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area of antitrust law and should remain in the common law area where they originally developed. A state, however, should still be able to recover common law money damages for injury to its general economy; such damages would simply not be treble.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — INHERITANCE BY ILLEGITIMATES

Labine v. Vincent,
401 U.S. 532 (1971).

The interests of the "illegitimate" child have been disregarded for centuries.[1] At one time, under the curious concept that the illegitimate child was *nullius filius* (the son of nobody), the laws sanctioned and occasionally required that the mother and father disregard the child altogether.[2] Not until 1576 was a statute enacted placing a duty upon the parents to support the illegitimate child.[3] The rationale of this statute, however, was not to benefit the child but to relieve the parish of the burden it had often assumed.[4] Only in recent history has it been recognized that the illegitimate child has human needs. Still, he continues to be persecuted by society and penalized by its laws[5] for an event over which he had no control.[6]

[1] *See generally* 2 J. KENT, COMMENTARIES 228 (11th ed. 1867); Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1 (1969); Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967) [hereinafter cited as *Equal Protection*]; Krause, *Bringing the Bastard Into the Great Society — A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829 (1966).

[2] Originally this concept merely served to prevent the illegitimate child from inheriting from his parents; only later did it become the general principle behind the denial of any relationship between the child and his parents. *See* 2 J. KENT, *supra* note 1, at 228.

[3] Act for Setting the Poor on Work of 1576, 18 Eliz. c. 3.

[4] *See* Foster & Freed, *Unequal Protection: Poverty and Family Law*, 42 IND. L.J. 192, 203 (1967).

[5] Although the lawmakers' intent may not have been to discriminate against or directly penalize the child, this has been the result of most legislation on the subject of illegitimate children. The general argument for denying illegitimate children equal rights with legitimate children was that giving them such rights would discourage marriage since no advantage would remain to be derived by the parents from the marital relationship. Social stability requires the institution of marriage and the home, and without the stigma of illegitimacy, fewer parents would be induced to enter into the institutional arrangement. *See Equal Protection*, *supra* note 1, at 493. Although the state may have a valid interest in promoting stable family life, this interest should not justify laws that sweep so widely as to deny illegitimate children basic human rights. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965); NAACP v. Alabama, 377 U.S. 288, 307 (1964). Nonetheless, state laws have denied illegitimate children

Laws discriminating against illegitimates, traditionally justified as discouraging sexual promiscuity and promoting the family unit,[7] have lately been challenged both in treatises[8] and the courts. In *Levy v. Louisiana*,[9] a case that promised a more sensitive treatment of illegitimate children, Mr. Justice Douglas, writing for a six to three majority, declared: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being."[10] He stated that because these children are clearly persons, they are entitled to the benefits of the equal protection clause of the 14th amendment, and cannot, therefore, be invidiously discriminated against. Thus, the Court held that the Louisiana wrongful death statute, which had been interpreted by the Supreme Court of Louisiana to exclude illegitimate children from recovering for the wrongful death of their mother, violated the 14th amendment because "it is invidious to discriminate against [the children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."[11] In the companion case to *Levy*, *Glona v. American Guarantee & Liability Insurance Co.*,[12] the Court held that construing Louisiana's wrongful death statute to bar recovery to the parent for the death of an illegitimate child

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the same levels of paternal support, the same rights to inherit property, and the same rights to receive state benefits that are afforded legitimate children. *See generally* Gray & Rudovsky, *supra* note 1; *Equal Protection, supra* note 1. Federal laws governing welfare benefits also result in discrimination against illegitimate children. *See* Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337, 341 (1962). To what extent these forms of discrimination are constitutionally valid has not yet been fully decided.

[6] *Cf.* Robinson v. California, 370 U.S. 660 (1962), where the Court held that a California statute which made it a misdemeanor for any person to "be addicted to the use of narcotics" and which had been construed by California courts to make the "status" of narcotic addiction a criminal offense inflicted a cruel and unusual punishment in violation of the eighth and 14th amendments.

