COMMENTS

PATERNITY STATUTES: THWARTING EQUAL PROTECTION FOR ILLEGITIMATES

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When measured against United States Supreme Court decisions since 1968 and the newly evolved standards they embody in equal protection for illegitimate children, the Florida statute for the determination of paternity is constitutionally infirm in three areas: restrictions on standing, statute of limitations, and its fixed schedule of support obligation. A review of current statutory and case law throughout the United States will demonstrate the urgent need for the adoption in Florida and elsewhere of the Uniform Parentage Act.

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I. Some Statistics

Illegitimate children cannot be characterized as a vocal minority. Any improvement in their lives has come from the persistent efforts of a few commentators\(^1\) to catch the conscience of the courts and legislatures. A mention of some recent statistics will reveal the enormity of the problem.

The number of registered illegitimate births has increased from a total of 141,600 in the United States in 1950 (or 3.9 percent of all births) to 407,300 in 1973 (or 13 percent of all births).\(^2\) In many urban areas the rate of illegitimate births exceeds 40 percent; in some cities more than half of all births are illegitimate.\(^3\)

According to a recent report by the Planned Parenthood Association,\(^4\) one million teenage girls (1 in 10) become pregnant an-

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4. The report is entitled "Eleven Million Teenagers" and was quoted in The Washington Post, June 5, 1977 (Parade) at 4, Col. 1.
nually. Three hundred thousand pregnancies result in abortion and in another 300,000 cases the mothers are married when conception occurs. 200,000 children of these girls are born illegitimate and 100,000 achieve legitimacy through the mother's subsequent marriage.\textsuperscript{5}

II. Discrimination

Children are not self-supporting. Their survival depends on support from parents, private social welfare agencies, or the state.\textsuperscript{6} When the child is illegitimate there is a far greater possibility that the mother will be unable to provide adequately for the child and, thus, the burden of support will shift to the state unless the father is identified and his obligation enforced. Morally, logically, and legally, the duty of child support should fall on those who are responsible for the child's being. Unfortunately, since the primary purpose of the parental support statutes was, and to an extent still is, to relieve the state by imposing the burden of the child's maintenance on the father, the adequacy of support was determined at a survival level; the welfare of the child was a secondary consideration if, indeed, present at all.

The earliest paternity statute in our legal heritage sets a prejudicial moral tone which is reflected even today in paternity legislation, although modern legislators are careful to employ far more neutral language.\textsuperscript{8} Prejudice against illegitimate children results from society's organizational need to encourage marriage, deter extra-marital sexual relations and prevent disruption of the family

\textsuperscript{5} Id.
\textsuperscript{7} Id.
\textsuperscript{8} An Act for Setting the Poor on Work, 1576, 18 Eliz. 1, c.3 § 2 quoted in Krause, Scientific Evidence and the Ascertainment of Paternity, 5 FAM. L.Q. 252, 252 (1971):
Concerning bastards begotten and born out of lawful matrimony (an offense God's law and man's law) the said bastards being now left to be kept at the charges of the parish where they be born, to the great burden of the same parish, and in defrauding of the relief of the impotent and aged true poor of the same parish, and to the evil example and encouragement of the lewd life: (2) It is ordained and enacted by the authority aforesaid, That two justices of the Peace (whereof one to be of the quorum, in or next unto the limits where the parish church is, within which parish such bastard shall be born, upon examination of the cause and circumstance) shall and may be their discretion take order, as well for the punishment of the mother and reputed father of such bastard child, as also for the better relief of every such parish in part or all; (3) and shall and may likewise by such discretion take order for the keeping of every such bastard child, by charging such mother or reputed father with the payment of money weekly or other sustenation for the relief of such child, in such wise as they shall think meet and convenient.
Early in history, a dual system of families developed: the conventional family and the inferior family, distinguished by the absence of marriage. Legal discrimination against the members of the inferior family by denying them the substantive legal rights and duties of the traditional family was meant to discourage promiscuity. It has failed. The mother's knowledge that her illicit sexual activity may produce a child who will be discriminated against legally has little or no deterrent value. The complete immunity from parental obligations enjoyed by fathers of illegitimates who evade acknowledgment and adjudication of paternity certainly has no salutary effect on the state's interest in promoting marriage and discouraging promiscuity.

