THE EXPANDING RIGHTS OF THE ILLEGITIMATE

I. INTRODUCTION

The illegitimate has long occupied a disfavored position in the law.¹ In virtually every area of our jurisprudence in which the illegitimate has attempted to assert rights, he has been met with either legislation or court decision which have given him, at best, an inferior legal status.² Whether the legal interest advanced has been in the area of child support,³ wrongful death,⁴ inheritance,⁵ workmen's compensation,⁶ public housing,⁷ custody and visitation,⁸ or legal name,⁹ the illegitimate has consistently been de-


². In many states discriminations exist in the father-child relationship while the illegitimate child is accorded the same treatment as legitimate offspring in the mother-child relationship. Apparently this disparity has arisen from a problem of proof. Often there is no ready proof as to paternity of a child, while the question of maternity is rarely in doubt. See text at notes 111-17 infra. See, e.g., NEB. REV. STAT. § 30-109 (Reissue 1964) at note 112 infra.

³. Under the common law as applied in most states, the putative father owed no duty of support to his illegitimate child. See, e.g., State v. White, 363 Mo. 83, 248 S.W.2d 841 (1952); Carlson v. Bartels, 143 Neb. 680, 10 N.W.2d 671 (1943).

⁴. An illegitimate in some states can recover by statute for the wrongful death of his mother. See, e.g., Md. Ann. Code art. 67, § 4 (1957). However, in other states, such as Louisiana, the right to recovery was denied the illegitimate in all instances prior to the decision of Levy v. Louisiana, 391 U.S. 68 (1968).

⁵. Although in most states inheritance by the illegitimate child from his mother is permitted, he generally may not inherit from his father even where paternity was adjudicated in a prior proceeding. See cases and statutes cited in 6 POWELL, THE LAW OF REAL PROPERTY § 1003 (1969).


⁹. Although the father of the illegitimate generally does not have visitation rights, a few cases have granted such rights. See, e.g., Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965); People ex rel. Francois v. Ivanova, 14 App. Div. 2d 317, 221 N.Y.S.2d 75 (Sup. Ct. 1961).

¹⁰. A child's legal right to use his father's name is dependent solely upon his legitimacy. See Krause, Equal Protection for the Illegitimate, 65 MICH. L. REV. 477, 503-04 (1967).
ned rights perfunctorily accorded the legitimate child. Although such denials have been justified as being required by the dictates of history and paramount state interest, the underlying foundation would appear to be a judicial and legislative reluctance to place the imprimatur of legal sanction upon the product of a relationship which both the law and traditional morality condemns.

Until recently, in most jurisdictions, the classification of the illegitimate, for many purposes, as being "nulius filius," or the child of nobody, went unchallenged. Then, in 1968, the United States Supreme Court, in *Levy v. Louisiana*, held that a state's denial to an illegitimate child of the right to recover for the wrongful death of his mother, when a legitimate child was accorded such right, constituted an invidious discrimination against illegitimates and, therefore, was unsustainable under the equal protection clause of the Fourteenth Amendment.

At the present time the effect of *Levy* upon the rights of the illegitimate in areas other than wrongful death is unclear. Lower courts have generally found the *Levy* rationale to be controlling whenever an illegitimate has challenged a state law as being discriminatory. Indeed, one court has cited *Levy* as holding that any statute discriminating against an individual solely on the basis of his birth out of wedlock is violative of equal protection. However, a recent federal decision, again in Louisiana, held that a state law preventing certain illegitimates from taking as heirs under intestate succession laws was not violative of the federal constitution.

The issue now to be resolved is whether the equal protection clause of the Fourteenth Amendment prohibits virtually all state

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10. In feudal times the Church was at the forefront in punishing fornication and adultery, imposing especially severe penalties upon the child born from an adulterous relationship. See Ayer, *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 36-42 (1902).
11. See text at notes 102-17 infra.
14. 391 U.S. at 72.
discriminations against illegitimates. Since many state classifications discriminate in terms of illegitimacy, the resolution of that issue is not of little importance.

II. DEVELOPMENTS IN EQUAL PROTECTION— "FUNDAMENTAL RIGHTS" AND "SUSPECT CLASSIFICATIONS"

Equal protection, as embodied in the Fourteenth Amendment, requires "the protection of equal laws" to all persons.\(^{18}\) However, it has long been realized that, as a practical necessity, states must often resort to a system of classification to carry out the state's objectives.\(^ {19}\) Although state legislatures are allowed broad discretion in the selection of classes, the law must treat alike all who are equally situated.\(^ {20}\) Thus, the test for equal protection is often said to be whether a rational basis exists; the classifications established must not be arbitrary but must tend reasonably to further a valid state interest.\(^ {21}\)

Traditionally there has existed a strong presumption that discriminations\(^ {22}\) in state laws are founded upon adequate standards,\(^ {23}\) with a resulting heavy burden placed upon any challenger to demonstrate that a classification is in fact arbitrary.\(^ {24}\) However, the latitude of the state's prerogative to establish classifications, subject only to the requirement that they be rational and not arbi-

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18. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886): These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protections of equal laws.


22. A "discrimination" is, in the abstract, a "classification." As was stated in State v. Arkansas Louisiana Gas Co., 227 La. 179, 78 So. 2d 825, 827 (1955):

The word "discrimination" . . . without any context, merely means "The act of treating differently; treating one differently from another . . . ."

