, 12 N.J. 426, 97 A.2d 390 (1953). Another disputed question is the child's right to the "services" of his parents. PROSSER, TORTS 908-09 (3d ed. 1964). However, the legitimate child normally enjoys broad benefits by reason of the *fact* that he has been born into a family context, and consequently he has not needed an affirmative statement of his rights as urgently as has the illegitimate.

6. In Texas and Idaho the father has no obligation to support his illegitimate child. In Missouri only a criminal action applies to nonsupport and in Virginia an obligation of support is imposed on the father only where he has voluntarily and formally recognized the child. MO. ANN. STAT. §§ 559.353, .356 (Supp. 1965); VA. CODE ANN. § 20-61.1 (1960). See James —— v. Hutton, 373 S.W.2d 167 (Kan. City, Mo. Ct. App. 1963), which refused to derive a civil liability from the criminal statute.

7. ARIZ. REV. STAT. ANN. § 14-206 (1956); ILL. REV. STAT. ch. 106¾, § 52 (1965); IND. ANN. STAT. § 3-624 (1946); KY. REV. STAT. ANN. § 406.011 (Supp. 1965); MINN. STAT. ANN. § 257.23 (1959); N.J. REV. STAT. § 9:16-2 (1960); VA. CODE ANN. § 20-61.1 (1960).

8. The illegitimate's right of support is discussed in Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 850-52 (1966). As to the legitimate child's right of support, see JACOBS & GOEBEL, CASES ON DOMESTIC RELATIONS 977-95 (1961). See also FRIEDMANN, *op. cit. supra* note 5, at 246-51.

One of the most important problems with which the illegitimate is faced is that many paternity statutes consider that not his but rather his mother's rights are in issue. See, *e.g.*, *In re* Paternity, 33 Ohio Op. 2d 299, 211 N.E.2d 894 (1965), in which the illegitimate child unsuccessfully attempted to upset a compromise agreement between the putative father and the child's mother.

9. The term *filius nullius* originally referred to inheritance matters, and only later was interpreted to deny any relationship between bastard and parent. HOOPER, ILLEGITIMACY 25-26, 27 (1911).

family.[10] On the other hand, these laws do generally designate the legitimate child as an heir of his father, mother, ancestors and collaterals, and sometimes, if rarely, limit the father's power to disinherit his legitimate child.[11]

Custody, Visitation and Adoption: Even though the legitimate child's right to the company of his father is not altogether clear,[12] it is certain that the illegitimate child fares worse. To the extent that the legitimate child's rights follow at least *de facto* from the father's parental authority over him (which includes the father's right to custody and visitation), discrimination results from the fact that in many states the father has no parental authority at all over his illegitimate child.[13]

10. The subject of the illegitimate's inheritance rights is discussed in Krause, *supra* note 8, at 854-56. Aside from discrimination under the intestacy laws, the illegitimate child also is disfavored by a long line of judicial decisions which construe the term "child" for purposes of interpreting wills as not including an illegitimate child of the testator. See Annot., *Right of Illegitimate Child To Take Under Testamentary Gift to "Children,"* 34 A.L.R.2d 4 (1954).

11. Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates*, 8 FLA. L. REV. 151 (1955). Theoretically, the bastard might fare better than a legitimate child if he has a support judgment that is enforceable against his father's estate and his father has disinherited the legitimate children. For example, a support action against the father's estate is provided by IND. ANN. STAT. § 3-629 (1946).

12. Some doubt recently arose when Iowa's Supreme Court refused to grant custody of a seven-year-old boy to his father who had remarried. The court concluded that the child's best interests would be served if permanent custody were granted to his maternal grandparents who had been asked by the boy's father to take care of the boy after the mother's death. The court noted that the grandparents had given the boy "a stable, dependable, conventional, middle-class, middlewest background," whereas the boy's life with his father would be "unstable, unconventional, arty, bohemian, and probably intellectually stimulating." Painter v. Bannister, 140 N.W.2d 152 (Iowa, 1966), *cert. denied*, 35 U.S.L. WEEK 3175 (U.S. Nov. 14, 1966).

13. The illegitimate's situation in matters of custody, visitation and adoption is discussed in Krause, *supra* note 8, at 857. To illustrate, in Petition of Malmstedt, 220 A.2d 147 (Md. Ct. App. 1966), the Maryland Court of Appeals refused to grant the father of an illegitimate baby permission to adopt the child even though the mother did not want to keep her. The mother turned the infant over to an adoption agency three days after birth. *Accord, In re* Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964); *cf.* Wallace v. Wallace, 60 Ill. App. 2d 300, 210 N.E.2d 4 (1965); De Phillips v. De Phillips, 219 N.E.2d 465 (Ill. 1966), in which, on the basis of an Illinois statute denying the illegitimate father the right of "custody or control," the fathers of illegitimate children were not accorded rights of visitation. The courts also held that the illegitimate child has no right to the company of his father and vice versa. Consider, however, Justice Klingbiel's forceful dissent in *De Phillips*, 219 N.E. 2d at 467-68, in which he relied on Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965), a case which reached the opposite result after reviewing the law of a number of jurisdictions, and cases like Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966) and Balint v. Horvath, 34 Ohio Op. 2d 247, 212 N.E.2d 200 (1965). In *Godinez*, custody of two illegitimate children was awarded to the father where the mother was considered unfit, the court deciding that the presumption in the mother's favor should be abolished and that no distinction should be made between legitimate and illegitimate children in questions of custody; in *Balint* it was held that under statutory adoption procedures in Ohio, the natural father must be served with notice.

Father's Name: The illegitimate generally has no right to bear his father's name.[14]

State and Federal "Welfare Laws": A large and important category of legislation which affects the illegitimate is the body of state and federal "welfare" statutes that tie a child's eligibility for benefits to the existence of a father who is primarily "covered" by the legislation in question. On the state level, for example, are workmen's compensation laws and wrongful death acts. While a growing number of these enactments provide or have been interpreted to provide that an illegitimate child is entitled to the same rights as a legitimate child, there are still many states in which the illegitimate children of covered fathers remain ineligible for these benefits.[15] Under the federal welfare statutes which provide benefits for children,[16] eligibility for such benefits is derived typically through the child's father who, by membership in a given class or otherwise, has "earned" the benefit. These statutes do not consistently provide benefits for the illegitimate children of eligible fathers. The Longshoremen's and Harbor Worker's Compensation Act,[17] the Foreign Service Act,[18] various items of veteran's legislation,[19] and the Social Security Act[20] expressly provide benefits for illegitimate children,

14. See Krause, *supra* note 8, at 858; *cf.* Hooper, *supra* note 9, at 6-7, 122-24. Hooper provides some historical background on the name question, such as the fact that the Norman prefix "Fitz" is said to have been the common prefix given by a father to a bastard son whom he was willing to acknowledge.

In re M., 91 N.J. Super. 296, 219 A.2d 906 (1966), involved a minor who applied to have his name changed from that of his mother to that of his natural father. The child's father and mother desired the change of the child's name, but the father's wife objected. The court granted the name change, since no "unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste" was involved. 219 A.2d at 907.

15. See Krause, *supra* note 8, at 856-57.

16. See generally Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

17. 44 Stat. 1424 (1927), as amended, 33 U.S.C. § 902(14) (1964) defines "child" to include an "acknowledged illegitimate child dependent upon the deceased."

18. 60 Stat. 1020 (1946), as amended, 22 U.S.C. § 1064(3) (1964) defines "child" to include a "recognized natural child who received more than one-half of his support from the participant."

19. 38 U.S.C. § 101(4) (1964) defines "child" to include:

> [an] illegitimate child but, as to the alleged father, only if acknowledged in writing signed by him, or if he has been judicially ordered to contribute to the child's support or has been, before his death, judicially decreed to be the father of such child, or if he is otherwise shown by evidence satisfactory to the Administrator to be the father of the child.

20. 64 Stat. 492 (1950), as amended, 42 U.S.C. § 416(h)(2)(1964) provides:

> (A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is

but impose varying standards of proof of paternity. A second group of statutes, including the Federal Group Life Insurance Act[21] and the Copyright Act,[22] does not define the term "child" so as to include

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domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1) (B), would have been a valid marriage.

