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Inheritance Rights of Illegitimate Children under the Equal Protection Clause

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Inheritance Rights of Illegitimate Children Under the Equal Protection Clause*

I. INTRODUCTION

The assimilation of the bastard into modern society has not been accomplished with all deliberate speed.[1] This is not to say that the illegitimate child has been without spokesmen; even Shakespeare spoke out for him.[2] Nevertheless, the bastard has remained the victim of society's scorn to this day.

The legal posture of the illegitimate child in the United States has been a topic of extensive research and discussion. The purpose of this Note is to examine the most recent development in this area—the extension of equal protection under the fourteenth amendment to the illegitimate child, the effect of this extension on his right to inherit wealth from his natural ancestors and its implications for estate planners.

II. EXISTING LEGAL BARRIERS TO INHERITANCE BY THE ILLEGITIMATE CHILD

Intestate inheritance rights have developed very slowly and sporadically for the illegitimate child. At common law, he was denied the right to inherit under any circumstances,[3] the apparent rationale being to discourage promiscuity.[4] The obvious in-

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1. *See* Gray & Rudovsky, *The Court Acknowledges the Illegitimate*, 118 U. OF PA. L. REV. 1 (1969); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana*, 36 U. CHI. L. REV. 338 (1969); Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829 (1966).

2. "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?" William Shakespeare, as quoted by Justice Douglas in Levy v. Louisiana, 391 U.S. 68, 72 n.6 (1968).

3. 10 AM. JUR. 2D, *Bastards* § 146 (1963). The illegitimate child was considered to be *nullius filius* (son of nobody) and therefore possessed of no rights of inheritance. 2 KENT, COMMENTARIES 228 (11th ed. 1867).

4. Note, *Illegitimacy*, 26 BROOKYLN L. REV. 45, 47 (1960); 2 KENT, COMMENTARIES 227, 228 (11th ed. 1867). For some time legal writers have criticized the classification as being unreasonable, arbitrary and ineffective. The majority of the writers feel that the statutes are completely out of step with society but few suggest that the entire classification should be completely eradicated. *See generally* Gray & Rudovsky, *supra* note 1; Krause, *supra* note 1; Krause, *Equal Protection for the Ille-*

equity of punishing the child for the transgressions of his parents was apparently considered necessary to accomplish the social objective.

While the common law rule has been modified in every jurisdiction[5] due to the realization that such an arbitrary rule is both undesirable and ineffective, the illegitimate child continues to be the target of discrimination. This discrimination takes the form of both outright prohibitions of inheritance by an illegitimate child, and restrictive judicial interpretations of the words "child" and "issue." Instances of discrimination may be classified into three general categories: 1) intestate succession statutes, 2) pretermitted heir statutes and 3) testamentary instruments. The fact that the relevant policy considerations are different for each context has given rise to a lack of uniformity in the interpretations.

A. INTESTATE SUCCESSION STATUTES

The "estate plans" which are responsible for the disposition of most estates in the United States are the various intestate succession statutes. The justification for such statutes is that they provide for the orderly passing of property which has not been disposed of by the decedent, and they do so in a manner that represents the plan the decedent most probably would have chosen had he expressed his desires on the matter.[6]

While all states have disregarded the harsh common law rule to some extent, the bastard is not treated with uniformity. Some states give the illegitimate child little more than the right to inherit from his mother,[7] while other states[8] give him all the inheritance rights which are enjoyed by legitimates. The great majority of states fall in between. Usually they grant the child the right to inherit from his mother unconditionally, and from his father if the father acknowledges or legitimizes the child in the manner prescribed by statute.[9] Five states give the illegitimate child the right to inherit from his father on the basis

gitimate, 65 MICH. L. REV. 477 (1967); Note, *Proposals For Change in Pennsylvania's Treatment of the Illegitimate*, 29 U. PITT. L. REV. 566 (1968).

5. Note, *Illegitimacy*, *supra* note 4, at 74-79.

6. Krause, *supra* note 4, at 492.

7. *E.g.*, 20 PA. STAT. ANN. § 1.7 (1964); GA. CODE ANN. §§ 113-904, 905 (1959).