[7] Rather than penalizing the child in order to deter promiscuity and illegitimacy and promote the family unit, the laws might focus on the adults. Ostensibly, laws prohibiting fornication and adultery, although also reflecting particular moral views, have such goals. But the ease with which men may escape the social and legal penalties for such acts, compared with the impossibility of escape for women who bear children out of wedlock, reflects the chauvinistic dual standards that for centuries have been applied to male sexual activity. This same male chauvinism has undoubtedly been a prime factor behind laws, drawn principally by male legislators, that limit "accidental" offsprings' inheritance rights against the father. *E.g.*, LA. CIV. CODE ANN. arts. 919, 206 (West 1952).

[8] *See* authorities cited note 1 *supra*.

[9] 391 U.S. 68 (1968).

[10] *Id.* at 70.

[11] *Id.* at 72.

[12] 391 U.S. 73 (1968). Justices Black and Stewart joined Mr. Justice Harlan's single dissent for both *Levy* and *Glona*. *Id.* at 76.

while allowing recovery for the death of a legitimate child also violated the equal protection clause, there being no rational basis for the distinction.

The *Levy* and *Glona* decisions sparked hopes for the extension of the rights of illegitimates. Indeed, two lawyers who worked on the *Levy* brief were prompted to write that *Levy* and *Glona* "provide a basis from which all major legal disadvantages suffered by reason of illegitimacy can be challenged successfully."[13] This optimism reflected their opinion that the two decisions established that "a state will carry a heavy burden in attempting to show a reasonable relationship between a classification based on illegitimacy and a legitimate state purpose."[14] Whether this will be so in the future is uncertain in light of the Court's most recent pronouncement on the rights of illegitimates in *Labine v. Vincent*.[15]

In 1962 Ezra Vincent fathered the child, Rita Nell, of Lou Bertha Patterson (now Lou Bertha Labine). Two months later the parents, as authorized under Louisiana law,[16] jointly executed before a notary a form acknowledging that Ezra Vincent was the "natural father" of the child. By this act Mr. Vincent became obligated under state law to support Rita Nell.[17] The parents continued to live together and raise their daughter until Mr. Vincent died in 1968.[18] He left no will. Rita Nell's mother sued on the child's behalf, seeking to have her named sole heir to Mr. Vincent's estate. Applying Louisiana law,[19] the trial court dismissed the action and declared

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[13] Gray & Rudovsky, *supra* note 1, at 2.

[14] *Id.* at 39. *See* note 28 *infra.*

[15] 401 U.S. 532 (1971).

[16] LA. CIV. CODE ANN. art. 203 (West 1952).

[17] *Id.* art. 242.

[18] Louisiana does not recognize common law marriages. *See* Green v. Crowell, 69 F.2d 762 (5th Cir.), *cert. denied*, 293 U.S. 554 (1934); [1942-1944] OP. ATT'Y GEN. (La.) 754, 768. Thus, although a de facto family existed for nearly 7 years, neither the child nor her mother could obtain all the benefits Louisiana law confers on the de jure family.

[19] Louisiana law provides that "[c]hildren are either legitimate, illegitimate, or legitimated." LA. CIV. CODE ANN. art. 178 (West 1952). Not all illegitimate children can be legitimated; only those whose parents do not have legitimate descendants and could have lawfully married each other at the time of the child's conception, or whose parents later marry can be legitimated. *Id.* arts. 200, 198. An illegitimate child who can be legitimated becomes a "natural" child when his father formally acknowledges him. Article 206 provides, however, that "[i]llegitimate children, though duly acknowledged, cannot claim the rights of legitimate children." Article 919 provides in part that "[n]atural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State." Thus, in the case at hand, although Rita Vincent was the "natural" child of Ezra Vincent, Mr. Vincent's collateral heirs took his property under article 919.