The reference under § 416(h)(2)(A) to the state intestacy laws usually results in discrimination against the illegitimate, since state intestacy laws generally do not permit the illegitimate child to inherit from his father. See text at note 9 *supra*. In order to reduce the incidence of such discrimination, a new subsection, § 416(h)(3), was added in 1965. In the report accompanying this addition to § 416, the Senate Committee expressed its belief that:

> in a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live.

S. REP. No. 404, 89th Cong., 1st Sess. 109-10 (1965).

In essence, the new section provides that:

> an applicant will be considered the child of the worker if the worker (1) has acknowledged in writing that he is the child's father; (2) has been decreed by a court to be the child's father; (3) has been ordered by a court to contribute to the support of the child because he is the child's father; or (4) is shown by other evidence satisfactory to the Secretary to be the child's father and has been living with or contributing to the support of the child.

Id. at 267.

21. 68 Stat. 738 (1954), as amended, 5 U.S.C. § 2093 (1964) speaks of "the child or children of such employee." Concerning this language, the court in Grove v. United States, 170 F. Supp. 176, 181 (E.D. Va. 1959), said the following:

> But there are many peculiar problems arising from the familial relationship and, as there is no federal law of domestic relations, the matter is primarily of state concern. . . . This court leans to the view that the state law must control the familial relationship.

The court applied Virginia law which resulted in granting recovery to the child.

22. 17 U.S.C. § 24 (1964). The Act provides for renewal of copyright, if the holder is deceased, by the "widow, widower, or children of the author." In DeSylva v. Ballentine, 351 U.S. 570, 580 (1956), this language was interpreted in accordance with state law defining "child":

> The scope of a Federal right is, of course, a Federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.

The court applied California law so as to include the bastard within the definition of "child." *Cf.* 351 U.S. at 583-84 (Douglas, J., concurring):

> But I would think the statutory policy of protecting dependents would be better served by uniformity, rather than by the diversity which would flow from incorporating into the Act the laws of forty eight states. . . . I would . . . regardless of state law, hold that illegitimate children were "children" within the meaning of § 24 of the Copyright Act.

or exclude illegitimates expressly, and here the courts have looked to state law for a definition of "child." In dealing with a third group of laws, such as the Federal Death on the High Seas Act[23] and, it appears, the Federal Employer's Liability Act[24] and the Jones Act,[25] the courts have developed a "federal" definition of "child" which includes illegitimates. Thus the federal attitude toward the inclusion of illegitimates within the class of children who are eligible to receive benefits under "welfare" laws consists of a mixture of deference to state policy in the field of family relations, habit rooted in long continued common law and social discrimination against the illegitimate, and concern about the problem of proof of paternity.[26] On balance, however, the federal welfare laws have gone far toward eliminating discrimination against the illegitimate, the longest step having been taken in the 1965 amendment to the Social Security Act.[27]

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23. 41 Stat. 537 (1920), 46 U.S.C. 761 (1964): "[T]he personal representative of the decedent may maintain a suit for damages . . . for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." The term "child" has been held to include illegitimates by the application of a federal, not state law definition. Middleton v. Luckenbach S. S. Co., 70 F.2d 326 (2d Cir. 1934).

24. 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51 (1964) provides for damage liability for the death of an employee "to his or her personal representative for the benefit of the surviving widow or husband and children of such employee." 36 Stat. 291 (1910), 45 U.S.C. § 59 (1964) provides that a right of action for injury to an employee "shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee." In Huber v. Baltimore & O.R.R., 241 F. Supp. 646 (D. Md. 1965), § 51 was interpreted to apply a *federal* definition of "children," unless it were in conflict with a clear state policy. In Bowen v. New York Cent. R.R., 179 F. Supp. 225 (D. Mass. 1959), on the other hand, § 59 of the Act had been interpreted to refer to the state law definition of "children" which, in that case, resulted in the *denying* of recovery to the illegitimate child.

25. 38 Stat. 1185 (1950), as amended, 46 U.S.C. § 688 (1964) provides: "[T]he personal representative of such seaman may maintain an action for damages at law . . . and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." The reference to "railway employees" involves 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1964); see cases discussed *supra* note 24. *But cf.* Civil v. Waterman S.S. Corp., 217 F.2d 94 (2d Cir. 1954), which compares the statutory language of 41 Stat. 537 (1920), 46 U.S.C. § 761 (1964), and 36 Stat. 291 (1910), 45 U.S.C. § 59 (1964), and adopts the *Luckenbach* view, *supra* note 23.

26. Indeed, there are other less liberal federal laws affecting the illegitimate. For instance, federal law covering the full range of the illegitimate's legal relationships applies in the District of Columbia. The child has a right of support and education against his father "commensurate with defendant's ability to pay . . . until the child reaches the age of 16 years," D.C. CODE ANN. § 16-2349 (Supp. 1966), but does not have the right to inherit from his father or his father's family. Inheritance rights for the bastard are provided only with respect to his mother, siblings, and their descendants, D.C. CODE ANN. § 19-316 (Supp. 1966); Blethyn v. Bidder, 80 F. Supp. 962, 963 (D.D.C. 1948). See also 66 Stat. 238 (1952), 8 U.S.C. § 1409 (1964) (citizenship legislation).

27. See note 20 *supra*.

I. The Equal Protection Clause of the Fourteenth Amendment and the Law of Illegitimacy

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

In our time the general constitutional phrase promising equal protection has become specific law. It has been used to invalidate many state statutes which discriminated on the basis of race or other arbitrary criteria. Definite rules have been developed for this process of invalidation. These rules will be applied below to state and federal legislation that favors the legitimate child and discriminates against the illegitimate in matters of inheritance rights, rights of support, rights of name and custody, and social welfare.[28] The question that will be asked is whether state and federal legislation may constitutionally discriminate between children on the basis of their birth in or out of wedlock.

Surprisingly, a search of probable sources disclosed no case in which the question of the validity of discrimination against the illigitimate was discussed in equal protection terms, although at least one court chose to ignore an opportunity for such a discussion.[29] Even more surprisingly, a search of equal protection literature turned up scant reference to illegitimacy as a questionable classification.[30] Nevertheless, one should not be startled by the use of the equal protection clause in an analysis of the problem of discrimination against the illegitimate, for the bastard's demand for equality may be traced back at least to the French revolution[31] and more recently has found expression in the post-war West German consti-

28. Although the Supreme Court, in the first case in which it was called upon to interpret the equal protection clause, expressed doubt whether the clause reached any discrimination other than state discrimination against Negroes on account of their race, the provision has for a long time been applied to various other types of discrimination. See *The Constitution of the United States of America*, S. Doc. No. 39, 88th Cong., 1st Sess. 1279-1321 (1964).

29. In Brown v. Brown, 183 Va. 353, 357, 32 S.E.2d 79, 81 (1944), a bastard sued his father for support in the absence of an applicable statute. In response to the child's constitutional argument, the court merely commented: "there is no merit in the contention that a denial of recovery in this case would result in a violation of the appellant's rights guaranteed under the Fourteenth amendment . . . and under . . . the Constitution of Virginia."

30. Note, *"Suitable Home" Tests Under Social Security: A Functional Approach to Equal Protection*, 70 Yale L.J. 1192, 1201 (1961). The equal protection argument is raised more forcefully by Foote, Levy and Sanders, Cases on Family Law 72-73 (1966), whose standard-setting new work was published after this article was completed.

31. See Brinton, French Revolutionary Legislation on Illegitimacy 1789-1804 (1936).

tution.[32] Furthermore, the Texas Court of Civil Appeals has applied the equal protection clause in a remarkable recent case involving illegitimacy. The court refused to enforce a Kentucky judgment which would have required a Texas father to support his illegitimate child.[33] The Texas court reasoned that to obligate this father to support his child would be to deny the *father* equal protection of the laws, since Texas law did not impose a support obligation on fathers of illegitimate children.

It is time that the matter be considered from the standpoint of the child!

The equal protection clause does not forbid "unequal laws" and does not require every law to be equally applicable to all individuals.[34] Of necessity, classification must be permitted; otherwise there could be no meaningful legislation.[35] The question asked under the fourteenth amendment thus is whether a given piece of legislation operates "equally" upon all members of a group that is defined reasonably and in terms of a proper purpose. Two levels of inquiry must be distinguished. First, a law does not provide equal protection if it applies only to part of a larger group that is similarly situated in

32. GERMAN FED. REP. CONST. art. VI (5). In Germany, a new statute that seeks to realize equality for the illegitimate is presently being drafted by the Ministry of Justice. It is expected that information concerning the draft statute will have been made available to interested parties late in 1966. Letter From Dr. Jansen, Ministry of Justice, Bonn, Germany, to the author, Feb. 11, 1966.