The argument in favor of discrimination to prevent disruption of the family unit plainly envisions a traditional family whose husband-father has begotten an illegitimate child by an unmarried woman. It balances the need of the former, acceptable unit against those of the latter, "inferior" family which his activities have created. The mental anguish of the wife and economic loss to her family should her husband be required to support the "accidental" child, prevail over the need of the illegitimate child to be supported. Disregarding the questionable value judgments implicit in this argument, the "scenario" is no longer typical of American life. "More than one-quarter of American children—more than one-half of the black children—are not living with their biological fathers." Eighty-three percent of the families nationwide who received Aid to Families with Dependent Children (AFDC) assistance in 1973 quali—

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11. Id.

12. Even if we assume, closing our eyes to the soaring illegitimate birth rate, that a woman will refrain from illicit sexual activity in order to avoid bearing a child who will be denied paternal support, there is no basis for the conclusion that the Equal Protection Clause permits resort to this practice of vicarious expiation. Nor can it be seriously contended that the governmental purpose of promoting marriage and discouraging sexual promiscuity is promoted by a rule which guarantees to the rake immunity from liability for the support of the children born as a result of his extramarital copulative prformance [sic].


fied because the father was absent from home. 14

Furthermore, this argument accepts as desirable a father’s free
deciding whether or not his children will be legitimate. choice in Through legitimation or adoption, or through marriage to the
more commonly mother, a father can bestow rights on the child which marital
children enjoy from birth. The father can also choose to withhold these
rights. 15

Courts have justified the different support obligations owed by
the father to his marital and non-marital children by reasoning that
a father assumes the duty to support the children of the marriage
as an incident of the marriage contract. The child is a third-party beneficiary under this consent theory. 16 The theory is premised on
the contention that children owe their right to support to the existence of marriage. 17 “In fact, marriage owes its existence to the necessity that children be supported.” 18 The fallacy of the consent theory is apparent when we recognize that the support duty would be imposed on a father even if he were expressly to agree with his wife not to assume it. 19

These long-held beliefs are changing. 20 The legal impediments to the illegitimate child’s right to support, to inheritance and to welfare benefits contingent on paternal dependency are being eliminated, principally through the application of the equal protection clause.

15. These rights include support, inheritance, benefit of federal and state welfare laws, use of the father’s name, and the father’s right to custody and visitation.
18. Id. (quoting 1 Westermark, HISTORY OF HUMAN MARRIAGE 72 (1921)).
19. G ______ v. P__________, 466 S.W.2d at 46.
20. Society is becoming progressively more aware that children deserve proper care, comfort, and protection even if they are illegitimate. The burden of illegitimacy in purely social relationships should be enough without society adding unnecessarily to the burden with legal implications having to do with care, health, and welfare of children.

Armijo v. Wesselius, 440 P.2d 471, 473 (Wash. 1968). (Wrongful death statute cannot constitutionally deny an illegitimate infant the right to claim and recover damages for the wrongful death of his or her parent).
III. EQUAL PROTECTION

A. An Overview of Standards

1. INTRODUCTION

Equal protection is generally understood to mean that a legislative classification must include all and only those persons who are similarly situated with respect to the law's legitimate governmental purpose. Since few classifications are totally accurate, formulas have been used to determine permissible degrees of under- or over-inclusiveness.

The United States Supreme Court fashioned a two-tiered approach to equal protection challenges in an effort to reduce the "endless tinkering with legislative judgments" which characterized pre-1937 Supreme Court decisions involving substantive due process. Minimal judicial scrutiny embodied in the reasonable relationship test has been applied to most legislation. Under the compelling state interest test, strict judicial scrutiny has been applied to legislation affecting either a suspect class of persons or, more recently, fundamental personal rights.

The dichotomy is easy to understand and simple to apply, and for that reason it is commendable. However, the Court's two-tiered approach has resulted in rigid, automatic determinations which have afforded infrequent individual relief. In all but one Supreme Court case between 1937 and 1970 to which the reasonable relationship test was applied, the legislative classification has been upheld. Conversely, in only one case involving strict scrutiny of a suspect category has the Court upheld the legislative classification.