Mr. Vincent's collateral relations — his brothers and sisters — to be his heirs entitled to take his property to the exclusion of the acknowledged, but not legitimated, Rita Nell. A Louisiana court of appeals affirmed,[20] the Supreme Court of Louisiana denied review,[21] and the Supreme Court of United States affirmed the trial court's ruling.[22]

The appellants had argued that the Louisiana statutory scheme for intestate succession, which barred the illegitimate but acknowledged child from sharing in her father's estate as would a legitimate child,[23] constituted an individious discrimination under the equal protection and due process clauses of the Federal Constitution. Mr. Justice Black, writing for the five to four majority, concluded, however, "that in the circumstances presented in this case, there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empower this Court to nullify the [Louisiana intestate succession scheme]."[24] He found appellants' reliance upon the *Levy* and *Glona* decisions "misplaced," and refused to extend the rationale of those cases where, he said, it did not apply. "*Levy*," he stated, "did not say and can not fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring."[25]

Mr. Justice Black's abrupt dismissal of the principles of *Levy* and *Glona* is rather startling, as is his whole opinion. He briefly dismissed the applicability of *Glona* in a footnote, stating: "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State."[26] The implications of this statement are either that there was no classification at all involved in the Louisiana statutes, or that if there was a classification, for some reason it was not necessary for the Court to apply a test. It is inconceivable that the Court could or did think that there was no classification at all. Mr. Justice Black stated at one point: "Of course,

[20] Succession of Vincent, 229 So. 2d 449 (La. Ct. App. 1969), *review denied*, 231 So. 2d 395 (La. 1970), *aff'd sub nom.* Labine v. Vincent, 401 U.S. 532 (1971).

[21] Succession of Vincent, 231 So. 2d 395 (La. 1970), *aff'd sub nom.* Labine v. Vincent, 401 U.S. 532 (1971).

[22] Labine v. Vincent, 401 U.S. 532 (1971).

[23] *See* note 19 *supra.*

[24] 401 U.S. at 539-40.

[25] *Id.* at 536.

[26] *Id.* at 536 n.6.

it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates."[27] Thus, we are left with the curious conclusion that somehow this discrimination is beyond the reach of the equal protection clause. It is true that the *Levy* Court did not specify whether the "close scrutiny" or "minimum rationality" test[28] was being applied, or that Mr. Justice Douglas raised questions that went beyond the scope of that decision,[29] but there can be no doubt that the issue involved there was whether the state's discrimination against illegitimates violated the equal protection clause. It is strange then, that the Court would not subject the classification in the instant case to at least some test.[30]

But, as Mr. Justice Brennan wrote in dissent, "[f]or reasons unarticulated, the Court refuses to consider in this case whether there is any reason at all, or any basis whatever, for the difference in treatment that Louisiana accords to publicly acknowledged illegitimates

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[27] *Id.* at 537.

[28] The 14th amendment provides in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This mandate requires that laws that discriminate against classes of people must have a rational purpose for the discrimination. Further, any classification drawn between groups must be rationally related to the legislative purpose, and the classification must include all who are situated similarly; it must not be under-inclusive or over-inclusive. Historically, in the field of economic and social regulation, the Court has granted a presumption of validity to the challenged law and placed the burden on the challenger to demonstrate that the law does not rest on any reasonable basis. Laws will not be overturned if they have a rational purpose and there is some minimum rational basis for the classification imposed. This is the "minimum rationality" test. Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Madden v. Kentucky, 309 U.S. 83 (1940); Lindsley v. Natural Carbonic Gas Co. 220 U.S. 61 (1911). A more stringent standard of review has been applied to "inherently suspect" classifications — classifications based on race or ancestry — as well as classifications that affect fundamental interests such as voting, procreation, and travel. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942). The courts subject these classifications to a more stringent standard by rejecting if not reversing the presumption of validity. The end result is closer scrutiny of the classification involved. Such a classification will be struck down unless the state can demonstrate that it is necessary to achieve a compelling state interest. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942). The *Levy* Court did not specify which test was being applied, although Mr. Justice Douglas implied that the classification might be inherently suspect. 391 U.S. at 71.