33. Bjorgo v. Bjorgo, 391 S.W.2d 528 (Tex. Civ. App. 1965), *rev'd*, 402 S.W.2d 143 (Tex. Sup. Ct. 1966).

34. Equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; . . . all persons should be equally entitled to pursue their happiness and acquire and enjoy property; . . . they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; . . . no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; . . . no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and . . . in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses . . . . [Equal protection is not] designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions.

Barbier v. Connolly, 113 U.S. 27, 31-32 (1885). See generally Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949), and S. Doc. No. 39, *supra* note 28, at 1283-84.

35. See S. Doc. No. 39, *supra* note 28, at 1284-85.

relation to the purpose of the legislation, or if the criteria defining the covered group are such that they bring within that group some individuals who are not similarly situated, again tested in terms of the purpose of the legislation.[36] On this first level no question is raised as to the propriety of the statutory purpose; the test consists of a mechanical comparison of the group which is the object of the statutory concern with the group which is defined by the statutory language.[37] Both the over- and the under-inclusiveness of a group are illustrated by *Skinner v. Oklahoma*,[38] a case involving the statutory classification of habitual, hereditary criminals for purposes of sterilization. The classification which was employed was under-inclusive in that it failed to include, along with habitual robbers, other offenders of "intrinsically the same quality", such as embezzlers. At the same time, the classification was over-inclusive because not all habitual robbers necessarily are hereditary criminals.[39] A sad example of a well-defined group is furnished by *Plessy v. Ferguson*,[40] in which the plaintiff, a person of seven-eighths white descent, was told that he had no right to be treated as a white citizen if the state law classified him as a Negro. The statute met the constitutional test because it applied to him just as it applied to other Negroes, and such an application was in direct furtherance of the purpose of the statute—racial segregation. If the equal protection clause had remained limited to this mechanical function, it would not have become very famous. However, the *Plessy* Court's deference to the statutory purpose[41] has been overcome, and modern courts

36. "The ultimate test of validity is not whether foreign corporations differ from domestic, but *whether the differences between them are pertinent to the subject with respect to which the classification is made.*" Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 583 (1935). (Emphasis added.)

37. Over-inclusiveness is the worse offense and usually shifts the case into the due process area. See, *e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 510-12 (1964). As to under-inclusiveness, the state is not prevented by the equal protection clause from confining "its restrictions to those classes of cases where the need is deemed to be clearest." Miller v. Wilson, 236 U.S. 373, 384 (1915). "[T]he law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." Buck v. Bell, 274 U.S. 200, 208 (1927). On the other hand, "sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Tussman & tenBroek, *supra* note 34, at 348-49, 351.

38. 316 U.S. 535 (1942).

39. 316 U.S. at 544-45 (Stone, C. J., concurring).

40. 163 U.S. 537 (1896).

41. [T]he case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs

have realized that the purpose of the statute may itself be in violation of the equal protection clause, aside from problems of over- and under-inclusiveness that may or may not be present.[42] This is the second level of inquiry.

Viewed in this light, it might be said that we ask not only whether the classification includes all who are situated similarly, but also whether the purpose of the grouping is proper. A statute which segregates Negroes passes the first test if it applies equally to all Negroes, but fails the second, since there is no reason for classifying Negroes and whites in separate groups[43] other than the improper reason of maintaining in an unequal position two groups which for all rational purposes are situated similarly.[44] Likewise, men and women are "situated similarly" for many rational purposes, and therefore, if challenged on constitutional grounds, it is not necessarily enough that legislation discriminating against women applies equally to all women.[45] Thus, to show that legislation discriminating against the illegitimate applies equally to all illegitimates, regardless of color, nationality, or sex, does not prove the validity of such legislation. The question is whether the criterion of *illegitimacy* may be used as the basis for a legislative classification. Employing the second test that has been defined, it would follow that legislation denying to the illegitimate rights that are granted to those of legitimate birth is acceptable only if it is related to a proper public concern with respect to which legitimate and illegitimate children are *not* situated similarly. The legislation fails the constitutional test if it is not so related. Clearly, then, in order to test for equal protection purposes the laws regulating the status of the illegitimate, their legislative purposes must be defined and evaluated.[46] Long ago, Mr. Justice Van Devan-

and traditions of the people, and with a view to the promotion of their comfort, and the preservation of public peace and good order.
Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

42. Tussman & tenBroek, *supra* note 34, at 356, go so far as to say that "the significant formulation, suggested by the Rutledge dissent in [Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947)], is that even if the classification is reasonably related to a legitimate public purpose, the employment of a forbidden trait invalidates it."

43. *Cf.* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), which is discussed in similar terms by Tussman & tenBroek, *supra* note 34, at 374-75.

44. See Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959). The adoption of the fourteenth amendment, of course, had ended doubt as to the Negro's equality, but what is now viewed as unequal legislation drew its life at that time from the notion that separateness did not mean inequality.

45. See Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

46. Viewed in this light the prohibition against discriminatory legislation is a

ter stated the Supreme Court's traditional view concerning this evaluation:

> The rules by which this contention must be tested . . . are these: 1. The equal-protection clause . . . does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary . . . .[47]

Mr. Justice Van Devanter expressed the Court's reluctance to interfere with state law where the equal protection clause is invoked to protect *economic* interests. Indeed, this reluctance has been likened to a presumption of constitutionality.[48] However, this presumption is reversed where the "basic civil rights of man" are at issue.[49] Very recently, Mr. Justice Douglas said:

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was

demand for purity of motive. It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility, or, alternatively, of favoritism, and partiality. The imposition of special burdens, the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the proscribed motives replace a concern for the public good as the "purpose" of the law, there is a violation of the equal protection prohibition against discriminatory legislation.

Tussman & tenBroek, *supra* note 34, at 358-59. While "motive" may be difficult to identify if a law can be justified in terms of some regulatory purpose, motive becomes clear in the absence of such a purpose. The difficulty that has concerned the authors and the courts in cases of this type (to distinguish between regulatory purpose and prejudice in cases where some regulatory ends were served), is largely absent in the case of discrimination against the illegitimate where, as will be shown below, a rational purpose only rarely befogs the issue. *Cf.* Baker v. Carr, 369 U.S. 186, 226 (1962) (Brennan, J.): judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the fourteenth amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

47. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

48. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 666 (1963).

49. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); McKay, *supra* note 48, at 666, 667.

> at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. . . . We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.[50]

It would seem to be beyond question that a child's right to a familial relationship with his father is more akin to a "fundamental right and liberty" or a "basic civil right of man" than to a mere economic interest. Although money is involved, the illegitimate's claim goes much further, for it centers on his second-class status in our society—a society in which illegitimacy is a "psychic catastrophe" and in which recovery in tort is granted for a false allegation of illegitimacy.[51] Indeed, the psychological effect of the stigma of bastardy upon its victim[52] seems quite comparable to the damaging psychological effects upon the victims of racial discrimination, which effects were successfully exploited in the battle over school segregation.[53] In other words, a classification based on a criterion of illegitimacy is a vulnerable one, with respect to which the presumption of constitutionality is reversed. Nevertheless, no universal, black-white answer is either possible or desirable; this writer will not argue that *all* distinctions between the legitimate

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50. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669, 670 (1966). (Citation omitted.)

51. "In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal. . . . To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." Fodor, *Emotional Trauma Resulting From Illegitimate Birth*, 54 ARCHIVES OF NEUROLOGY AND PSYCHIATRY 381 (1945). See also note 52 *infra*. The tort point is covered at note 75 *infra*.

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

> Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences. . . .
>
> The second discernible pattern was that the older group of illegitimate children consistently made a poorer showing than the younger group, in comparison with the legitimate children. A possible explanation for this is that, as these children grow older and are able to internalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory.

Id. at 173.

53. Brown v. Board of Educ., 347 U.S. 483 (1954); Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 YALE L.J. 730 (1952).

and the illegitimate are not of proper concern to the state in the exercise of its police power.