8. ARIZ. REV. STAT. ANN. § 14-206 (1956); ORE. REV. STAT. § 109.060 (1968).

9. *E.g.*, MINN. STAT. §§ 525.172, 525.173 (1947); COLO. REV. STAT. ANN. § 152-2-8 (1963).

of a suit brought by the mother against the father for child support.[10] A similar disparity exists among the states in regard to the illegitimate child's right to inherit property from his maternal or paternal ancestors.[11] While some statutes[12] specifically allow it and others specifically disallow it,[13] the majority of states provide fewer inheritance rights with respect to the illegitimate child's ancestors than they do with respect to his parents.[14]

B. Pretermitted Heir Statutes

Pretermitted heir statutes, in general, provide that a child of a testator who is born after the making of the testamentary instrument may take that share of the testator's estate which he would have taken had the testator died intestate.[15] The underlying presumption is that in such situations the testator is more likely to have forgotten to revise his will than to have intended to disinherit the child.[16] The "children" or "issue" to whose benefit these statutes inure is circumscribed by the common law rule which has historically defined the words as including only legitimate children or illegitimate children who have been properly acknowledged or legitimized.[17] This rule, however, has been relaxed to some extent in many jurisdictions

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10. Ind. Ann. Stat. § 6-207 (1953); Iowa Code Ann. § 633.222 (1964); Kan. Stat. Ann. § 59-501 (1964); Tenn. Code Ann. § 36-234 (1964); Wis. Stat. Ann. § 237.06 (Supp. 1965).

11. *Compare* Minn. Stat. § 525.172 (1947), *with* Ariz. Rev. Stat. Ann. § 14-206 (1956). Rhode Island Hosp. Trust Co. v. Hodgkin, 48 R.I. 459, 137 A. 381, *rehearing denied*, 138 A. 184 (1927).

12. Ariz. Rev. Stat. Ann. § 14-206 (1956); Ore. Rev. Stat. § 109.060 (1968).

13. *E.g.*, Minn. Stat. § 525.172 (1947); N.D. Cent. Code § 50-01-05 (1960).

14. *See generally* Note, *Illegitimacy*, *supra* note 4. *See also* Note, *Legislation; Inheritance By, From and Through Illegitimates*, 84 U. Pa. L. Rev. 531, 540 (1936). Rhode Island Hosp. Trust Co. v. Hodgkin, 48 R.I. 459, 137 A. 381, *rehearing denied*, 138 A. 184 (1927); Turnmire v. Mayes, 121 Tenn. 45, 114 S.W. 478 (1908); Spencer v. Burns, 413 Ill. 240, 108 N.E.2d 413 (1952); Succession of Wesley, 224 La. 182, 69 So. 2d 8 (1953).

15. *See* Evans, *Should Pretermitted Issue be Entitled to Inherit*, 31 Calif. L. Rev. 263 (1943); Dainow, *Inheritance by Pretermitted Children*, 32 Nw. U.L. Rev. 1 (1937).

16. T. Atkinson, Law of Wills 141 (1953). *See also* Minn. Stat. § 525.201 (1967).

17. The only state which has not accepted this common law rule is Connecticut. *See* Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553 (1875). *See also* text accompanying note 4 *supra*.

which consider it merely a presumption and allow it to be easily rebutted.[18]

C. Testamentary Instrument

The interpretation of language found in testamentary instruments is not bound by the same guidelines as the interpretation of statutory language. Testamentary language derives its meaning from the intent of the testator which can have no effect on instruments other than the one under consideration. Courts have apparently considered this a license to interpret testamentary language more liberally than statutory language. While the common law rule which considers illegitimate children to be beyond the scope of the words "child" or "issue" also applies to language found in testamentary instruments, courts have generally allowed it to be easily overcome by a showing of contrary intent on the part of the testator.[19]