[29] Mr. Justice Douglas queried in *Levy*: "When the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock?" 391 U.S. at 71.

[30] Perhaps the majority approached the issue in the same way as Mr. Justice Harlan, who pointed out in his concurring opinion that appellant was a "natural" rather than "illegitimate" child. 401 U.S. at 541. Thus the classification involved would be between natural children and legitimates rather than between illegitimates and legitimates. In any event, this semantic distinction does not nullify the issue of classification.

and to legitimate children."[31] Rather, the Court simply asserted that the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left within the state is committed by the Constitution to the people and their legislature[32] — a conclusion no one was questioning. Did this mean, a bewildered Mr. Justice Brennan asked, that the majority was saying that the equal protection clause is inapplicable to subjects regulated by the state? Such an extraordinary proposition, he pointed out, "would reverse 104 years of constitutional adjudication under the Equal Protection and Due Process clauses."[33]

The majority's remarkable conclusion that discrimination against the child was insulated from the 14th amendment solely because it was state action may be the product of unusually poor draftsmanship rather than a disregard for constitutional principles. Although Mr. Justice Black voiced his opinion that the Court need not apply the rational basis test to the discrimination involved, he did make an attempt to show the classification's rationality by noting that the Louisiana intestate succession laws also discriminated against other classes, for example, against ascendants as opposed to descendants, and in favor of wives and against concubines.[34] Presumably, a finding that these other classifications were rational meant that the treatment accorded children on the basis of illegitimacy must be rational also. But rather than analyze the validity of the other classifications and then justify with particularity his analogical reasoning, Mr. Justice Black simply implied that because Louisiana had made these classifications on the basis of its prior determination of what constituted "legal" relationships, the classifications were presumably valid. Further, he maintained that the state could define these "legal" relationships without reference to biological or social factors. But this is precisely the elliptical reasoning of Mr. Justice Harlan's dissent in *Levy* and *Glona*,[35] which the majority in those cases dismissed in Mr. Justice Douglas' statement that "[t]o say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection

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[31] *Id.* at 548.
Justices Douglas, Marshall, and White joined in Mr. Justice Brennan's dissent.
[32] *Id.* at 538.
[33] *Id.* at 549.
[34] *Id.* at 537-38. *See* LA. CIV. CODE ANN. art. 903 (West 1952); *Id.* art. 1481.
[35] *See* 391 U.S. at 80.

Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses."[36]

The only other attempt by the Court to justify its decision was its purported distinction of *Levy* on the grounds that in its wrongful death statute, as opposed to its intestate succession laws, Louisiana had created an "insurmountable barrier" to the illegitimate child.[37] But Mr. Justice Harlan's dissent in *Levy*, in which Mr. Justice Black concurred, emphasized that there was no such barrier in *Levy*, for the mother only had to formally acknowledge the child to permit his recovery under the existing state law.[38] The further implication, however, that any discrimination short of an "insurmountable barrier" is constitutionally permissible, contradicts past decisions of the Court which have not required such an existential obstacle before applying the equal protection clause.[39]

Since Mr. Justice Brennan felt that the majority failed, or perhaps refused, to analyze Louisiana's discrimination against publicly acknowledged illegitimates in terms of the requirements of the 14th amendment, he undertook his own analysis to determine whether, at a minimum, there was any rational basis for the discrimination or whether the classification bore any intelligible proper relationship to the consequences that flowed from it. First, he stated, there is no biological basis for the distinction; the child is as biologically related to the father as any child can be. Second, the state's legitimate interest in preventing fraudulent claims upon the estate of a deceased is not apparent in the case where the father has already formally acknowledged his child.[40] Third, Mr. Justice Brennan took issue with Mr. Justice Harlan's statement in his concurring opinion that a state may reasonably impose greater obligations on a man in

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[36] *Id.* at 75-76.