2. RATIONAL BASIS STANDARD

The Court traditionally analyzes equal protection cases in three steps: firstly, identifying the trait which forms the basis of the clas-
sification; secondly, discerning the purpose of the law; thirdly, scrutinizing the relationship between the trait and the purpose. The extremely permissible standard of *McGowan v. Maryland* has become most commonly cited for the reasonable relationship formula:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if *any state of facts reasonably may be conceived to justify it*.31

3. **Suspect Classifications**

Since the Fourteenth Amendment grew out of the Civil War and the emancipation of the slaves, the equal protection clause was naturally aimed at legislation which discriminated against blacks. In *Korematsu v. United States* the Court added classifications based on any other racial group to the umbrella of strict scrutiny protection. Two categories in addition to race have been identified by the Court as being suspect: alienage and ancestry.

The labelling of a classification as suspect does not automatically preclude constitutionality. In *Korematsu* the Court indicated that “[p]ressing public necessity” justified the relocation of persons of Japanese descent, including both American citizens and aliens, to detention camps during the Second World War. In addition, legislation aimed at a particular group with a non-discriminatory purpose, for example, to compensate that group for prior state discrimination, would be permissible if it could withstand a challenge of reverse discrimination.37

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30. Comment, supra note 28, at 617.
32. 323 U.S. 214 (1944).
37. See Bakke v. Regents of the Univ. of Calif., 18 Cal. 3d, 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 429 U.S. 1090 (1977); Carter v. Gallagher, 452 F.2d 315 (8th
quires the demonstration that the statute "promote[s] a compelling governmental interest"\(^3\) to save the classificatory scheme.

Language in the earlier decisions involving the classifications of illegitimacy\(^3\) and sex\(^4\) was equivocal. More recent decisions have now firmly rejected the possibility that illegitimacy and sex would join the very restrictive category of suspect classifications.\(^4\)

## 4. FUNDAMENTAL PERSONAL RIGHTS

*Skinner v. Oklahoma*\(^4\) was the first attempt by the Court to apply the strict scrutiny test to a non-suspect class. The Court found that Oklahoma's Habitual Criminal Sterilization Act involved "one of the basic civil rights of man"—the right to procreate.\(^4\) Other fundamental personal rights which have been identified by the Court are: the right to criminal appeals,\(^4\) the free exercise of religion,\(^5\) privacy in marital decision,\(^6\) the right to vote,\(^7\) marriage,\(^8\) freedom of political association,\(^9\) freedom of interstate travel,\(^10\) and the right to terminate pregnancy in the first trimester.\(^11\)

## 5. THE Reed FORMULA

In 1971 the *Reed v. Reed*\(^12\) decision engendered a major breakthrough in equal protection analysis, thereby significantly easing the tensions of the bipolar approach. Presented with a sex-based classification giving preference to males in qualifying as estate administrators, the Court was not prepared to declare sex a suspect category. Nor was it prepared to uphold the statutory discrimina-

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\(^3\) Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis omitted).
\(^5\) Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (plurality opinion).
\(^8\) 316 U.S. 535 (1942).
\(^9\) Id. at 541.
\(^12\) Griswold v. Connecticut, 381 U.S. 479 (1965).
\(^18\) 404 U.S. 71 (1971).
tion. A new standard was needed and it was adopted from the there-
tofore infrequently cited opinion of F.S. Royster Guano Co. v. Virginian.\footnote{53}

The Equal Protection Clause of [the Fourteenth Amendment] does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'\footnote{54}

The Reed (Guano) test differs from the traditional equal protec-
tion standard in two respects.\footnote{55} Firstly, it does not require a mere absence of irrationality to validate a statute. The new requirement is that the classification "rest upon some ground of difference having a fair and substantial relation to the object of the legislation."\footnote{56} The shift may impose an affirmative duty on the party defending the statute to demonstrate a rational connection between the objective of the statute and the classification chosen to effectuate that goal. Secondly, the relation must now be fair and substantial, rather than merely rational. This newly recognized standard clearly lays the way for findings of unconstitutionality outside the scope of suspect classifications and fundamental personal rights. During the 1971 term following the Reed decision, six of the nine equal protec-
tion cases (all decided without resort to strict scrutiny) found violations of the equal protection clause.\footnote{57}

The effect of the Reed decision on the validity of Labine v. Vincent\footnote{58} is uncertain. In Labine, the Court upheld discrimination against acknowledged illegitimate children using a standard even less demanding than the minimum rational basis test.\footnote{59} Giving great deference to the power of the State to legislate in the area of intestate succession, the Court eschewed intelligent analysis of the relationship between the State's objectives and the classifications drawn to further them. Reed, eight months later, permitted the

\footnotesize{
54. 404 U.S. at 75-76 (citations omitted).
56. 253 U.S. at 415.
58. 401 U.S. 532 (1971).
59. See text accompanying notes 100-02 infra.
}
Court to tamper with the statutory scheme in order to equalize opportunities for women to become estate administrators. Surely acting as an administrator is of less consequence than sharing in the estate of one’s father.