III. EXTENSION OF EQUAL PROTECTION TO THE ILLEGITIMATE CHILD

Recently it has been suggested that the distinction between legitimate and illegitimate children, as it relates to the right of inheritance, is invalid under the equal protection clause of the fourteenth amendment.[20] This contention is complicated, however, by the fact that the mandate of fourteenth amendment equal protection[21] has been subjected to recent expansion.[22] It is applied in two distinct areas, each of which has received a different standard of review.[23] The historical standard is applied when reviewing economic regulation. This standard of re-

18. Kent v. Barker, 2 Gray (Mass.) 535 (1854); King v. Dolan, 255 Mass. 236, 151 N.E. 109 (1926); Barker v. Stucker, 213 Mo. App. 245, 248 S.W. 1003 (1923); Mansfield v. Neff, 43 Utah 258, 124 P. 1160 (1913).

19. Old Colony Trust Co. v. Attorney Gen. of United States, 326 Mass. 532, 95 N.E.2d 649 (1950); Jung v. Saint Paul Fire Dept. Relief Ass'n, 223 Minn. 402, 27 N.W.2d 151 (1947). At least two jurisdictions have rejected this rule. Eaton v. Eaton, 88 Conn. 269, 91 A. 191 (1914); *In re* Ellis, 225 Iowa 1279, 282 N.W. 758 (1938).

20. *See generally* Gray & Rudovsky, *supra* note 1; Krause, *supra* note 1.

21. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

22. Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1067 (1969).

23. *Compare* Railway Express Agency Inc. v. New York, 336 U.S. 106 (1949), *with* Loving v. Virginia, 388 U.S. 1 (1967).

view is satisfied when the court finds that there is a rational purpose, for the legislation under review, upon which the legislature could have relied.[24] Generally the courts have given legislatures the benefit of any doubt when there are two possible purposes for a statute, one which is permissible and one which is not.[25] Once a rational purpose has been attributed to the statute, this standard requires that all persons similarly situated be treated in the same manner.[26] Thus, statutes which are either under-inclusive[27] or over-inclusive[28] are invalid although statutes which violate one of these principles usually seem to violate the other.[29] The burden of establishing a violation of the equal protection clause is cast upon the challenging party.[30] The Supreme Court has also appeared to grant the challenged law a presumption of validity.[31]

Recently, a more stringent standard of review has been applied to *inherently suspect* classifications. The term "suspect classifications" encompasses an increasing number of possible classifications, such as race,[32] ancestry[33] and alienage[34] as well as any other classification which is made to affect fundamental interests such as voting,[35] procreation[36] and education.[37] While all are suspect classifications, courts have treated some more strictly than others.

Suspect classifications are subjected to a more stringent standard by rejecting the presumption of validity[38] and casting the burden of justifying the classification onto the state rather than the challenging party.[39] The end result is a much more careful consideration of the classification and less chance of its surviving judicial scrutiny.[40] The choice between the two stand-

24. Railway Express Agency Inc. v. New York, 336 U.S. 106 (1949).
25. Goesaert v. Cleary, 335 U.S. 464 (1948).
26. McLaughlin v. Florida, 379 U.S. 184 (1964).
27. Rinaldi v. Yeager, 384 U.S. 305 (1966).
28. Carrington v. Rash, 380 U.S. 89 (1965).
29. Note, *supra* note 22, at 1086.
30. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).
31. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Madden v. Kentucky, 309 U.S. 83, 88 (1940).
32. McLaughlin v. Florida, 379 U.S. 184 (1964).
33. Koumatsu v. United States, 323 U.S. 214 (1944).
34. Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).
35. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
36. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
37. Brown v. Board of Educ., 347 U.S. 483 (1954).
38. Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).
39. Loving v. Virginia, 388 U.S. 1, 9 (1957).
40. Note, *supra* note 22, at 1124.

ards of review exerts a significant influence on the eventual outcome.[41]

Professor Krause has written extensively on the constitutional implications of discrimination between legitimate and illegitimate children.[42] He concludes that the illegitimate child is clearly entitled to some benefits which are denied him, although the classification is not necessarily invalid for all purposes.[43] For example, he concedes that the illegitimate child should not necessarily be entitled to his father's name. Likewise, he is not willing to maintain that limitations on the right of the illegitimate child to inherit are a denial of equal protection in all situations.[44] The constitutional rights of the illegitimate are at best uncertain, yet they are seldom litigated. Only a few recent judicial actions are worthy of note.