There is no difficulty in establishing "state action" as a source of the discrimination against illegitimates. While much of the bastard's problem may result from private discrimination,[54] there is no doubt that it is state action when the illegitimate child does not inherit under the intestacy laws, when his statutory right of support is either non-existent or limited, or when he does not qualify under welfare laws. With respect to federal legislation, though, another bridge must be crossed before the equal protection rationale may be applied, for the fifth amendment does not express a requirement of equal protection. However, there is evidence that, with respect to equal protection questions, the fifth amendment is to federal legislation what the fourteenth amendment is to state action.[55] Thus, the same test which is applied to state legislation which discriminates against the illegitimate should also be applied to federal laws.

II. An Evaluation of the Relationship Between Legislation Which Discriminates Against Illegitimates and its Regulatory Purposes

Discrimination against the illegitimate is rooted so deeply in our culture that legislative enactments on illegitimacy are generally silent as to legislative purpose. Furthermore, most legislation involving illegitimacy has been favorable in that it has *reduced* the burden that was imposed upon the illegitimate by the common law. The present concern is not with the purposes of these laws; at issue are the reasons that might be thought to justify continued discrimination.

A. *Uncertainty of Paternity*

It may be argued that illegitimate birth furnishes less convincing evidence of paternity than does birth in wedlock, or that illegitimate paternity often cannot be established with the degree of certainty with which the child of a marriage may be ascribed to his father. Some may say that a mere support obligation is imposed on the father because to impose more would burden too heavily one who might not be the father. In cases of uncertain paternity, this

54. The question as to the extent to which the fourteenth amendment covers private discrimination is unsettled. See Bell v. Maryland, 378 U.S. 226 (1964); United States v. Guest, 383 U.S. 745 (1966).

55. Bolling v. Sharpe, 347 U.S. 497 (1954); S. Doc. No. 39, *supra* note 28, at 973-75.

argument would carry weight, although it might be preferable if no obligation at all were imposed in such cases.[56] However, the fact that uncertainty may exist in one illegitimate paternity case is not to say that uncertainty exists in every case. It may be stipulated that the equal protection argument is limited to those illegitimates whose paternity has been or can be established with at least the same degree of probability as the paternity of a legitimate child is established by his birth in wedlock. In many cases this can be done now, and, with appropriate changes in procedure, it could be done in more cases.[57] Modern techniques for the testing of blood have moved

56. The desirability of holding several suspected fathers jointly liable where the alternative is to leave the child without support is persuasively argued in Note, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859 (1966). While this writer has reservations as to the validity of the joint liability approach, it is arguable that, whatever may be said against it, the alternative of leaving the child without support may be worse. A joint support obligation is not necessarily in conflict with the thesis of this article, since such an obligation would be imposed only if paternity could not be established with the degree of certainty that would warrant legitimate status for the child. The related question whether the state has an obligation to take action to ascertain the identity of father is raised in the text at note 93 *infra*.

57. The type of paternity proceeding now available in many states may not provide the best possible mechanism for ascertaining paternity. There is room for doubt and reason for concern if the percentage of convictions in paternity cases reaches 95% in a typical metropolitan county. See Glazer, *Blood Grouping Tests in the Proof of Non-Paternity*, 33 Mich. St. B.J., No. 1, pp. 12, 17 (1954). However, this provides an argument not against the providing of the substantive rights that are the subject of this paper, but rather against the present methods of ascertaining paternity. The difficulty may center on the jury which seems especially likely to err in the emotion-charged atmosphere of the typical paternity suit because deep-seated notions of morality tend to transcend applicable secular law. Other problems stem from the criminal nature of the proceeding in many states which, especially when combined with a prosecution for fornication, puts the case on the level of determining moral "guilt" or "innocence" rather than objectively ascertaining a state of facts, although it may be said that in a criminal proceeding the required higher standard of proof and the various constitutional law guaranties actually safeguard the rights of the accused. Arguably, if *legitimation*, rather than only a support obligation, is the result of a successful paternity action, even a civil proceeding should employ the standard of proof of the criminal law, *i.e.* proof "beyond a reasonable doubt" rather than the weaker civil standard of a "preponderance of the evidence." *Cf.* Krause, *supra* note 8, at 829 (§ 18), 853. It also seems clear that more should be done to obtain the father's voluntary cooperation. See CHOATE & GALLAGHER (CHILDREN'S BUREAU), UNMARRIED PARENTS—A GUIDE FOR THE DEVELOPMENT OF SERVICES IN PUBLIC WELFARE 36-37 (1961); Pannor, *Casework Services for Unmarried Fathers*, 10 CHILDREN 65 (1963). However, proposals as to new procedures are beyond the scope of this paper. Suffice it to say that if existing procedures are inadequate, the answer is that new procedures must be devised rather than that rights must be denied. In a different context, the Utah Supreme Court said not long ago:

> Due to the highly subjective and volatile nature of emotional distress . . . , the courts have historically been wary of dangers in opening the door to recovery therefor. This is partly because such claims may easily be fabricated: or as sometimes stated, are easy to assert and hard to defend against.
>
> . . .
>
> It is . . . to be observed that the argument against allowing such an action because groundless charges may be made is not a good reason for denying recovery.

beyond the point of merely establishing exclusions for narrow groups of lucky non-fathers;[58] it should also be considered that there is nothing foolproof about birth in wedlock.[59] Furthermore, voluntary cooperation can be obtained from some illegitimate fathers.

B. *Discouraging Promiscuity*

There is no question that the state may properly regulate many aspects of sexual conduct. Our society holds that intercourse outside

> If the right to recover for injury resulting from the wrongful conduct could be defeated whenever such dangers exist, many of the grievances the law deals with would be eliminated. That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs . . . . *It is the function of courts and juries to determine whether claims are valid or false.* This responsibility should not be shunned merely because the task may be difficult to perform.

Samms v. Eccles, 11 Utah 2d 289, 291, 293, 358 P.2d 344, 345, 347 (1961). (Emphasis added.)

58. Indeed, if progress in the law of evidence would keep up with scientific progress, see generally Korn, *Law, Fact and Science in the Courts*, 66 COLUM. L. REV. 1080 (1966), the possibility of holding a non-father liable in a paternity action may soon disappear as a realistic concern. In the near future, we may see biological tests carried to the point, for most practical purposes, of *positively* establishing paternity. Recent German decisions have done as much. In one case, detailed blood tests were considered to establish a 99.55% probability of paternity. L. G. Koeln, 13.10.1961, 16 MONATSSCHRIFT FUER DEUTSCHES RECHT 309 (1962). In another paternity case reviewed in 1964, the West German Supreme Court held that a blood test taken as recently as 1955 that had failed to exclude defendant as a possible father was not conclusive in view of newly developed, more sophisticated methods of blood testing that now might result in defendant's exclusion as a possible father. BGH 5.2.1964, 11 ZEITSCHRIFT FUER DAS GESAMTE FAMILIENRECHT 251 (1964). Recent progress in blood research is outlined in *Blood Groups*, 3 ENCYCLOPAEDIA BRITANNICA 804 (1966). See also Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 HARV. L. REV. 466 (1958); SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 492-99 (1953). Schatkin says that "the average chances of an innocent man of obtaining an exclusion are about 55%, and with rarer blood constellations . . . the chances may be as high as 82%." Schatkin, *Paternity Proceedings and Blood Tests*, ABA PROCEEDINGS OF SECTION OF FAMILY LAW 14, 15 (1960). The famous Charlie Chaplin case, Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946), 74 Cal. App. 2d 669, 169 P.2d 453 (1946) with its verdict "contrary to science, nature and truth" is an example of what wrong can happen in a paternity proceeding. See SCHATKIN, *op. cit. supra* at 250-63, for a full discussion of the case. However, similar miscarriages of justice can result in the context of a marriage; for example, California and Oregon have a *conclusive* presumption of legitimacy as to children born in wedlock, unless, given cohabitation, the husband is impotent. CAL. EVID. CODE § 621 (1965); ORE. REV. STAT. § 41.350(6) (1963). Other states employ a rebuttable presumption of legitimacy, but make the rebuttal difficult. Krause, *supra* note 8, at 844.