Thus, though perhaps some public misconception dictates otherwise, a discrimination is not per se invalid but is so only when it is unreasonable.


trary, has been judicially restricted when the state legislates in certain rather vaguely defined areas. Basically, these areas encompass two types of classifications, those affecting "fundamental personal rights" and certain "suspect classifications" based upon race, or nationality. In addition, several opinions seem to indicate that some classifications which discriminate on the basis of economic status are also "suspect."

Whether the legislation affects a "fundamental right" or involves a "suspect classification," the effect is the same, the tradi-
tional presumption of validity is no longer entertained, and the court examines the law and its operation with "exact ing scrutiny" to determine whether the statute can be sustained. In such cases the state has a heavy burden to demonstrate a "compelling governmental interest" that it is necessary to have such a statute, and that the system of classification is likewise necessary for achieving the statutory goals. However, the Court generally first examines the issue of classification and, if at all possible, avoids a determination of the necessity of the statute.

Whereas classifications under the traditional approach are invalidated because they are arbitrary, classifications aimed at the

appointed counsel for appeal when appeal was a matter of right); Griffin v. Illinois, 351 U.S. 12 (1956) (right to adequate appellate review). Thus, it would seem that the Court has yet to decide whether a classification discriminating against the impoverished is a violation of equal protection in the absence of the showing of the impairment of a fundamental right.

30. Kramer v. Union School Dist., 395 U.S. 621, 628 (1969): The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

31. In Korematsu v. United States, 323 U.S. 214, 216 (1944) the Court recognized that: "Pressing public necessity [here World War II] may sometimes justify [special treatment of a single or national group]."

32. In Shapiro v. Thompson, 394 U.S. 618, 634 (1969), the Court stated that when the "appellees were exercising a constitutional right, [the right to travel from state to state] . . . any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional."

33. See McLaughlin v. Florida, 379 U.S. 184 (1964), where the Court invalidated a statute which prohibited unmarried, interracial couples from habitually living in and occupying the same room in the night time. No identical statute proscribed similar conduct by members of the same race. The Court refused to discuss the validity of the ultimate question of whether Florida's prohibition against interracial marriages was constitutional. Id. at 195-96. Likewise in Oyama v. California, 332 U.S. 633 (1948), the Court invalidated classifications based on alienage which effectively discriminated against Japanese. Specifically involved was the unequal burden of proof required for a Japanese to rebut the statutory presumption that a transfer of realty from parent to son was not a gift but was intended for the benefit of the son. The Court refused to decide whether the entire statutory network, the Alien Land Law, was constitutional. See concurring opinions of Justices Black and Douglas at 647-50 and Justices Murphy and Rutledge at 650-74 and the dissenting opinion of Justices Reed and Burton, at 674-84. But cf. Korematsu v. United States, 323 U.S. 214 (1944), where the Court dwelled on the necessity, war and its effects, for justifying a law, without thoroughly examining whether the application of the law against all Japanese was necessary. See dissenting opinions of Justice Roberts at 225-33, Justice Murphy at 233-42, and Justice Jackson at 242-48; see also Comment, 18 Cin. L. Rev. 81 (1949).

34. See text at notes 21-24 supra.
"sensitive area" of human rights are invalidated because they are invidious. In essence, if a classification is aimed at either a "fundamental personal right" or at a "suspect area," the classification will, barring the showing of a compelling state interest, be invidious.

The extent of protection now afforded the illegitimate's rights by the Fourteenth Amendment is dependent upon which of the above equal protection standards is to be applied to the Levy case. If the traditional "rational basis" test is to be used, the effect of Levy is probably no greater than its narrow holding invalidating Louisiana's wrongful death statute as construed to deny a right of recovery by illegitimate children for the wrongful death of their mother. However, if the classification was struck down as affecting a "fundamental personal right" or as being "suspect," the effect of Levy could well pervade every area in which rights accorded the legitimate have been denied the illegitimate.

III. Levy v. Louisiana—"RATIONAL BASIS" OR "COMPELLING STATE INTEREST?"

In Levy, Justice Douglas, for the Court, cryptically stated that the test for equal protection was premised ultimately upon whether the line drawn was a rational one. Thus, some support is present

35. Webster's New International Dictionary 1190 (2d ed. 1959), defines "invidious" in several ways:
1) detrimental to reputation: DEFAMATORY,
2) likely to cause discontent or animosity or envy,
3) full of envious resentment: JEALOUS,
4a) of an unpleasant or objectionable nature: HATEFUL, OB-NOXIOUS,
b) causing harm or resentment: INJURIOUS.
All of the above definitions imply a personal reaction. These definitions were adopted by the court in Sanders v. Gray, 203 F. Supp. 158, 168 at n.9 (1962).
Also, it is obvious that a classification is invidious when directed at someone because of the type of person he is:
When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if ... a particular race or nationality had been selected for oppressive treatment.
37. See text at notes 3-9 supra.
within the opinion itself for regarding Levy as a traditional "rational basis" case. However, the nature of the case, the Court's conclusion, and the thrust of Douglas' reasoning point toward the "compelling interest" theory.\(^{39}\) While admitting that the states are given extensive latitude when classifying for social and economic purposes,\(^{40}\) Douglas noted that the Court has been "extremely sensitive" when discussing basic civil rights, having "not hesitated to strike down an invidious classification even though it had history and tradition on its side."\(^{41}\)

Also, as support for the invalidation of the Louisiana statute on equal protection grounds Douglas posed three rhetorical questions:

> 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? . . . How under our constitutional regime can he be denied . . . rights which other citizens enjoy?\(^{42}\)

The opinion also laid stress on the fact that an illegitimate's responsibilities as a citizen are the same as those for any other citizen.\(^{43}\) Furthermore, "[I]egitimacy or illegitimacy of birth has no relation to the nature of the wrong . . . inflicted on the mother."\(^{44}\) In addition, Douglas concluded that the discrimination was invidious "when no action, conduct or demeanor of [the illegitimate's] is possibly relevant to the harm that was done the mother."\(^{45}\) The cumulative effect of the foregoing seems to be that virtually no state interest could justify the statutory discrimination against the illegitimates in Levy. In short, the classification could be salvaged

\(^{39}\) A classification under the traditional approach is invalid because it is arbitrary, under the "compelling interest" approach because it is invidious. (See text at notes 18-36 supra.) The test under the traditional approach is whether a "rational basis" exists (see text at 21 supra); the test under the "compelling interest" approach is whether there is a necessity for the classification (see text at note 31 supra). Thus, Justice Douglas' conclusion that the classification was invidious indicates that the test he was applying was the "compelling interest" test of necessity or justification. However, Justice Harlan was strongly critical of the classification of Levy as a "compelling interest" case. (See text at notes 46-48 infra.)


\(^{41}\) 391 U.S. at 71 (citation omitted).

\(^{42}\) Id.

\(^{43}\) Id.

\(^{44}\) Id. at 72.

\(^{45}\) Id. (footnote omitted).
only by the showing of a “compelling state interest.”

Justice Harlan, in dissent, also noted the existence of “inherently suspect” classifications but determined that such classifications were inapplicable to the facts of the *Levy* case:

The Equal Protection Clause states a complex and difficult principle. Certain classifications are “inherently suspect,” which I take to mean that any reliance upon them in differentiating legal rights requires very strong affirmative justification. The difference between a child who has been formally acknowledged and one who has not is hardly one of these.

To Justice Harlan, the denial of rights to the illegitimate in *Levy* was but one method by which the state chose to enforce compliance with its marriage laws. In effect, the approach of the dissent was that under traditional equal protection standards the Court could not interfere with the constitutionally presumed classification.

If Justice Harlan’s categorization of *Levy* as a traditional “rational basis” case is correct, then his criticism of the majority opinion as being a “constitutional curiosity” “reached by a process that can only be described as brute force” is justified. However, solid underpinnings of constitutional law may be seen to exist for the majority’s seemingly enigmatic opinion.

### A. *Levy*—“FUNDAMENTAL RIGHT?”

Except for some introductory propositions of law from “compelling interest” cases, the text of Douglas’ central argument in *Levy* is notable for its lack of clear-cut support from analogous decisions. However, an examination of the “compelling interest”
theory suggests that Levy could be justified as falling within the penumbra of either of the "compelling interest" equal protection categories previously mentioned.

Language supporting the categorization of Levy as involving a "fundamental personal right" is found in Douglas' discussion of the contrast between the traditional equal protection approach and the "compelling interest" doctrine:

In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications . . . . However that might be, we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side.52

In support of the above, Justice Douglas cited Skinner v. Oklahoma,53 a case in which the right to procreate was deemed to be a "basic civil right" which could be denied only upon the showing of a "compelling state interest." Thus, Douglas' rather oblique references to "extreme sensitivity" and "basic civil rights" provide evidence, by way of analogy to prior "fundamental right" cases, that he regarded Levy as also involving a "fundamental right."

Also, a recent examination of equal protection cases involving a "fundamental personal right" indicates that the more exacting scrutiny given these cases by the Court may be due to several factors.54 Among the factors mentioned were: (1) the Court's greater competency in dealing with personal, rather than economic interest—the latter requiring knowledge of local conditions outside the scope of the Court's ability;55 (2) a belief by the Court that the rights involved are simply more important than others;56 (3) a recognition that any restriction on the ability to participate in the political process is an interference with a right which is fundamental57 (clearly inapplicable to the facts of Levy); and (4) the fact that the detriment caused by the classification is so severe as to warrant the Court's "close scrutiny."58 Of these factors, the last was deemed the most persuasive and the most logical explanation

in which Douglas argues the case for equal protection for the illegitimate he fails to cite any specific cases to support his conclusions.

52. 391 U.S. at 71 (citations omitted).
55. Id. at 1128-29.
56. Id. at 1128.
57. Id. at 1129.
58. Id. at 1130-31.
of the decisions examined. 59

The factors established by the examination discussed above provide additional basis for categorizing the rights in Levy as involving a “fundamental personal right.” Since the rights present in Levy were of a personal nature, 60 the classification of those rights as being “fundamental” would clearly fall within the purview of the Court’s competence. Also, the right of a child to be legally identified as such is perhaps a more important right than rights accorded on a purely economic basis. 61 Similarly, the repercussions from the denial of that right would seem to effect a detriment sufficient to meet the severity test deemed to be most explicative of the “fundamental right” cases. 62

The impact of the above discussion is that support exits both from language within the opinion itself and from an analysis of other “fundamental personal right” cases for viewing Levy as involving a “fundamental right.” However, a more difficult problem is encountered upon an attempt to identify that right. Certainly, the right to bring suit under a wrongful death statute could hardly be deemed to be fundamental since, presumably, the legislature could abolish such right. If there is in fact a “fundamental right” in Levy, it must flow from a more immutable source than the whim of the legislature.