[37] 401 U.S. at 539.

[38] 391 U.S. at 80. For critical comments on the acknowledgment requirement itself, see Gray & Rudovsky, *supra* note 1, at 10; *Equal Protection, supra* note 1, at 495-500.

[39] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); Hunter v. Erickson, 393 U.S. 385 (1969); Douglas v. California, 372 U.S. 353 (1963); Morey v. Doud, 354 U.S. 457 (1957); Smith v. Cahoon, 283 U.S. 553 (1931); *cf.* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896).

[40] For discussions of the problems presented when the child has not been formally acknowledged, see Gray & Rudovsky, *supra* note 1, at 24-26; *Equal Protection, supra* note 1, at 490, 495-500; Note, *Inheritance Rights of Illegitimate Children Under the Equal Protection Clause*, 54 MINN. L. REV. 1336, 1346-47 (1970); 21 CASE W. RES. L. REV. 292 (1970). *See also* Burnett v. Camden, ___ Ind. ___, 254 N.E.2d 199, *cert. denied*, 399 U.S. 901 (1970) (imposing on illegitimate child the burden of proving paternity during lifetime of father in order to qualify for inheritance rights does not violate the equal protection clause).

respect to the children of him and his wife than in respect to other children of whom he may be the father. Although such a policy might encourage marriage by offering an inducement to the woman to seek the benefits of these extra obligations, it is predicated on a decision entirely within the control of the man and the woman. The child is not a party to this decision and it is improper to penalize him because of a sexual relationship over which he had no control.[41]

One of the historical justifications for intestate succession laws is that they provide for the orderly passing of property in a manner that represents the plan that the decedent most probably would have chosen had he expressed his intent.[42] But when such a plan discriminates against illegitimates, particularly publicly acknowledged illegitimates, it seems proper to require reasonable evidence to support the proposition that fathers generally do not intend to leave property to these children.[43] The *Labine* Court made no argument that fathers who have acknowledged their illegitimate children generally tend to disinherit them. And Mr. Justice Brennan noted that logic and common sense, as well as the writings cited to the Court,[44] suggest precisely the opposite. Further, the lower court's decision in *Labine*[45] and Louisiana's statutory treatment of illegitimates as a whole[46] indicate that the disinheritance of acknowledged illegitimates represents state policy unrelated to effectuating the intentions of the decedent.[47]

Finally, Mr. Justice Brennan stated that the majority failed to mention the central reality of the case, that "Louisiana punishes illegitimate children for the misdeeds of their parents."[48] The state court had explicitly upheld the statute on the ground that the pun-

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[41] For critical comments on the dependency of the child's rights upon the father's actions, see Gray & Rudovsky, *supra* note 1, at 25; *Equal Protection*, *supra* note 1, at 495-500.

[42] *See* Gray & Rudovsky, *supra* note 1, at 14; *Equal Protection*, *supra* note 1, at 492; Note, *supra* note 39, at 1336.

[43] This requirement should follow regardless of whether or not the classification is inherently suspect.

[44] *See* 401 U.S. at 556 nn.22-25.

[45] Succession of Vincent, 229 So. 2d 449, 452 (La. Ct. App. 1969), *review denied*, 231 So. 2d 395 (La. 1970), *aff'd sub nom.* Labine v. Vincent, 401 U.S. 532 (1971); *see* text accompanying note 49 *infra.*

[46] *See* note 19 *supra, especially* LA. CIV. CODE ANN. art. 206 (West 1952), which provides that "[i]llegitimate children, though duly acknowledged, cannot claim the rights of legitimate children."