59. Kinsey reports that "among the married females in the sample, about a quarter (26%) had had extra-marital coitus by age forty." While Kinsey suggests that pregnancies resulting from such activity often end in abortion, or that affected marriages end in divorces, he allows for extra-marital children being raised in their mothers' homes without the truth being known to their husbands. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 416, 434 (1953); *cf.* Whitman v. Whitman, 215 N.W.2d 689 (Ind. Ct. App. 1966) which upheld the legitimacy of a child born in 1962 to the wife of a man who had been sterilized in 1946, had enjoyed childless but happy sexual relations with his wife from then until 1963, and had been found sterile by medical examination shortly before the trial.

of marriage is undesirable, and thus the discouragement of "illicit" intercourse is considered a proper end of legislation. Given this valid purpose, however, a connection must still be established between the legal status of the bastard and his parents' conduct. The only connection, if one exists, lies in the expectation that potential parents will be so concerned about the treatment that awaits their illegitimate child at the hands of the law that they will refrain from illicit conduct. This raises the question whether a law may properly punish one in order to evoke guilt feelings in another whose conduct is to be affected. To ask the question is to answer it.[60]

Furthermore, laws discriminating against illegitimate children have very little effect on their parents' sexual conduct, as is evidenced by the statistics on illegitimate births.[61] Indeed, it is probable that the father would be more effectively discouraged from illicit intercourse if his risk of incurring a serious obligation were substantially increased, that is, if a resulting child were given legitimate status. As to the mother, the social shame of having an illegitimate child and the resulting lessened chance of marriage probably does tend to discourage illicit relations or, at least, to encourage birth control practices. However, the social "shame" of illegitimate pregnancy is not necessarily tied to legislated discrimination against the illegitimate.[62]

C. *Protection of the Family Unit*

The family is the basic social organism in Western society. The propriety of the state's interest in the family therefore is beyond question, and state legislation fairly designed to encourage the stability of the family must go unchallenged. Consequently, if discriminatory laws directed against illegitimates protect the stability

60. *Cf.* Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964) (citations omitted): It is a familiar and basic principle, recently reaffirmed in NAACP v. Alabama . . . , that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." . . . In applying this principle the Court in NAACP v. Alabama, *supra*, referred to the criteria enunciated in Shelton v. Tucker, *supra*, at 488: "(E)ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." This principle requires that we consider the congressional purpose underlying . . . the . . . Act.

61. See note 2 *supra*.

62. See note 60 *supra*. It also should be noted that, in a social environment where the "shame" problem is serious, it is perhaps most likely that the potential mother's feelings will crystallize in her procuring an illegal abortion.

of marriage and the family, they may pass the test of the equal protection clause.

The family protection argument basically is that giving the bastard the rights of a legitimate child would discourage marriage, since no advantage would remain to be derived from marriage. It is feared that absent the social stigma which attaches to one giving birth to an illegitimate child, fewer parents would find it worthwhile to give their union the permanence which a formal marriage provides and which the law may properly enhance.

> The gist of the theory is that the function of reproduction can be carried out in a socially useful manner only if it is performed in conformity with institutional patterns, because only by means of an institutional system can individuals be organized and taught to cooperate in the performance of this long-range function, and the function be integrated with other social functions. The reproductive or familial institutions constitute the social machinery in terms of which the creation of new members of society is supposed to take place. The birth of children that do not fit into this machinery must necessarily receive the disapproval of society, else the institutional system itself, which depends upon favorable attitudes in individuals, would not be approved or sustained.[63]

Similar reasoning has already been answered in connection with the "promiscuity" argument.[64] To repeat, if the state wishes to discourage casual unions, it should do so directly, as, for example, by laws punishing fornication[65] or providing incentives for marriage,[66] rather than by placing at a disadvantage a group that cannot prevent the mischief against which the law is directed. It may also be relevant to consider that, whatever the strength of the argument of family protection once may have been, the concept of the family as a social institution has undergone a profound change in the last few

63. Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOCIOLOGY 215, 219 (1939).

64. See note 60 *supra* and accompanying text.

65. It would *not* do to punish the parents for the illegitimate birth of the child because whether the punishment consisted of a fine or a jail sentence, the child ultimately would bear the burden of such punishment. *Cf.* note 85 *infra*; MISS. CODE ANN. § 2018.6.1 (1964 Supp.) which provides that:

> If any person, who shall have previously become the natural parent of an illegitimate child . . . shall again become the natural parent of an illegitimate child born within this State, he or she shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished. . . . Provided, however, that . . . multiple births shall be construed to be the birth of one (1) child.

66. Consider presently available tax incentives for married persons, such as exemptions and income splitting privileges. Some welfare arrangements, on the other hand, discourage marriage and legitimacy. For example, a widow who remarries often will lose pension benefits derived through her first husband. Finally, the widespread unavailability to the "poor" of legal aid services that include family matters, such as divorces and legitimation, contributes to the incidence of illegitimacy.

centuries. It may well be sound to conclude that the bastard does not have the relevancy to the modern, pragmatic concept of marriage that he possessed when the family was viewed primarily as a religious, sacred institution.[67]

A pragmatic approach to family protection focuses on the father's legitimate family and asks whether it would harm that unit if his illegitimate child were granted a full relationship with him. Should a wife be compelled to accept her husband's extra-marital child into her house? Should a wife's inheritance be reduced in favor of an illegitimate? Should legitimate children be asked to share the attention, company, and money of their father with an extra-marital half-sibling? These are valid questions, but all of these questions, ranging from the child's right of inheritance, to support, custody and name matters,[68] may be asked as well of the legitimate child of a father's earlier marriage. In any relevant sense, the father's premarital illegitimate child and his child of an earlier marriage are thus "situated similarly."[69] Perhaps the most cogent distinction lies in the wife's emotions, but even if the wife were granted a hearing, it must be concluded that her problem is hardly comparable to the problems of the child. It already has been pointed out that the stigma of bastardy tends to produce severe psychological effects on the victims

67. With reference to the law of divorce, Professor Friedmann said of the social status of the family:

> Today, the family is to a far lesser extent than in earlier times held together by economic necessity or social subservience. In modern Western Society, women can and do operate a business, exercise a profession or seek industrial employment. In times of depression or in marriages entered into by very young people, the wife is sometimes the main breadwinner, at least temporarily. Children, subject to certain social legislation, go out and earn wages long before they have attained full legal capacity.
>
> It is by no means a bad thing that the bonds of a family, including those between husband and wife, should no longer repose essentially on a stern religious doctrine or on the economic necessity of hanging together as a family, or on the social and legal supremacy of the husband and father. It may be a sign of maturity that, as it has been said "of the earlier bonds of family, only mutual affection and responsibility for the raising of children are today important, at least in modern Western society." This change in the foundations of family cohesion does, however, compel a reassessment of the legal remedies for the enforcement of its cohesion or, where necessary, dissolution.

FRIEDMANN, LAW IN A CHANGING SOCIETY 224-25 (1959). These arguments apply with equal force with respect to the legal status of the illegitimate to the extent discrimination originally resulted from the religious orientation of the family concept. *Cf.* note 84 *infra*. Friedmann himself strongly favors reform of the law of illegitimacy, saying that "[t]he stigma that modern Western society still generally, though probably decreasingly, places upon the illegitimate child is utterly at variance with the ethical standards by which we profess to be guided." Friedmann, *op. cit. supra* at 253.

68. For a detailed discussion of these subjects, see text accompanying notes 89-91 *infra*.

69. The position of the "adulterous bastard," born outside of an existing marriage, is more difficult, but even great concern for the protection of the existing family does not warrant denying the child some relationship with his father.

of discrimination that are comparable to the damaging psychological effects resulting from racial discrimination.[70] Finally, the fact that discrimination against the illegitimate continues unabated even where there is no family in the picture is more evidence of the inappropriateness of the criterion of legitimacy to the state's interest in protecting the family.

D. *Actual Relationship with Father*

An attractive reason which may be invoked to justify discrimination against the illegitimate is found in the actual, living family relationship a father normally has with his legitimate children, a type of relationship he usually would not have with his illegitimate child. Indeed, legislation which focused on this difference might be difficult to fault, were it not for the fact that the denial of a relationship with his father is precisely the wrong of which the illegitimate is complaining. To argue that because the illegitimate does not have a relationship with his father he should not be entitled to one is bootstrapping. Furthermore, the discriminatory legislation which is attacked here does *not* define its classes in terms of the actual father-child relationship. Whether living in a family setting or not, the legitimate child enjoys broader rights against his father (whom he might never have seen) than does the illegitimate (who might, in fact, live with his father and mother in a permanent family-like situation). Therefore, even if children might reasonably be classified on the basis of whether they live and share their lives with their fathers, the definition of these two groups by means of the criterion of birth in or out of wedlock is over-inclusive in that it covers children who are legitimate but who do not live with their fathers and under-inclusive in that it excludes illegitimates who do live with their fathers.