Identification of a “fundamental personal right” is in general and specifically in Levy, a problem which is compounded by a lack of judicial clarity in the decisions wherein the question has been examined. The cases involving a “fundamental personal right” have been dealt with on an ad hoc basis, and, thus, formulation of a precise definition is impossible. 63 However, personal interests which have been identified as fundamental and subject to “compelling interest treatment” include voting, 64 procreation, 65 rights with respect to criminal procedure, 66 the right to travel from state

59. Id. at 1130.
60. Justice Douglas stated in Levy: The rights asserted here involve the intimate, familial relationship between a child and his own mother.” 391 U.S. at 71.
61. See text at notes 55, 56 supra.
62. See text at notes 58, 59 supra.
to state,67 and, under some circumstances, education.68

Levy does not fall clearly within the purview of any one of the above categories of cases which have evoked the “fundamental personal right” doctrine. However, since the Court has chosen to apply the doctrine in many cases without clearly articulating its reasons for doing so,69 those categories should be regarded merely as examples of the type of rights or interest which will require “compelling interest” treatment rather than as an exclusive enumeration of those rights which alone will qualify for such treatment. Consequently, the question for resolution narrows itself to whether the rights involved in Levy are within the penumbra of that general type of interest which has been held to be “fundamental” in other equal protection cases.

Although in Shapiro v. Thompson70 some indication is present that recognized constitutional rights are included within the scope of “fundamental rights,” and that “any classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional,”71 no recognized constitutional right can be identified in Levy. However, Justice Douglas’ analysis as presented in Levy appears to suggest that when rights are accorded on the parent-child relationship, such rights should be given to anyone who can show such a relationship.72 For the state to deny the existence of this intimate, natural relationship, created by birth but not formalized by compliance with statutory procedure, is arbitrary.

The import of Douglas’ emphasis upon the relationship of the children in Levy to their mother seems to be that biologically, whoever is conceived in the womb of a woman is the child of that woman, and that a state is powerless to alter this relationship through employment of a legal fiction.73 Levy does not prohibit a state’s classifying one born out of wedlock as an illegitimate.74

69. See text at note 63 supra.
71. Id. at 634.
72. See note 60 supra.
   To 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 Clause necessarily limits the authority of a State to draw such “legal” lines as it chooses.
For discussion of the Glona case see the text at notes 103-07 infra.
74. One born out of wedlock is still an illegitimate under state law.
However, it is one thing to declare that one is an illegitimate, but quite another to declare that, because he is an illegitimate, he is not a child of his mother. Accordingly, if rights are premised on the parent-child relationship, the state is precluded from denying the existence of that relationship merely because it was not created in a "legally" authorized manner. If the particular individual is, in biological terms, the child of his mother, equal protection demands that he have whatever legal rights would accrue to him but for his parents' failure to formalize their relationship, unless some conduct of the illegitimate child warranted different treatment.

Admittedly, the attempt to identify a "fundamental personal right" in Levy is akin to groping for the proverbial needle in a legal haystack; however, application of the "suspect classification" theory to the facts of Levy may provide a sounder equal protection basis for extension of the illegitimate's rights.

B. Levy—"Suspect Classification?"

As aforementioned, certain "suspect classifications" are also constitutionally proscribed unless sustained by a "compelling state interest." Of these "suspect classifications", classifications based on race or color are, of course, most closely scrutinized since the Fourteenth Amendment was specifically designed to prohibit discrimination because of color or race. Race or color is "constitutionally an irrelevance," in short, skin color is not significant in the determination of how men should be treated under the law.

Since classifications engendered by race have been struck down because the underlying legislative motive was concluded to be

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75. This, of course, presents solely a problem of proof. Unless one can prove existence of the parent-child relationship, he has no standing to bring an action. See text at notes 111-17 infra.

76. When an illegitimate happens to be within another class, a state may discriminate against that class but not because of the presence of the illegitimate. For instance, in intestacy a discrimination may validly hinder unascertainables since such a discrimination is not aimed at one because of the accident of his birth but simply for the reason that his existence or claim is not discoverable. Thus, if an illegimate is unascertainable in an intestacy distribution, discrimination is valid because he is not ascertainable but not because he is illegitimate. (See text at notes 135-42 infra.)

77. See text at notes 25-36 supra.


79. Edwards v. California, 314 U.S. 160, 185 (1941) (concurring opinion); see note 28 supra for the complete statement.
prejudice and hate totally unrelated to the general welfare of the state as a whole,\textsuperscript{80} and since such classifications denote inferiority of that group, classifications premised upon illegitimacy of birth may be invalidated as invidious for analogous reasons.