[47] Mr. Justice Brennan found it significant that only a narrow class of fathers can legitimate their offspring by declaration (*see* note 19 *supra*), and that unacknowledged and "adulterous" illegitimates are prohibited from inheriting more than a mere "sustenance" or "alimony" even by will. *See* Bennett v. Cane, 18 La. Ann. 590 (1866); LA. CIV. CODE ANN. arts. 920, 1488 (West 1952).

[48] 401 U.S. at 557.

ishment of the child might encourage the parents to marry, "however unfair it may be to punish innocent children for the fault of their parents."[49] Such a policy could be obtained more directly by focusing on the parents whose actions the state seeks to influence. Given the importance and nature of the decision to marry,[50] Mr. Justice Brennan concluded "that disinheriting the illegitimate child must be held to 'bear no intelligible proper relation to the consequences that are made to flow' from the State's classification."[51] He found that the discrimination rested on moral prejudice rather than any rational basis and therefore was clearly invidious.

Mr. Justice Brennan's dissent is more persuasive than the majority opinion, as well as more attuned to the interests of the illegitimate child. He does not say that a state may never discriminate against illegitimates, only that at least a rational basis must exist to support the discrimination. Such a basis, as he clearly demonstrated, does not exist in the case of inheritance by an acknowledged child.

Arguably, there are some instances in which discrimination against the illegitimate child would be warranted. Proof of paternity, for example, a burden not imposed on the legitimate child, would appear to be a rational requirement for purposes of extending support and inheritance rights. Obviously, it is necessary at some point to ascertain paternity in order to perfect the child's rights. But although it may be legitimate to impose this burden of proof, a due process problem remains: whether the child can be denied rights because of the mother's failure to initiate proceedings against the father. The rights of the child may be jeopardized by the mother who wishes to avoid possible threats to her interests that institution of a paternity proceeding might cause,[52] or by the mother who does not desire to involve the father in a troublesome situation. Only one state has attempted to alleviate the problem; Minnesota allows the commissioner of public welfare to bring paternity actions to protect the future interests of illegitimate children.[53]

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[49] 229 So. 2d at 452.

[50] *Cf.* Boddie v. Connecticut, 401 U.S. 371 (1971).

[51] 401 U.S. at 558, *citing* Glona v. American Guarantee Co., 391 U.S. 73, 81 (1968) (Harlan, J. dissenting).

[52] The possible violent reaction of the father may be the most feared threat. Also, the necessary admission of an "immoral" and often illegal act does not particularly encourage the institution of paternity actions.

[53] MINN. STAT. ANN. § 257.33 (1971). Perhaps one purpose of the statute is to relieve the welfare department of future obligations. The statutory language, however, emphasizes protection of the *child's* interests. Of course, if the mother is unwilling or unable to identify the putative father, this statutory provision is rendered nugatory.

Proof of paternity as a prior condition for receiving government benefits may also reflect a rational discrimination. But whether the illegitimate child should be required to prove actual dependency upon the father in order to recover under workmen's compensation statutes, for example, while the legitimate child usually benefits from a conclusive presumption of dependency,[54] is dubious.

Given the Court's opinion in *Labine*, however, such problems are not likely to be given close scrutiny. Although the dissenting Justices appear to consider inherently suspect any classification based on illegitimacy,[55] the majority does not.[56] Indeed, the majority's refusal to analyze the classification even on the basis of a minimum rationality test suggests that it may consider such classifications almost irrebuttably valid.

In the course of his opinion for the majority, Mr. Justice Black informed the appellants that their reliance on *Levy* and *Glona* was misplaced.[57] This probably surprised not only the appellants, but also various state supreme courts that had relied almost exclusively on *Levy* and *Glona* in striking down state laws that discriminated against illegitimates in the areas of support,[58] inheritance,[59] and wrongful death recovery.[60] Like the Supreme Court in *Levy* and

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Whether the mother can be penalized for failure to cooperate is questionable. Forcing her to divulge information concerning the birth may be compelling her to give inculpatory information in violation of the fifth amendment and may also infringe upon her right to privacy. *Cf.* Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969). Thus, a balance must be struck between protecting the rights of the child and the legitimate interests of the mother.