E. *The Father's Choice*

Racial discrimination violates the Constitution because it has no rational basis. Is there no rational basis for the state to take the position that the father may bestow on the child of his wife certain rights that he withholds from the child of his mistress? Approached from this direction, the key to the child's status is the father's voluntary acceptance of the legal obligations summarized in the word "legitimacy." This may occur directly in a transaction between the

70. See notes 51-53 *supra.*

child and the father, as in legitimation or adoption, or indirectly through the contract of marriage, which might be viewed as a third party beneficiary contract by which the father prospectively confers legitimacy on all children resulting from the marriage. Other situations in which the law permits a choice as to whether to grant or withhold benefits superficially support this focus on the father's consent. For example, a father may generally disinherit even his legitimate child,[71] and a mistress becomes entitled to the rights of a wife only with her keeper's voluntary consent, expressed in a formal or informal contract of marriage.[72]

What justifies permitting the father to make a choice as to his child's legitimacy status? Objectively, an illegitimate child would usually be distinguishable from his legitimate half-sibling on the following partially overlapping grounds: (1) The father did not intend to "create" the child, whereas an intent to procreate may at least be implied in a marriage situation; (2) The father did not "create" the child against the background of a permanent family unit; rather, (3) The child was the accidental result of a casual union with a woman who, since the father did not marry her, probably was not fully acceptable to him.[73] But, does this justify the injury which is inflicted on the child who is deprived of the property rights and social status accorded most children[74] and who is stigmatized with the contemptible label of "bastard"?[75] When the further considera-

71. A number of limitations are discussed in Scoles, *Conflict of Laws and Non-Barrable Interests in Administration of Decedent's Estates*, 8 FLA. L. REV. 151 (1955).

72. During recent years, abolition of common law marriage in a growing number of states has increased the incidence of illegitimacy. Less than one-third of the states retain the institution. Public policy arguments against the institution of common law marriage often overlook the interests of the child who, in the absence of any semblance of a legal relation between his parents or a special statute, is condemned to bastardy. *But see* W. VA. CODE ANN. § 4086 (1961) which legitimates the issue of "common law marriages" that are not valid for any other purpose. See generally JACOBS & GOEBEL, CASES ON DOMESTIC RELATIONS 93-94 (1961); Weyrauch, *Informal Marriage and Common Law Marriage*, in SEXUAL BEHAVIOR AND THE LAW 297, 300-01 (Slovenko ed. 1965).

73. The same distinctions apply on the mother's side as well, but as to her, most states today give the illegitimate child the same rights as are enjoyed by a legitimate child. Although, within the present framework, it is not necessary to pursue the questions whether the father and mother are in comparable situations with respect to their legal relationship with their child and, if so, whether the mother may complain of unequal treatment if her obligations to her illegitimate child are greater than those imposed on the child's father, it is at least interesting that the advantages which the father is given as a matter of course are denied with equal finality to the mother.

74. The sophistic argument that but for the wrongful act the child would not have been at all, and that therefore he should not complain of what he is (as it presumably is better than nothing), needs no answer in this context. In a *damage* inquiry, on the other hand, the argument may have some relevancy. See note 78 *infra*.

75. The following is an abbreviated list of defamatory epithets compiled in a lead-

tion that the father voluntarily brought about this injury to a child who was helplessly delivered into his predicament is added, it becomes clear that the decision to withhold legitimate status from his offspring cannot properly be considered a decision for the father to make. Indeed, that the father cannot so decide has probably never been questioned seriously. The first paternity act in English history speaks of the father's begetting of a bastard as "an offense against God's law and man's law,"[76] and, for a long time, paternity actions were *criminal* prosecutions of the father in which the criminal offense was the causing of a birth out of wedlock.[77] A much discussed recent case which held that the fathering of an illegitimate child is a wrongful act—a tort or a crime—committed by the father *upon the child*,[78] lends further support to the conclusion that the father's choice to confer upon or withhold from his extra-marital offspring a legitimate status is not a reasonable criterion on which the state may base a classification.[79] In addition, it might be noted that another

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ing textbook on torts: ". . . immoral or unchaste, or 'queer' . . . a coward, a drunkard, a hypocrite, a liar, a scoundrel, a crook, a scandal-monger, an anarchist, a skunk, a bastard, a eunuch . . . because all of these things obviously tend to affect the esteem in which he is held by his neighbors." PROSSER, TORTS 757-58 (3rd ed. 1964). Of course, quite aside from the neighbors' esteem, an allegation of bastardy may be a serious matter in that it may dispute eligibility to inherit.

76. 18 Eliz. I, c. 3 (1576). It does not affect the argument that at least the original paternity statutes were enacted for the protection of the community, rather than for the benefit of the child.

77. More recently, many states have shifted the paternity action into the civil sector. The act of fornication was *not* the offense sought to be punished because no prosecution would lie if the father had married the mother prior to the child's birth and thereby legitimated him. Thus, the "[Maryland bastardy law] takes no notice of fornication as a crime, except where it results in the birth of a child . . . . If, upon trial of the question of paternity, he is acquitted, . . . the admitted fornication is passed by without further notice." Plunkard v. State, 67 Md. 364, 369, 10 Atl. 225, 226-27 (1887).

78. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 247, 190 N.E.2d 851, 852 (1963); *cf.* Williams v. State, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), *rev'd*, 25 App. Div. 2d 906, 269 N.Y.S.2d 786 (1966). Without attempting to analyze the conceptual problems inherent in using tort law to alleviate the problems of illegitimacy, we need seize here upon only those aspects of the holding that classify the father's withholding of legitimate status from his child as a wrongful act, as a choice he is not permitted to make. In cases like the *Zepeda* case, it would make more sense if plaintiff would ask the court for an order to force his father to legitimate him. This would provide *legal* equality, which is all the law should be asked to provide. Most of the difficult conceptual problems that frustrated the *Zepeda* court arose because plaintiff asked for *de facto* equality in the sense that he wanted to have the difference between his situation and that of a legitimate child made up in damages. See generally Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127 (1966); Note, *Liability to Bastard for Negligence Resulting in His Conception*, 18 STAN. L. REV. 530 (1966).

79. This situation differs from a case of adoption, in which it is the adopter's voluntary acceptance of the child that *creates* the relationship, whereas the relationship between the father and the illegitimate is created biologically.

fallacy in the consensual relationship argument is that it puts the cart before the horse: It may well be said that a correct analysis of the situation is *not* that the contractual relationship between the parents binds them to the support of their children, but rather that their contractual relationship is merely declaratory of their biological relationship with their children and is rooted in social necessity.[80]

For purposes of this section, it has so far been assumed that it is indeed the father's voluntary choice that imposes the discrimination on the illegitimate child, and that therefore the situation *is* comparable to the case of a father disinheriting a legitimate child.[81] However, this assumption is unsound. If the discrimination against the child is to be ascribed wholly to the father, the law should provide the father with an accessible opportunity, short of marrying the child's mother, for legitimating the child after he is born. A father has no such opportunity under the laws of many states,[82] and it is obviously unsatisfactory to say that he *can* control the legitimacy status of his child merely by insisting that women engaging in sexual relations with him be married to him.

F. *The "Real" Reason*

This discussion has not produced a rational legislative purpose justifying classification on the basis of illegitimacy. The reason for this may be that there is no such purpose. Our long continued acceptance of this legislatively enforced inequality between legitimate and illegitimate children may rest on much the same ground as did the inferior position of women, Negroes, and other classes through the centuries—prejudice.

There has been a long history of discrimination against the illegitimate.[83] The medieval church, in both its concern for the family

80. "Marriage and the family are most intimately connected with one another: it is originally for the benefit of the young that male and female continue to live together. We may therefore say that marriage is rooted in the family rather than the family in marriage." In other words, "children do not owe their right of support to the existence of marriage, but marriage to the necessity of the support of children." Robbins & Deak, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 COLUM. L. REV. 308 (1930), citing 1 WESTERMARCK, HISTORY OF HUMAN MARRIAGE 72 (5th ed. 1921).