*Reed* ought to be interpreted as overruling *Labine* *sub silentio*, but state legislatures and courts, reluctant to put illegitimates on a parity with legitimate children, will probably distinguish the case on other grounds.

Inexplicably, the Court in *Trimble v. Gordon* adopt the *Reed* standard as part of its opinion but does not expressly overrule *Labine*. *Trimble* is the first Supreme Court case since *Labine* to deal with intestacy laws that discriminate against illegitimates. An Illinois statute that excludes an illegitimate from sharing in the intestate estate of his father was found to deny equal protection.61

6. THE *Weber* TEST

Six months after the *Reed* Court gave new vitality to the two-tiered approach to equal protection challenges by resurrecting a meaningful minimum standard, the Court in *Weber v. Aetna Casualty & Surety Co.*, 62 without mentioning *Guano* or *Reed*, ostensibly embarked on yet another avenue of analysis:

Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . . The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?63

The Court found a Louisiana Workmen’s Compensation classificatory scheme64 which gave priority to legitimate and acknowledged illegitimate children over unacknowledged illegitimate children, to be violative of equal protection principles.65 However, the basis for this holding was not clearly articulated. Moreover, the new

60. 430 U.S. 762 (1977).
61. A discussion of *Trimble* is found in the text accompanying notes 161-68 and 203 *infra*.
63. Id. at 172-73.
64. LA. REV. STAT. ANN. § 23.1232(1)-(8) (West 1964); LA. CIV. CODE, Arts. 202, 203, 204 (1972).
65. The Workmen’s Compensation benefits were entirely satisfied by the amount of a tort settlement brought on behalf of the four legitimate children whose entitlement totally exhausted the benefits, leaving nothing for the two unacknowledged, but dependent, illegitimate children.
“hybrid” test which was devised in Weber for the whole spectrum of equal protection challenges apparently was not even utilized. The Court gave no indication of what right, approaching a sensitive and fundamental personal right, was endangered by the priority classification. Instead, Justice Powell concluded that the classification bore “no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve,” and that “the classification is justified by no legitimate state interest, compelling or otherwise.” If “significant” means the same thing as “fair and substantial” the Reed test has been covertly applied.

Powell's opinion in Weber gives no guidelines as to which state interests are legitimate and which are not. Two state interests were reflected in the workmen's compensation statute: the promotion of legitimate family relationships and the efficiency of administrative determination of eligibility. These are both recognized as legitimate state interests.

Finally, the eloquent, emotional language at the close of the Weber opinion dilutes its precedential value from an analytic standpoint.

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.

Powell appears to have invoked the due process principle which precludes a state from punishing persons for their status, as opposed to acts, over which they have no control. This is an established
constitutional doctrine and arguably could defeat all legal discrimination against illegitimates. A standard of strict scrutiny would then be appropriate. It is regrettable that Powell failed to elevate this principle to the level of an alternative holding. Despite the fact that it was allowed to remain dicta, the Court has invoked the passage like a talisman in later opinions to buttress its analysis.\textsuperscript{72}

B. Application of Equal Protection Principles to Illegitimacy: Levy to Trimble

The irregular line of illegitimacy cases will be sketched in this section, principally focusing on their value as precedent. If a common thread can be found in the nine opinions\textsuperscript{73} it is that the dicta is as articulate as the constitutional analysis is unintelligible.

1. Levy AND Glona

Levy v. Louisiana\textsuperscript{74} and Glona v. American Guarantee & Liability Insurance Co.\textsuperscript{75} are the first two cases in which the Court dealt with illegitimacy.\textsuperscript{76} Levy and Glona found that Louisiana's wrongful death statute violated equal protection by denying recovery to dependent, unacknowledged, illegitimate children for the wrongful death of their mother and recovery by a mother for the wrongful death of her illegitimate child.