A. The First Step—*Levy v. Louisiana*

The United States Supreme Court in *Levy v. Louisiana*[45] acknowledged that a classification on the basis of legitimacy could violate the fourteenth amendment. In *Levy*, five illegitimate children brought an action for the wrongful death of their mother. The Louisiana court disallowed the claim on the sole ground that the children were illegitimate.[46] In finding a violation of the fourteenth amendment, the Supreme Court said: "[I]t is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."[47]

While no one has attacked the result in *Levy*, the opinion of the Court has been criticized for its lack of clarity.[48] The basis for the decision is clearly the equal protection clause of the fourteenth amendment but the Court failed to designate

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41. *Id.* at 1101.
42. *See* note 1 *supra.*
43. His most recent article states: "Whatever the conclusion as to any specific instance of discrimination, no rational reason supports the wholesale discrimination imposed by our present legal order." Krause, *supra* note 1, at 362.
44. 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. *See generally* Krause, *supra* note 4. *But see* Gray & Rudovsky, *supra* note 1, at 39.
45. 391 U.S. 68 (1968).
46. Levy v. State, 192 So. 2d 193, 195 (1966).
47. 391 U.S. at 72 (1968).
48. *See* Gray & Rudovsky, *supra* note 1, at 3; Krause, *supra* note 1, at 341.

which standard of review was being applied.[49] Although Justice Douglas seemed to assail the classification in other situations as well,[50] he carefully concluded that it was applicable only to the *Levy* situation. This would appear to imply that there may be situations in which the legitimacy or illegitimacy of a child would be a permissible basis for classification.[51]

Some language in *Levy* suggests that other considerations might be determinative in future cases. An example is the Court's reference to the intimate familial relationship which existed between the mother and her illegitimate children.[52] If the *Levy* Court relied heavily on this factor, the decision will be of little benefit to illegitimates outside such a relationship. Such would probably be the case if the parent involved were the father.[53]

The proper interpretation of *Levy* is unclear. It has been suggested that *Levy* makes any classification based on illegitimacy "inherently suspect."[54] If this analysis proves to be correct, the stricter standard of review will be applied to any such classification.[55] On the other hand, some are reluctant to analogize *Levy* to other situations in which the classification exists.[56] Most are content to hedge and agree with Professor Krause that in some situations, plausible and desirable reasons exist for distinguishing between legitimate and illegitimate children.

Two courts have held that *Levy* forbids the state from discriminating between illegitimate and legitimate children in providing for the child's support. The Supreme Court of Missouri has stated that the principles applied 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

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49. *See* text accompanying notes 23-41 *supra.*

50. Douglas stated that illegitimates are not "nonpersons" (391 U.S. at 70) and "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother." *Id.* at 72.

51. *See* text accompanying note 47 *supra.*

52. The Ohio Supreme Court has gone so far as to suggest that this was the basis for the decision in *Levy.* Baston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968).

53. *See* text accompanying notes 78-81 *infra.*

54. Gray & Rudovsky, *The Court Acknowledges the Illegitimate,* 118 U. PA. L. REV. 1, 4-8 (1969).

55. *See* notes 24-40 *supra.*

56. Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana,* 36 U. CHI. L. REV. 338 (1969); Note, *Bastards,* 47 TEXAS L. REV. 326 (1968); Recent Decisions, 35 BROOKLYN L. REV. 135 (1968); Current Decisions, 10 WM. & MARY L. REV. 247 (1968).

> the guise of discouraging illegitimacy, states may no longer cast the burden upon the innocent child.[57]

While this language refers only to actions by children to compel support, the reasoning may be applied to any situation in which there is discrimination between legitimates and illegitimates.