81. Inheritance rights are discussed in text accompanying note 91 *infra*.

82. In some states, the father may legitimate his child only with the mother's consent. See Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 847 n.50 (1966). A number of states provide for legitimation only through the marriage of the child's parents. See, *e.g.*, Nichols v. Estate of Sauls, 250 Miss. 307, 165 So. 2d 352 (1964); MASS. ANN. LAWS ch. 190, § 7 (1955); MISS. CODE ANN. § 474 (1942). Distinguish the argument made in this section from the state action argument found in the text accompanying note 54 *supra*.

83. See BÜCKLING, DIE RECHTSTELLUNG DER UNEHLICHEN KINDER IM MITTELALTER UND

and its aversion to illicit sex,[84] reinforced the basic self-interest of the father, which self-interest may ultimately have been most directly responsible for the situation of the illegitimate. It was natural that men, as legislators, would have limited their accidental offsprings' claims against them, both economically and in terms of a family relationship, especially since the social status of the illegitimate mother often did not equal their own. Moreover, their legitimate wives had an interest in denying the illegitimate's claim on their husbands, since any such claim could be allowed only at the expense of the legitimate family. Against these forces have stood only the illegitimate mother and the helpless child,[85] and thus it is not surprising that our laws are inconsiderate of the child's interests. Indeed, it seems surprising that today the illegitimate does have some rights against his father, until it is remembered that this development had its origin in the self-interest of a society which

IN DER HEUTIGEN REFORMBEWEGUNG (1920); Wolff, *The Background of the Post-Classical Legislation on Illegitimacy*, 3 SEMINAR 21 (1945). On the whole, the bastard appears to have fared better under English law than on the European continent. HOOPER, ILLEGITIMACY 28, 32 (1911).

84. "The unfortunate, and often tragic, status of the illegitimate child in the great majority of modern Western family laws is an outcome of the Christian conception of the monogamous marriage." FRIEDMANN, *op. cit. supra* note 67, at 251. "*[F]ilius nullius* expresses no mere technical uncertainty as to the fatherhood of the bastard, but rather the moral antipathy, inculcated by the Church, to the irregular intercourse of which he was the fruit." HOOPER, *op. cit. supra* note 83, at 27.

> As a result of [the church's] hatred of extramarital relations, the usual legal attitude of *laissez faire* toward bastards gave way in the middle ages to a treatment of them which deprived them of the ordinary rights of man . . . . Some law books treated them as almost rightless beings, on a par with robbers and thieves.

Robbins & Deak, *supra* note 80, at 315. On the other hand, the bastard had not been well-off in ancient Rome. See *id.* at 310.

85. Because of all crimes her crime could be most easily detected, the unmarried mother suffered most under this new theory of punishment. Man could very easily conform to the rules of the church, first because his sexual transgression could not be detected, and then because he could resort to perjury to evade the law. But the woman could not do this. . . . All religious teachers of old agreed with Augustine that woman was the "gate of the devil." The church sincerely believed that it had finally located the root of the whole sex problem; it was the unmarried mother. The whole punishment of sex union fell on her. If the man could be found out, he too would suffer, but his crime was not at all comparable to hers. But the greatest injustice was inflicted on the illegitimate children . . . .

> Then the large number of unmarried mothers, which steadily increased as the church victoriously marched forward in its establishment of celibacy, tried to conform to the requirement of the church by concealing pregnancy, and child-birth, and then by killing their children secretly. This was the beginning of illegitimate infanticide . . . .
>
> The usual punishments for infanticide during the Middle Ages and even into the eighteenth century were: sacking . . . , an infanticide being sewed up in a sack and thrown into the water; burying alive . . . ; empaling . . . , a pointed stick being driven through the heart; and burning alive . . . . These cruel forms of punishment by the civil courts . . . were paralleled by the most humiliating public church penance for the unmarried mother who did not kill her child.

WERNER, THE UNMARRIED MOTHER IN GERMAN LITERATURE 24-27 (1917). (Footnote omitted.)

sought protection against the support obligation that it would have had to bear if the natural father were not held to be responsible.[86] Once the public interest had been served by narrow support statutes, legislators tended to rest,[87] although there does appear to be one aspect of familial relationships in which full equality for the bastard has been realized—the law of incest.[88]

III. Application of the Equal Protection Clause to Laws on Illegitimacy

There is no doubt that in a society based on the family, illegitimacy is a serious social evil—*but it is a symptom not a cause.*[89] A literal application of the requirements of the equal protection clause would end or sharply curtail legislated discrimination which is now mistakenly directed against the illegitimate. In nearly all instances, classification based upon the criterion of legitimacy *alone* either is not related to a proper legislative purpose or, if a proper purpose is in the picture, such a classification is grossly over- or under-inclusive. What does this mean with respect to specific discriminatory laws?

A. *Right of Support*

Nothing more need be said with respect to rights of support to make the point that, for all rational legislative purposes, the usual bastard is situated similarly with the usual legitimate child, or at least with the father's legitimate child by a former marriage.

B. *Welfare Legislation*

It should be noted that all of the arguments in favor of discrimination which were discussed above center on the father-child rela-

86. See Robbins & Deak, *supra* note 80, at 317.

87. See Krause, *supra* note 82, at 831.

88. The law of incest disregards illegitimacy and holds that incest may be committed by relatives of any kind within the prohibited degrees. See, *e.g.*, Cal. Civ. Code § 59.

89. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view. The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent. The rule .that a bastard is nullius filius applies only in cases of inheritance.

Middleton v. Luckenbach S.S. Co., 70 F.2d 326, 330 (2d Cir. 1934) (construing 41 Stat. 537 (1920), 46 U.S.C. § 761 (1964)).

tionship, and that relationship is not in issue in the welfare context. Here, the relationship between the child and the state or, in a wrongful death action, between the child and a third party, is the subject matter of the questioned legislation. Therefore, these arguments, which were refuted in the father-child context are even less relevant here. Moreover, no other arguments appear to justify discrimination under welfare laws. On the contrary, the purposes of these laws would clearly be better served if there were no discrimination against the illegitimate; his needs normally would be as great as, if not greater than, those of a legitimate child of the father in question.[90]

C. *Intestacy Laws*

At first glance, it may seem to be much more difficult to conclude that there is unlawful discrimination with respect to rights of inheritance. However, the comparison that was drawn earlier[91] between the father's power to disinherit his legitimate child and the father's choice to give or deny legitimacy to his bastard child is a weak analogy when it is measured in terms of the gravity of the consequences, and it begs the question when considered in connection with inheritance rights. In the latter instance, the question must be whether the illegitimate is in the same position vis-à-vis his father as is his legitimate half-sibling; the answer of course is negative. The laws of intestate succession express a clear presumption that the legitimate child will take absent specific action by his father. However, absent a specific provision in his father's will, the illegitimate child will *not* take. It may be true that the laws of intestacy are at the citizen's service and express his presumed intent if he has failed to express it by will. It may also be true that the majority of fathers would not wish their bastard child to take under the laws of intestacy as if they were legitimate, so that the legislated presump-

90. Far in the future, enlightened governmental programs concerning birth control may provide a more direct solution to the problem of illegitimacy:

> Senator Ernest Gruening today accused John W. Gardner, the Secretary of Health, Education and Welfare, of hiding "under the table" the department's efforts to spread birth control knowledge. "People are afraid of it, and your department is afraid of it," the Alaska Democrat said. "You are not tackling your duty with the enthusiasm that the President of the United States demands." . . . [Mr. Gardner] cited the liberalization in recent months of rules on the giving of birth control information and devices to any woman requesting them. He said his department was spending $2 million this year on birth control research, double that of last year; and $3.1 million on family planning services against $2 million in the fiscal year 1965. "More than 30 of our states are now providing birth control assistance to families," he added. "Two years ago the number was only 13."