Also, several cases involving the rights of Orientals are replete with language indicating that when prejudice and antagonism were prevalent in treating a racial or national class differently, the classification could not be sustained. Only when an emergency existed was there justification, but then the classification was upheld only because the emergency made such action necessary, not because prejudice toward the group was found to be legally tolerable.\textsuperscript{81}

In \textit{Yick Wo v. Hopkins},\textsuperscript{82} although Chinese were not discriminated against in direct terms, the statute was “applied and administered by public authority with an evil eye and an unequal hand,” resulting in unjust treatment.\textsuperscript{83} In \textit{Korematsu v. United States},\textsuperscript{84} Justice Black declared:

Our task would be simple, our duty clear, were this a case involving imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . . Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . . .\textsuperscript{85}

Likewise, in \textit{Oyama v. California},\textsuperscript{86} it was held that “rights of a citizen may not be subordinated merely because of his father’s country of origin.”\textsuperscript{87} To the same effect in \textit{Takahashi v. Fish & Game Commission}:\textsuperscript{88}

It [the discrimination] is directed in spirit and effect solely against aliens of Japanese birth. It denies them . . . rights . . . only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain

\begin{itemize}
  \item \textsuperscript{81} \textit{See Korematsu v. United States}, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). Even though there is no equal protection clause in the Fifth Amendment similar to that in the Fourteenth, the Court has not hesitated to apply these principles to federal laws. In this connection, see \textit{Bolling v. Sharpe}, 347 U.S. 497 (1954).
  \item \textsuperscript{82} 118 U.S. 356 (1886).
  \item \textsuperscript{83} Id. at 373-74.
  \item \textsuperscript{84} 323 U.S. 214 (1944).
  \item \textsuperscript{85} Id. at 223.
  \item \textsuperscript{86} 332 U.S. 633 (1948).
  \item \textsuperscript{87} Id. at 647.
  \item \textsuperscript{88} 334 U.S. 410 (1944).
\end{itemize}
powerful interests.\textsuperscript{89}

Although, as previously mentioned, most of the framers of the Fourteenth Amendment probably intended to insure complete equality for the Negro only,\textsuperscript{90} shortly after the amendment became the law of the land, public concern arose as to how far the law extended.\textsuperscript{91} The argument that seems to have gained much popular support at the time was the idea that civil equality did not necessarily imply social equality.\textsuperscript{92} Hence, the acceptance by the Court of the "separate but equal" doctrine in permitting segregation.\textsuperscript{93}

However, when the Supreme Court reversed itself in 1954 and denounced the "separate but equal" approach, the thrust of the Court's argument was that separating black and white children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."\textsuperscript{94} The Court continued, quoting from the lower court decision: "... for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."\textsuperscript{95} Similarly, state imposed discriminations against the illegitimate could well generate "feelings of inferiority" that would "affect their hearts and minds" permanently. Also, the discrimination without question denotes the inferior status of the illegitimate.

Undeniably, the illegitimate has received disfavored treatment at the hands of our society and law.\textsuperscript{96} It is apparent that the hatred of his parents' "sin" has carried over to brand the illegitimate as inferior.\textsuperscript{97} Consequently, the grouping together of illegitimates and treating them in a different manner than legitimates would

\textsuperscript{89} Id. at 422 (concurring opinion).
\textsuperscript{90} See Frank and Munro, The Original Understanding of "Equal Protection of the Laws", 50 COLUM. L. REV. 131, 148 (1950).
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 149, where a statement by Senator Pratt of Indiana (see 2 CONG. REC. 4082 (1874)) was paraphrased:
Normally the hotel keeper's responsibility not to discriminate was explained in terms of a distinction between taking a Negro into the hotel or dining room, as distinguished from putting him into a particular room or at a particular table: the hotel keeper's obligation to take customers rested on law, but the right to choose one's own table-mate was "social."
\textsuperscript{93} Gong Lum v. Rice, 275 U.S. 78 (1927) (education); Plessy v. Ferguson, 163 U.S. 537 (1896) (transportation).
\textsuperscript{95} Id.
\textsuperscript{96} See notes and text at notes 1-12 supra.
appear to be, in effect, indistinguishable from grouping members of a specific race and treating them separately. The enmity in each instance is predicated on circumstances of birth over which neither had any control. Such a classification can be justified only when there is a strict necessity for the classification.

In short, the “lineage” decisions cited above invalidated discriminations that provided for unequal treatment because of ancestral heritage. The landmark decision of Brown v. Board of Education demanded similar equality for the races. The rationale of these cases, though perhaps not stated with the illegitimate in mind, would nevertheless be relevant to his situation as well. This view of the “suspect classification” doctrine was recently reinforced by a comment which stated that:

[T]he question whether opprobrium readily attaches to a particular classification may be the touchstone to predicting what other congenital and unalterable traits will be viewed as suspect in the future. Illegitimacy of birth, for example, would be a likely candidate under this formulation.

Again, due to the cryptic nature of the majority opinion in Levy, the theory propounded herein is based on a certain amount of speculation. However, it is evident that in Levy the “compelling interest” test of equal protection was applied and, in that light, the justification of Levy as being a “suspect classification” case is merited.

IV. THE EFFECT OF LEVY

Although the general mandate of Levy is that a state cannot establish discriminations against individuals solely on the basis of their birth out of wedlock, two questions remain: whether

98. See text at notes 78-89 supra. Another example of the parallel between prejudice based on nationality and discrimination against the illegitimate can be seen from the following language found in Oyama v. California, 332 U.S. 633, 646 (1948), quoting from Hirabayashi v. U.S., 320 U.S. 81, 100 (1943), the Court stated:

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

This language also has relevance to the problems of the illegitimate because discriminations are levied against him solely because of the conduct of his parents (ancestors).


101. See text at note 38 and note 51 supra.

102. See text at notes 105-17 infra.
a state could, under any circumstances, show a "compelling interest," and whether the Levy decision can be limited to the mother-child relationship.