[54] *See, e.g.*, Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(14) (1964), which in defining "child" includes only acknowledged illegitimate children that are *dependent* upon the deceased, a requirement not imposed upon legitimate children. Turnbull v. Cyr, 188 F.2d 455, 457 (1951).

[55] Mr. Justice Brennan stated, however, that he need not reach this issue in light of his determination that the discrimination cannot stand even under the rational basis test. 401 U.S. at 551 n.19.

[56] *Cf.* Levy v. Louisiana, 391 U.S. 68, 81 (1968) (Harlan, J. dissenting).

[57] 401 U.S. at 535.

[58] Munn v. Munn, 168 Colo. 76, 450 P.2d 68 (1969) (father's duty to support his illegitimate child cannot differ substantially from the duty owed his legitimate child); R___ v. R___, 431 S.W.2d 152 (Mo. 1968) (prohibiting the denial of paternal support to illegitimates); Storm v. None, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (Fam. Ct. 1968) (prohibiting the denial to illegitimates of the same levels of paternal support accorded to legitimates). *But see* Baston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968) (illegitimate child has no right of action against his father for support apart from statute).

[59] *In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968) (invalidating a statute in which the right to inherit from maternal kin was denied to an illegitimate child of the mother and to the descendants of the mother's other illegitimate children).

[60] Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969) (allowing an illegitimate to recover for the wrongful death of his father). *See also* Herbert v. Petroleum Pipe In-

Glona, these courts failed to precisely define which equal protection test was being applied. Nonetheless, great reliance was placed on the "principles" of *Levy* and *Glona.*[61] For instance, the Supreme Court of North Dakota applied the principles of *Levy* in finding that a statute "which punishes innocent children for their parents' transgressions, has no place in our system of government, which has as one of its basic tenets equal protection for all."[62] Similarly, the Supreme Court of New Jersey, in extending recovery to an illegitimate child for the wrongful death of his father, stated that although *Levy* involved a mother and child, "the underlying principle must be that when children suffer serious injury by the wrongful death of a parent, their legitimacy is irrelevant to the tortfeasor's liability, and hence it is invidious to grant a remedy to the legitimate child and withhold it from the illegitimate child."[63] And the Supreme Court of Missouri, in overturning a well-established rule denying illegitimate children any support from their fathers, stated:

> The principles applied by the United States Supreme Court [in *Levy*] would render invalid state action which produces discrimination between legitimate and illegitimate children insofar as the right of the child to compel support by his father is concerned. Under the guise of discouraging illegitimacy, states may no longer cast the burden upon the innocent child.[64]

In *Labine,* the Court has apparently rejected these principles. This rejection might be explained by the fact that two of the Justices who formed the majorities in *Levy* and *Glona* have subsequently been replaced by Mr. Chief Justice Burger and Mr. Justice Blackmun. Not so easily explained, however, is the absence of sound analytical reasoning to justify the result in *Labine.* Regardless, the rejection of the principles of *Levy* and *Glona* casts doubt on the continued vitality of the state decisions following those cases, and is likely to inhibit any further expansion of the rights of illegitimate children.

spectors, Inc., 396 F.2d 237 (5th Cir. 1968) (per curiam) (holding that illegitimate minors were to be considered "children" under the Jones Act, 46 U.S.C. § 688 (1964), which allows recovery for the death of seaman).

[61] *See* text accompanying notes 9-12 *supra.*

[62] *In re* Estate of Jensen, 162 N.W.2d 861, 878 (N.D. 1965) (*see* note 59 *supra*).

[63] Schmoll v. Creecy, 54 N.J. 194, 199, 254 A.2d 525, 529 (1969).

[64] R___ v. R___, 431 S.W.2d 152, 154 (Mo. 1968).