In passing on a proposed support agreement, the Family Court of the City of New York discussed *Levy* and its effect on the rights of illegitimate children. The court held that

> in the light of the [decision] of the United States Supreme Court [in Levy] . . . , state statutes which discriminate against children on the basis of a classification as to whether they were born in or out-of-wedlock must be held to violate the Equal Protection Clause of the Constitution.[58]

If this all-embracing interpretation of *Levy* is correct, the effects of *Levy* will be extended far beyond its facts.

C. Application of *Levy* to Inheritance Rights

The North Dakota Supreme Court in *In re Estate of Jensen*[59] is the only court to date to interpret *Levy* in connection with the inheritance rights of an illegitimate child. Emilie Jensen was the mother of four illegitimate children and two legitimate children, including Chris Jensen. After Chris Jensen died intestate, the illegitimate children of Emilie Jensen and their heirs claimed a right to share in the distribution of his estate. The applicable North Dakota statute specifically precluded illegitimate children and their heirs from taking a portion of the estate.[60] The lower court upheld the statute but the North Dakota Supreme Court reversed, stating: "[W]e have no hesitancy in holding that [this statute] is unconstitutional as an invidious discrimination against illegitimate children in violation of § 1 of the fourteenth amendment to the United States Constitution

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57. R—v. R—, 431 S.W.2d 152, 154 (Mo. 1968).

58. Storm v. None, 57 Misc. 2d 342, 291 N.Y.S.2d 515, 519 N.E.2d (1968).

59. 162 N.W.2d 861 (N.D. 1968).

60. He [any child born out of wedlock] . . . however, does not represent his father or mother by inheriting any part of the estate of the kindred of his father or mother, either lineal or collateral, unless before his death his parents shall have intermarried and his father after such marriage shall have acknowledged him as his child or adopted him into his family. In that case such child and all the legitimate children in such family are considered brothers and sisters and on the death of any one of them intestate and without issue the others, subject to the rights in the estate of such deceased child of the father and mother, respectively, as is provided in this code, inherit his estate as his heirs in the same manner as if all the children had been born in wedlock.

N.D. Cent. Code § 56-01-05 (1960).

. . . ."[61] If he Court in *Levy* was guilty of failing to analyze more difficult problems, the North Dakota Court is equally, but more obviously, deserving of the same criticism. It merely quoted the *Levy* opinion at great length and then concluded, "Applying the reasoning in *Levy*, as no action, conduct, or demeanor of the illegitimate children . . . is relevant to their status of illegitimacy, we conclude that the classification for purposes of inheritance contained in [the statute] . . . is unreasonable."[62]

While nothing in *Jensen* restricts it from being a complete grant of all rights of inheritance to illegitimate children, the reasoning of the opinion is demonstrably inadequate in several respects. The Jensen court cited the New York and California Codes on the subject of inheritance by illegitimate children with apparent approval.[63] Yet neither of these provide all the rights of inheritance for illegitimate children which are provided for legitimates.[64] In addition, the North Dakota Court cited a second North Dakota statute approvingly.[65] That statute provides that should the illegitimate child die intestate without spouse or issue, his property passes only to his mother unless the father has specifically acknowledged or adopted the child.[66] This suggests that the court had no quarrel with giving the illegitimate child the right to inherit from his father only if the father acknowledges or adopts him.[67] This statutory scheme, however, draws severe criticism from Professor Krause for allowing the father to choose whether or not to give his illegitimate child the rights which the law gives his legitimate child.[68]

IV. THE ILLEGITIMATE CHILD'S FUTURE

Regardless of which equal protection standard is applied, the legislation which discriminates against illegitimate children must have a purpose which the courts will consider rational and proper. The historical basis for the classification was society's distaste for the parents' activity.[69] This reasoning has been thor-