The standard which Justice Douglas articulates in Levy centers on whether the end result is a rational one.\textsuperscript{77} He notes that the Court has been "extremely sensitive when it comes to basic civil rights,"\textsuperscript{78} and identifies the rights here as "involv[ing] the intimate, familial relationship between a child and his own mother."\textsuperscript{79} He does not, however, specify which level of scrutiny is to be applied. Recovery

\textsuperscript{74} 391 U.S. 68 (1968).
\textsuperscript{75} 391 U.S. 73 (1968).
\textsuperscript{76} Wallach and Tenoso, supra note 10.
\textsuperscript{77} 391 U.S. at 71.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
for the wrongful death of one in a familial relationship is not definitively identified as a fundamental personal right, nor is illegitimacy made a suspect classification. There is no discussion of the state's interest in drawing a classificatory scheme basing recovery on legal relationships rather than biological or economic ones. Douglas does state that the status of illegitimacy has no relationship to the wrongful death of the mother and, in Levy's brief concluding paragraph, offers a constitutionally sufficient reason for striking down the discriminatory provision. Since the ground is not clearly staked out, however, the passage appears to be an afterthought rather than a ratio decidendi: "[I]t is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done their mother."\(^8\) This language alludes to the "principle which precludes a state from denying persons rights on the basis of a condition over which they have no control."\(^8\) Illegitimates are innocent of any wrongdoing so the law should not burden them on the basis of their status at birth.\(^8\)

Perhaps this principle was de-emphasized because in Glona, the companion case to Levy, the party discriminated against was the mother of an illegitimate. The valid state interests in promoting marriages and discouraging promiscuity are furthered in statutes which penalize the parents. The state's interest could fairly be asserted as not merely compensatory but "to compensate for loss to the extent not inconsistent with the predominant interest in promoting marriage and discouraging 'illegitimate' births."\(^8\) Nevertheless, Justice Douglas asserts that "we 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."\(^8\) Despite the absence of the word "invidious" and other more indicative language, it has been suggested that Glona, as well as Levy, was decided on strict scrutiny grounds.\(^8\)

The non-decisional language of Glona impedes understanding of what the case stands for. It is unique in that it deals with discrimination against a mother of an illegitimate. Thus it may be more

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80. Id. at 72 (footnote omitted).
82. In Robinson v. California, 370 U.S. 660 (1962) the eighth and fourteenth amendments were invoked against punishment for "narcotics addiction" which was found not to be a crime but an "illness which may be contracted innocently or involuntarily." Id. at 667.
83. Wallach and Tenoso, supra note 10, at 44.
84. 391 U.S. 73, 75.
85. Wallach and Tenoso, supra note 10, at 44-45.
proper to characterize Glona as dealing with a woman's right of privacy in matters of child bearing and familial decisionmaking (as in *Roe v. Wade* 86) rather than illegitimacy. 87

The dissenters 88 called Levy and Glona "constitutional curiosities." 89 The recovery scheme in the Louisiana wrongful death statute is, after all, a "traditional pattern." 90 Recovery based on legal family relationships is just as rational, they assert, as awarding recovery on the basis of biological, economic or emotional bonds. 91

Commentators hailed the decisions, despite their analytical deficiencies, as beginning an era of reform of the legal disabilities burdening illegitimates. It was asserted that "Levy and Glona provide a basis from which all major legal disadvantages suffered by reason of illegitimacy can be challenged successfully." 92 Contrary to this position, some courts chose to restrict the decisions to relationships involving illegitimate children and their mothers only. These decisions thus perpetuated differential treatment in support 93 and in paternal inheritance 94 rights.

2. Labine

*Labine v. Vincent* 95 was the only illegitimacy case decided by

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86. 410 U.S. 113 (1973).
88. J. Harlan with JJ. Black and Stewart.
90. Id. at 77.
91. Id. at 78-80.
94. Sanders v. Tillman, 245 So. 2d 198 (Miss. 1971) (illegitimate child may not recover for wrongful death of father where he had not legally acknowledged her during his lifetime); Rogers v. State Farm Mut. Auto Ass'n, 261 So. 2d 320 (La. App. 1972) (denied wrongful death action to illegitimate siblings, interpreting Levy and Glona as applicable to parent-child relationship only); City of West Palm Beach v. Cowart, 241 So. 2d 748 (Fla. 4th Dist. 1970) (father not allowed action for the wrongful death of his illegitimate child; Levy and Glona restricted to maternal relationship only); George v. Bertrand, 243 La. 647, 176 So. 2d 47, *writ refused*, 219 So. 2d 177 (1968), cert. denied, 396 U.S. 974 (1969) (legal husband of mother is presumed to be the father of a child born in wedlock and father of illegitimate child may not recover for the wrongful death of his son).
95. 401 U.S. 532 (1971).
the transition Court— the Court which followed the Warren Court and preceded the fully-composed Burger Court. To what extent this explains its anomalous position in the ten year line of illegitimacy cases is only conjectural. The 4-1-4 Court upheld Louisiana’s intestacy law which permits duly acknowledged illegitimate children to share in their father’s intestate estate only where there is no descendant, ascendant, collateral relation or wife.