Glona v. American Guarantee and Liability Insurance Co.,\textsuperscript{103} decided on the same day as Levy, casts doubt on the validity of the traditional argument offered in support of legal discrimination against the illegitimate, that is, discouragement of the relationship which conceives the illegitimate. The Court in Glona dealt with the same Louisiana statute\textsuperscript{104} involved in Levy, which, in Glona, had been construed to deny the right of a mother to recover for the wrongful death of her bastard son. Respecting the state argument in support of the classification, the Court said:

\begin{quote}
[W]e see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death.\textsuperscript{105}
\end{quote}

Thus, the Court summarily rejected the age-old thesis that denial of rights to the illegitimate will have a preventive effect upon illicit relationships.

Also, Douglas noted that on the whole, Louisiana's treatment of illegitimates was inconsistent.\textsuperscript{106} In some instances the illegitimate was accorded the same rights as the legitimate child, in others he was not.\textsuperscript{107} The effect of Douglas' discussion of the basis for the state's system of classification of legitimate and illegitimate

\begin{footnotes}
\item[103] 391 U.S. 73 (1968).
\item[104] LA. CIV. CODE ANN. art. 2315 (Supp. 1967).
\item[105] 391 U.S. at 75.
\item[106] 391 U.S. at 74-75.
\item[107] Id. Douglas stated:
Louisiana follows a curious course in its sanctions against illegitimacy. A common-law wife is allowed to sue under the Louisiana wrongful death statute. When a married woman gives birth to an illegitimate child, he is, with a few exceptions, conclusively presumed to be legitimate. Louisiana makes no distinction between legitimate children and illegitimate children where incest is concerned. A mother may inherit from an illegitimate child whom she has acknowledged and vice-versa. If the illegitimate son had a horse that was killed by the defendant and then died himself, his mother would have a right to sue for the loss of that property. If the illegitimate son were killed in an industrial accident at his place of employment, the mother would be eligible for recovery under the Louisiana Workmen's Compensation Act, if she were a dependent of his. Yet it is argued that since the legislature is dealing with "sin," it can deal with it selectively and is not compelled to adopt comprehensive or even consistent measures. (footnotes omitted)
\end{footnotes}
children was to inquire as to why Louisiana chose to discriminate against the illegitimate in only certain areas of the law if the purpose of the discrimination was truly to discourage illegitimacy. In short, if the state was really promoting a "compelling interest" through the discrimination, the classification between legitimate and illegitimate would pervade all areas of the law in which such classification could occur.

Similarly, other arguments advanced in support of the discrimination against illegitimates as a "compelling state interest" lack sufficient basis to withstand the "compelling interest" test. For instance, although it may be said that such discriminations are consistent with the father's probable desire not to recognize the child as his, such desire is hardly sufficient to validate the classification as being a "compelling state interest." Other even less plausible reasons have been advanced as justification for treating illegitimates as being legally inferior to legitimate children, however, such reasons would probably not be sufficient even under the traditional rational basis test.

At first glance the problem of proof created by according the illegitimate rights coequal with those of the legitimate child could seem to justify "compelling interest" treatment. This problem is also advanced as providing sufficient reason to at least limit the effect of Levy to discriminations against the illegitimate within the mother-child relationship only.

In many states the problem of proof has long been recognized, at least in a de facto sense, by legislation and court decisions which granted a child born out of wedlock greater rights against his mother than as against his father. Undeniably the basis for

108. For a general discussion of the arguments advanced in support of state discrimination against the illegitimate see Krause, Equal Protection for the Illegitimate, 65 MICH. L. REV. 477, 489-500 (1967).
110. See text at notes 123-40 infra.
111. The problem of proof is particularly difficult in the area of inheritance. If the parent from whom the illegitimate is alleging a right to inherit is dead, evidence sustaining or negating the child's claim may have perished with the death of the parent.
112. See, e.g., NEB. REV. STAT. § 30-109 (Reissue 1964), which places a heavier burden of proof upon the illegitimate child "taking" from his father rather than from his mother by providing that:
Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as an heir of his mother, and shall inherit his or her estate in whole or in part, as the case may be, in the same manner as if he had been born in lawful
different treatment has centered on the difficulty of proving pa-
ternity. History has shown that the identity of an illegitimate's
mother is rarely in dispute, while a determination of "who is the
father?" is oftentimes dependent upon legal proceedings for settle-
ment.113

Keeping in mind that Levy enables a state to discriminate
against illegitimates only upon the showing of a "compelling inter-
est,"114 the problem of proof becomes merely a question of the
degree of proof. As recognized by Justice Douglas in Glona:

Opening the courts to suits of this kind may conceivably
be a temptation to some to assert motherhood fraudu-
ently. This problem, however, concerns burden of proof.115

Although the degree of the difficulty of proof will generally, of
course, be greater in attempting to establish the father-child rela-
tionship, it remains, as indicated by the Court in Glona, simply a
problem of the degree of the burden of proof, not sufficient in
itself to validate the discrimination against the illegitimate as a
"compelling state interest."116 Thus, it would appear to follow that
any person who can establish parentage—either paternity or ma-
ternity—must be accorded the same rights as any other child of
the parent. As a corollary, the ultimate effect of Levy will dictate
that each state must establish machinery whereby a claimant can
attempt to prove the identity of a parent.117

V. POST-LEVY DECISIONS

Early decisions post-dating Levy and Glona have generally

wedlock; but he shall not be allowed to claim, as representing his
father or mother, any part of the estate of his or her kindred, either
lineal or collateral, unless, before his death, his parents shall
have inter-married and had other children, and his father, after
such marriage, shall have acknowledged him, as aforesaid, or
adopted him into his family, in which case such child and all
legitimate children shall be considered as brothers and sisters,
and on the death of either of them intestate, and without issue,
the other shall inherit his estate, and the heirs, as hereinbefore
provided, in like manner as if all the children had been legitimate,
saving to the father and mother respectively their rights in the
estate of all such children as provided hereinbefore, in like manner
as if all had been legitimate.