61. 162 N.W.2d at 878.
62. *Id.*
63. *Id.*
64. CAL. PROB. CODE §§ 255, 257 (West 1956); 17B N.Y. ESTATES POWERS & TRUST LAWS § 4-1.2 (McKinney 1967).
65. 162 N.W.2d at 878.
66. N.D. CENT. CODE § 56-01-06 (1960).
67. N.D. CENT. CODE § 56-01-05 (1960).
68. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 492 (1967).
69. *See* text accompanying note 4 *supra.*

oughly rejected today,[70] but several other justifications for discriminatory statutes exist. One is that stigmatization of the illegitimate child tends to protect the family as a unit of society:

> 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 co-operate 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 in ways 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.[71]

It is beyond question that protection of the family unit is a proper purpose for governmental action.[72] It is also reasonable that such discrimination could be considered to protect the family unit. An example of this would be to prevent the situation in which an illegitimate child might inherit the property of his parent even though the parent's spouse has no knowledge of the child.[73] This objection is not persuasive, however, because it could be resolved by placing the burden of proof on the child claiming the right to inherit and requiring that parenthood be established within a certain time of birth.[74]

Another justification for discriminatory statutes is found in

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70. *Id.*

71. Davis, *Illegitimacy and the Social Structure*, 45 AM. J. Soc. 215, 219 (1940).

72. *See generally* Krause, *supra* note 68.

73. The committee on the law of succession in relation to illegitimate persons suggested reform in the inheritance laws of Scotland, Wales and England. However, the report of the committee included the statement:

> [T]he Committee does not recommend that the extra-marital child should be permitted to succeed to the estate of any relative on the maternal side other than the mother herself, on the ground that "it would not be right to impose a system of intestate succession which could, for example, lead to participation of a daughter's bastard in the intestacy of that daughter's parent when such participation might be directly opposed to the wishes of the latter, who, indeed, might know nothing of the bastard.

Reports of Committees, 30 MOD. L. REV. 552, 554 (1967).

74. Note, *Legislation; Inheritance By, From and Through Illegitimates*, 84 U. PA. L. REV. 531, 541 (1936); *See* MINN. STAT. § 257.33 (1967) 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 . . . . For the

the underlying rationale of inheritance laws. As stated earlier, inheritance laws are intended to pass the decedent's property in the manner in which he probably would have wanted it to pass.[75] Legislatures might easily determine that most people would not want their property to pass to their illegitimate children if they had not acknowledged or adopted the child during their lifetime. Even more likely is the assumption that kindred of an individual would not want their property to pass to the illegitimate child of that individual. While the fourteenth amendment prevents an individual from relying upon the courts to support his private discriminatory actions,[76] courts have been allowed to enforce the distribution of the estate of an individual regardless of the basis for the distribution. Nevertheless, it has been suggested that not every estate plan drawn by a state could make distinctions which the individual would be allowed to make.[77] Consequently, it seems unlikely that this justification will support discriminatory legislation by itself.

A final justification in support of discrimination is the uncertainty as to parenthood. Even the strongest advocates of fourteenth amendment equal protection concede that their arguments are applicable only when paternity has been established.[78] That this is one basis of present day discrimination against the illegitimate child is evident from the nature of the statutes. No state unconditionally excludes the illegitimate child from inheriting from both of his parents.[79] The majority of states give the illegitimate child the right to inherit from his mother,[80] there being no doubt as to who the mother is. The illegitimate child does not fare as well when inheriting from the father.[81] The great variation in these statutes is apparently due to uncertainty in procedures by which the father is identified. Nevertheless, the fact that paternity must be proven and the high standard of proof employed does not vitiate the fourteenth amendment claims when it is established.

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better accomplishment of these purposes the commissioner of public welfare may initiate such legal or other action as is deemed necessary . . . .

75. *See* note 11 *supra.*

76. Reitman v. Mulkey, 387 U.S. 369 (1967); United States v. Guest, 383 U.S. 745 (1966); Bell v. Maryland, 378 U.S. 226 (1964); Burton v. Wilmington Pkg. Auth., 365 U.S. 715 (1961).