N. Y. Times, April 8, 1966, p. 14, col. 3.

91. See text at note 71 *supra*.

tion in favor of the legitimate child finds support in the actual intent of the majority of intestates. However, the question remains whether state law may express a prejudice, real though it may be, which rests on a pattern of discrimination that had been practiced with the encouragement of the church and the state until it became part of the "normal" intent of the majority. Finally, even if for purposes of argument it is assumed that a legislated disadvantage for children born outside of wedlock is supportable whenever legitimate children compete with illegitimates, the argument wholly breaks down when, as present law provides, the illegitimate child loses his father's inheritance to a distant but legitimate fifth cousin. It should be noted that "freedom of disposition" would not be affected if the presumption against the illegitimate were eliminated, since the father would be free to disinherit his illegitimate child by will, as he is now free to do with respect to his legitimate child.

D. *Visitation, Custody, Adoption*

It goes without saying that if the father is unwilling, his affection cannot be legislated. Given a willing father, the situation is still uncertain because even the *legitimate* child's right to his father's company has rarely been adequately defined. At this point, a look at the father's right to his child is important since it is the other side of the same coin and thus helps to define the rights of the child. Furthermore, while the argument in this paper centers on the child's position, the establishment of a familial relationship between father and illegitimate child would demand that the father be given some rights with respect to the child. Indeed, a plausible variation of the equal protection argument would be that the father and the mother of the child are situated similarly with respect to the child's custody and with respect to other rights over the child, so that it would deny equal protection to the *father* if he were not accorded rights that are given to the mother. Thus, he should be entitled to be heard on issues such as the child's general welfare, including his custody and education. The father's rights would extend to adoption matters, and thus the appropriateness of an adoption would have to be considered in the light of the interests of all three parties involved: the father, the mother, and the child. Moreover, since there is nothing unacceptable in principle about terminating parental rights if the child's interest requires such action, consideration of the father's interest would not unduly hinder adoption proceedings. Finally, the father's relationship with his illegitimate child should

generally include his right to inherit from or be supported by the child to the extent that state law provides these rights to the father of a legitimate child.

A countervailing consideration is that the state's interest in maintaining the integrity of the family becomes forceful in this area. If the father has a legitimate family, his wife could hardly, and very probably should not, be forced to accept an extra-marital child into her home. Thus, on superficial inspection, laws distinguishing between illegitimates and legitimates for purposes of defining rights of visitation and custody do not seem as vulnerable as other instances of legislated discrimination. However, on closer inspection, present law does fail the equal protection test because it decides these questions on the basis of the criterion of legitimacy alone; such an approach takes no account of the actual family situation. Often a family may not be in the picture, or the family involved may not be entitled to consideration. Thus, if the father decides to establish a new family, the illegitimate should not be deprived of any rights against his father which a legitimate child of a former marriage could not be forced to relinquish.

E. *Paternal Name*

The illegitimate's claim to his father's name cannot be advanced as a general proposition, for here there are rational distinctions between the child born into a family and the illegitimate. At least one function of the "family" name of the father is to identify those persons who live with him in an economic and social unit. This purpose would not be served if the father's name were given to an illegitimate who does not live with him. In addition, the state may consider that the mother has a proper interest in naming the child after herself, especially if she lives in a social and economic unit with her illegitimate child or children. On the other hand, the use of the father's name by the child also indicates his ancestry and, given the right father, the name can be of economic and social value. While a proper answer must be based on a case by case evaluation of these conflicting considerations, it is clear that the present practice of deciding the name question by using legitimacy as the *sole* criterion is arbitrary. Thus, once again, the law defines its categories poorly in relation to its purpose, for the legitimate child not living with the father will bear his name, although the illegitimate who lives with him will not.

IV. Conclusion

As was said at the outset of this discussion, no universal, black-white answer is possible or desirable. It is not argued that *all* distinctions between the legitimate and the illegitimate are not a proper concern of the state in the exercise of its police power. But whatever the conclusion as to any specific instance of discrimination, it seems clear that the wholesale discrimination imposed by our present legal order cannot be supported.

At one end of the spectrum of legislation discriminating against the illegitimate, the equal protection argument should be sufficient to dictate a change in the laws of those states that do not now impose an obligation of support on the father of an illegitimate child, or that now provide to the illegitimate a right of support which differs significantly from that possessed by a legitimate child. Discrimination under welfare laws is similarly wholly indefensible. At the other extreme, it is obvious that an application of the equal protection clause would not require the enforcement of an illegitimate's claim to paternal affection. Until social prejudices disappear—and legislated equalization of the bastard's situation would further this goal[92]—an attempt to legislate for the illegitimate a right to his father's company, as distinguished from his money, will fail. The other conduits of discrimination, such as the inheritance laws, lie somewhere between these two extremes.

Fortunately for the illegitimate, his case for equal protection is strongest in the areas which are of the greatest practical importance to him. While few illegitimates would gain from a provision for inheritance rights under the intestacy laws, many would benefit from an enlarged right of support. Few illegitimates would gain from a right to use the paternal name, but many would benefit from coverage under welfare laws.

92. Illegitimacy was a topic during and shortly after World War I. At that time, the U.S. Government published a number of studies relating to illegitimacy, and state legislatures took a fresh look at the subject. One of the foremost advocates of reform at that time, however, was cautious and pessimistic in his views: "It thus appears that the practical consequences of assimilating the status of the illegitimate child to that of a legitimate child are limited. And this is what may be expected of an attempt to alter by legislation social conditions and concepts." Freund, Illegitimacy Laws of the United States and Certain Foreign Countries 58 (1919). Freund reflected an attitude not unlike that of the Supreme Court in Plessy v. Ferguson, 163 U.S. 537, 551 (1896), where these famous last words were spoken:

> The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.

To say the least, legislation *has* helped.

Affirmatively, since there can be no equality unless the father is known, "equal protection" would require that a mechanism be provided so as to ascertain the illegitimate's paternity whenever possible.[93] If the *child's* rights are to be protected, the child's mother cannot have a right of "veto" over the paternity action. A paternity suit should be brought by appropriate state authorities on behalf of any child for whose benefit no such action has been brought and whose paternity has not been otherwise established within a reasonable period of time after his birth.[94]

The goal here is limited to *legal* equality of the illegitimate and the legitimate child. With the family at the base of our social structure, full equality will be prevented—simply because the legitimate usually is born into a family and the illegitimate is not. However, the factual impossibility of perfect equality is no excuse for failing to provide the degree of equality which the law can effectively furnish—the argument that law cannot make blacks white nor whites black provided no reason against legislating racial equality. An unwilling father is better than none. Decades ago, the concept of illegitimacy was successfully discarded by statute in Arizona and Oregon.[95] Experience in these states has shown that the goal of *legal* equality of legitimate and illegitimate children is achievable.

Is this the time and place to realize the literal requirement of equal protection in the law of illegitimacy? In finding the answer to this question, it should be recognized that the problem of illegitimacy is an important factor in the "war on poverty." American

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93. This finds support in the fact that the state now provides a strong presumption of paternity for the child born in wedlock, and even the rebuttal of that presumption usually involves the substitution of the child's real father for the presumed father. See note 58 *supra*.

94. *Cf.* MINN. STAT. ANN. § 257.33 (1959) which provides:

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

95. Arizona provides that "every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married," and "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," even when "the natural father of such child is married to a woman other than the mother of the child, as well as when he is single." ARIZ. REV. STAT. ANN. § 14-206 (1956). The Oregon statute is similar: "The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married." ORE. REV. STAT. § 109.060 (1957).

"poverty," a situation in which many of the statistical "poor" have television sets and automobiles, is as much a social problem as it is an economic one; individually and collectively, it is as much a crisis of self-respect as it is of money. This poverty will disappear only if the social level of the "poor" is raised concurrently with their material welfare. It seems clear that if about one third of the "poor" are illegitimate and thereby subject to discrimination under state and federal law, improving their social position depends at least in part upon a change in these laws.[96] If we wish to bring the poor into society, our laws must let them in.[97]

96. See notes 51-52 *supra*.

97. Would our courts today uphold laws that barred illegitimates from public office, such as judgeships, that reduced criminal penalties for the murder of an illegitimate to farcical levels, that prevented illegitimates from appearing or being witnesses in court, that denied them burial and that provided for escheat of their bodies to medical schools upon their deaths? BÜCKLING, *op. cit. supra* note 83, at 75-89. If these disabilities, all of which the illegitimate once bore, offend our modern sense of justice, we should question the part of the burden that remains—with all deliberate speed.