114. See text at notes 51-63, 77-100 supra.
115. 391 U.S. at 76.
116. See text at note 122 infra.
converged with the above conclusion whether the cases have involved rights flowing from the mother-child or father-child relationship. However, these cases have merely cited Levy as controlling authority and have failed to elaborate on the problems created by the enigmatic character of the Supreme Court decisions. Nevertheless, whether the area of law has been support, wrongful death of father, or intestate succession, an illegitimate has been accorded equal treatment in the lower courts. This pervasive effect of Levy and Glona is not surprising since, as noted by Chief Justice Warren in the most recent “compelling interest” case:

[W]e have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation.

However, in spite of the general trend of viewing Levy and Glona as controlling whenever state discrimination against illegitimates is challenged, at least two recent cases have reached a contrary result.

118. See cases cited in note 15 supra.
119. R. v. R., 431 S.W.2d 152 (Mo, 1968); Storm v. None, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (1968). See also Munn v. Munn, — Col. —, 450 P.2d 68 (1969). Cf. King v. Smith, 392 U.S. 309 (1968), in which a state’s attempt to prohibit federal welfare aid to children whose mother was cohabiting with a man not her husband was thwarted. Although the majority reached its conclusion on the basis of statutory interpretation, Mr. Justice Douglas, in a concurring opinion, stated that the rationale of Levy was applicable:

[T]he needy family is wholly cut off from AFDC assistance without considering whether the mother’s paramour is in fact aiding the family, is financially able to do so, or is legally required to do so. Since there is “sin,” the paramour’s wealth or indigency is irrelevant.

In other words, the Alabama regulation is aimed at punishing mothers who have non-marital sexual relations. The economic need of the children, their age, their other means of support, are all irrelevant. The standard is the so-called immorality of the mother. (footnote omitted.)

The other day in a comparable situation we held that the Equal Protection Clause of the Fourteenth Amendment barred discrimination against illegitimate children. We held that they cannot be denied a cause of action because they were conceived in “sin,” that the making of such a disqualification was an invidious discrimination. Levy v. Louisiana [391 U.S. 68]. I would think precisely the same result should be reached here. I would say that the immorality of the mother has no rational connection with the need of her children under any welfare program.

392 U.S. at 336.
In a decision rendered shortly after *Levy* was decided, the Ohio supreme court by a four to three vote, declared that an illegitimate whose mother had married a man not his father, had no civil right to support from his father under Ohio law, even though the father could be subjected to criminal liability for nonsupport.\(^1\)\(^2\)\(^3\) Rejecting the applicability of *Levy*,\(^1\) the court discussed the argument that illegitimate and legitimate offspring must be treated equally for support purposes because each are similarly situated as to need.\(^1\)\(^2\)\(^3\) The Court's conclusion was that an obligation to support a child arises only from a voluntary contract of marriage between the partners:

That contract includes, by way of well understood tradition and custom, the promise by the husband to support children which may result from this relationship which is favored by the law and public policy.\(^1\)\(^2\)\(^3\)

The Ohio court apparently took the same approach as the dissenting opinion in *Levy* and *Glona*, that is, the state could show a rational basis for making the discriminatory classification because support had customarily arisen from the contract of marriage.\(^1\)\(^2\)\(^3\)

The difficulty with the Ohio decision is its failure to recognize that a “compelling interest” situation was involved. The clear impact of *Levy* is inescapable—whenever a discrimination is based upon illegitimacy, the state must not only show a rational basis for making the classification but must go further and demonstrate that such classification is necessary and based upon a “compelling interest” of the state's.\(^1\)\(^2\)\(^3\)

*Strahan v. Strahan*,\(^1\)\(^2\) a recent federal decision, apparently recognized that classifications based upon illegitimacy did require strong justification in order to be sustained. However, it was the court's conclusion that Louisiana could demonstrate a powerful, overriding necessity for the classification.\(^1\)\(^8\) The case considered

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\(^{123}\) Baston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968).
\(^{124}\) Id., 239 N.E.2d at 63. The court explained that the present case had been argued before *Levy* was decided but that *Levy* was inapplicable in any event because in *Levy* the mother-child relationship only was involved.
\(^{126}\) Baston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62, 63-64 (1968).
\(^{127}\) See text at notes 46-49 supra.
\(^{128}\) See text at notes 30-33 supra.
\(^{130}\) The Court spoke not in terms of valid state interests but rather of paramount interests in defending Louisiana's authority to discriminate against illegitimates: "Louisiana has a paramount interest in encouraging the institution of marriage . . . ." Later the court stated that "the State has an even more powerful overriding and paramount reason for denying
whether an illegitimate should have a right of inheritance from his father coequal with his father's legitimate heirs.

Strahan reiterated and approved the traditional justification in support of state discrimination against those born out of wedlock, that of encouraging marriage while discouraging illegitimacy.\footnote{131} But the Strahan court appeared to recognize the frailty of the "sin" argument\footnote{132} and relied on "an even more powerful overriding and paramount reason for denying this right . . . the state's indisputable vital interest in the stability of its land titles."