77. Gray & Rudovsky, *supra* note 54, at 14.

78. Krause, *supra* note 68, at 490.

79. Note, *Illegitimacy*, 26 BROOKLN L. REV. 45, 76-79 (1960).

80. *Id.*

81. *Id.*

While the denial of inheritance from the parents' families appears to deserve the same considerations as does the denial of inheritance from the parents, one additional objection to allowing inheritance from the paternal ancestors does exist. Elimination of discrimination with respect to these ancestors could result in the property of the relative of a parent passing to an illegitimate child of which the relative had no knowledge.[82] It is conceded that requiring proof of paternity, at a reasonable time and in a reasonable manner, would quiet this objection.[83]

VI. CONCLUSION

Any attempt to draw a conclusion as to the constitutionality of any particular law which denies the illegitimate child the rights of inheritance which are given to his legitimate counterpart is at best an educated guess. The basic cause of this uncertainty is the imprecise nature in which the courts have dealt with the issues to this date. The first question which must be determined is which standard of review is to be employed.

The cases to date suggest that the more stringent standard will be applied, keeping the discrimination against illegitimate children to a minimum. Should this be the eventual outcome, portions of the applicable statutes of most states will undergo some change to bring them in line with what has been previously suggested. Judicial interpretations will likewise need to be altered to fall in line with the mandate of the equal protection clause. Interpretation of testamentary instruments would seem to be the least affected aspect as the theory of state action voiced in *Shelley v. Kraemer*[84] appears to be applicable only when dealing with the most basic of civil rights.

In the event that the more stringent standard is applied, some discrimination will be allowed on the ground that the state is allowed to set the standard of proof to be required to show paternity for any particular purpose.[85] This is probably a necessary form of discrimination because of the need for certainty and the difficulty of obtaining it. The degree of discrimination

82. *See* note 72 *supra.*
83. *See* note 73 *supra.*
84. Shelley v. Kraemer, 334 U.S. 1 (1948).
85. The standard of proof which is presently used for determining fatherhood for the purpose of support need not be the standard used for determining fatherhood for inheritance purposes. In fact society may have a much greater interest (evidenced by a lower standard of proof) in providing for the support of the illegitimate child than in providing inheritance (evidenced by a higher standard of proof).

which will be permitted on this basis is not clear but the state will probably not be allowed to maintain a position of no inheritance from the father or the paternal ancestors by means of an impossible standard of proof. Furthermore, a statutory system, under which the state has a duty to maintain a paternity action on behalf of the child, would likely help support some degree of discrimination as it would provide a protection for the rights of the illegitimate child.[86]

If the less stringent standard is applied to discrimination against illegitimate children with respect to their rights of inheritance, the permissible degree of discrimination will be greater. In this event, the numerous justifications for such discrimination will allow the states more discretion in determining the illegitimate child's rights.[87]

The illegitimate child has indeed made a substantial gain in his quest for rights which approach those enjoyed by his legitimate brother. Upon final analysis, however, it is clear that the bastard is not in precisely the same position as a legitimate child, and probably will not be for the forseeable future. Although the trend toward greater rights for the bastard is likely to continue, it will probably proceed piecemeal, and, at least in some legal respects, the bastard may cry, with Shakespeare, "Why bastard, wherefore base?"

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86. *See* note 73 *supra.*

87. Even if a legitimate purpose for discrimination is found, it must still be determined whether an illegitimate child may be the subject of discrimination on the basis of a status over which he has no control. Professor Krause has made the suggestion that discrimination against illegitimate children should be invalid under the line of cases exemplified by Robinson v. California, 370 U.S. 660 (1962), in which it was held that it is impermissible to hold an individual responsible for a status or conduct over which he has no control. *See* Krause, *supra* note 56, at 347. It seems unlikely that the reasoning of *Robinson* is applicable in this context since the illegitimate child is not suffering a criminal punishment as was the defendant in *Robinson.* In fact, Justice Harlan, in his concurring opinion in *Robinson,* specifically limited the holding to criminal punishment, 370 U.S. at 679.