In effect, this language suggests that the court is emphasizing that the purpose of the law is to promote a "compelling state interest."

Although Louisiana may be able to demonstrate a "compelling state interest" in preserving the stability of land titles, the court in Strahan nevertheless failed to show a corresponding need for an illegitimacy classification.\footnote{134} In support of its "land title" argument Strahan relied extensively on early Supreme Court decisions\footnote{135} in the area. The court, quoting from one such case, stated, "[u]ndisclosed and unknown claimants, are, to say the least, as dangerous to the stability of titles as other classes."\footnote{136}

Although this statement is quite true, a fear of "undisclosed and unknown claimants" is the reason that probate laws of the various states require notice to be given so that all such claimants to the estate of the deceased, whether by will or by intestacy, may come forth.

\begin{itemize}
  \item \footnote{131} Strahan v. Strahan, No. 14,120, at 3 (W.D. La. Sept. 22, 1969).
  \item \footnote{132} Id. at 4; cf. discussion at notes 103-07 supra.
  \item \footnote{133} Id.
  \item \footnote{134} See text at note 32 supra.
  \item \footnote{135} United States v. Burnison, 339 U.S. 87 (1950); Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946); Irvington Trust Co. v. Day, 314 U.S. 556 (1942); American Land Co. v. Zeiss, 219 U.S. 47 (1911); Hamilton v. Brown, 161 U.S. 256 (1896); United States v. Fox, 94 U.S. 315 (1876); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).
\end{itemize}

The court buttressed its "land title" argument by quoting further from Zeiss, supra, at 62-63:

This principle received recognition and was applied in Hamilton v. Brown, 161 U.S. 256 [1896], where it was held to be competent for a state to make provision for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to property upon the death of a person leaving such property within the State . . .

The power of the State as to titles should not be limited to settling them as against persons named. In order to exercise this power to the fullest extent, it is necessary that it should be made to operate on all interests, known and unknown.

and assert their claims for settlement or adjudication.\textsuperscript{137} Failing this, upon the termination of the probate proceedings, they are forever barred from further action.\textsuperscript{138}

Accordingly, if the justification for the statute is the exclusion of those who are not known or whose identity cannot reasonably be discovered, what logical basis exists for limiting the classification to illegitimates? Surely there may exist other classes whose claims may not be known, \textit{i.e.}, creditors, persons claiming under an alleged will, undiscovered legitimate children by a hitherto unknown marriage. To single out the illegitimate, when he can be ascertained as a child of the decedent, is invidious.

Moreover, if the illegitimate proves his claim of parent-child relationship before the estate is probated and asserts his claim within the same period of time, the state would not necessarily be swamped with chaos as to realty titles within its confines.\textsuperscript{139} Were the illegitimate, plainly the child of the decedent, remiss in asserting his claim to share in succession before probate, of course his claim, like that of any other ascertainable person, would be forever barred.\textsuperscript{140} To equate illegitimacy with unascertainability is clearly illogical.\textsuperscript{141} To deny rights under the guise that the two are synonymous is, under the Levy approach, invidious.\textsuperscript{142}

\textbf{VI. CONCLUSION}

Levy and Glona apparently proscribe virtually all state discriminations against a child born out of wedlock, even in regard to intestate succession.\textsuperscript{143} Although numerous arguments may be posed in aid of justification of state classifications disfavoring illegitimates, conception of such argument as would promote a "compelling state interest" is difficult.

As previously noted, the illegitimate has long been accorded an inferior status under our law.\textsuperscript{144} Whether the Supreme Court's

\begin{itemize}
\item \textsuperscript{137} \textit{E.g.,} Neb. Rev. Stat. § 30-603, -604, -605 (Reissue 1964).
\item \textsuperscript{138} \textit{E.g.,} Neb. Rev. Stat. § 30-609 (Reissue 1964).
\item \textsuperscript{139} Thus, if the "illegitimate" is unable to prove the parent-child relationship, it necessarily follows that his cause of action also fails. Cf. Krause, \textit{Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity}, 36 U. Chi. L. Rev. 338, 344 (1969).
\item \textsuperscript{140} \textit{See} text and note at note 138 supra.
\item \textsuperscript{141} Such an attempt has been termed "underinclusion" by Tussman and tenBroek in \textit{The Equal Protection of the Laws}, 37 Cal. L. Rev. 341, 348-51 (1949). \textit{See also} Comment, \textit{Developments in the Law—Equal Protection}, 82 Harv. L. Rev. 1065, 1084-86 (1969).
\item \textsuperscript{142} \textit{See} text at notes 24-36 supra.
\item \textsuperscript{143} \textit{See} text at notes 109, 129-42 supra.
\item \textsuperscript{144} \textit{See} note and text at note 1 supra.
\end{itemize}
opinions in Levy and Glona are to be treated as being premised on the "fundamental personal right" or "suspect classification" categories of the "compelling interest" theory of equal protection, the effect of those decisions is the same—no state can create classifications discriminating against illegitimates "when no action, conduct, or demeanor of theirs is possibly relevant" to the status accorded them by the state]."

The Supreme Court, through Levy and Glona has determined that, at least in the eyes of the Constitution, the illegitimate is no longer "nulius filius," that the following questions posed long ago are now legally irrelevant:

Why bastard? wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?

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146. See text following note 12 supra.