The classification was tested on what appears to be a subminimum scrutiny standard. Instead of attempting to suggest a rational basis for distinguishing between duly acknowledged illegitimates and legitimates, the Court intones:

[The power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for the legislature, not the life-tenured judges of this Court, to select from among possible laws . . . . [We cannot] say that Louisiana does not have the power to make laws for distribution of property left within the State.]

The reaction of the dissent to this “reasoning” was less than cordial. “[T]he Court has not analyzed, or perhaps simply refuses to analyze, Louisiana’s discrimination against acknowledged illegitimates in terms of the requirements of the Fourteenth Amendment.” Furthermore, the dissenters stated:

It is, to say the least, bewildering that a Court that for decades has wrestled with the nuances of the concept of ‘state action’ in

96. JJ. Black, Blackmun, Stewart and C.J. Burger constituted the “majority” opinion with J. Harlan concurring. JJ. Brennan, Douglas, Marshall and White dissented.

97. Levy and Glona, decided by the Warren Court, produced the following division: JJ. Brennan, Douglas, Fortas, Marshall, White, and C.J. Warren, majority; JJ. Black, Harlan, and Stewart, dissenting.

98. The Levy/Glona, Labine and Weber divisions appear thusly:

Levy/Glona

Labine
DISS/CONC/MAJ: Douglas, Brennan, Marshall, White — —/ Harlan/Black, Stewart, Burger, Blackmun

Weber


101. Id. at 551 (dissenting opinion).
order to ascertain the reach of the Fourteenth Amendment, in this case holds that the state action here, because it is state action, is insulated from these restraints.¹⁰²

Four other points remain to be examined. Firstly, the majority in Labine attempts to distinguish Levy by pointing out that the latter case involved an insurmountable barrier to recovery (the illegitimate children in Levy were totally barred from wrongful death recovery) whereas the plaintiff in Labine could have shared in her father's estate had he provided for her in his will. The dissent readily dismisses this argument by noting that the "insurmountable" barrier in Levy could have been overcome if the mother had acknowledged her child. In Labine, even acknowledgement was insufficient to confer equal rights.¹⁰³ The dissent also refutes the second implication that any discrimination which is less than insurmountable is permissible by resort to Levy.¹⁰⁴ The Court's most recent statement on this question, in Trimble v. Gordon,¹⁰⁵ refers to it as an "analytical anomaly."¹⁰⁶ Secondly, the State's interest argument, alluded to in Harlan's dissent in Levy and Glona as to probative problems in claims of illegitimates, is inapplicable to Labine where the father had formally acknowledged his paternity. Thirdly, Harlan's concurring opinion suggests that the discrimination was reasonable as reflecting the probable intent of a father to confer greater rights on his marital children than on "the products of a casual liaison."¹⁰⁷ The dissent refutes this contention by reminding Jus-

¹⁰². Id. at 549 (dissenting opinion).
¹⁰³. Id. at 550 (dissenting opinion).
¹⁰⁴. Id.
¹⁰⁶. Id. at 773-74.
¹⁰⁷. 401 U.S. 532, 540 (concurring opinion).
tice Harlan that this child was not the product of a casual liaison, but lived for all of her six years with her father who had formally acknowledged her and, thereby, had undertaken and discharged the legal duty of her support. Finally, the dissenters repeat the due process argument\(^\text{108}\) mentioned in *Levy*\(^\text{109}\) by quoting from a state supreme court decision\(^\text{110}\) which invalidated a similar discrimination on the authority of *Levy*. Once again they invoke the term "invidious." It thus would appear that they continued to espouse a standard of strict scrutiny.

3. **Weber**

Having dealt with Louisiana’s wrongful death and inheritance statutes in *Levy*, *Glona* and *Labine*, the Court in *Weber v. Aetna Casualty & Surety Co.*\(^\text{111}\) next turned to Louisiana’s workmen’s compensation scheme which gave a lower priority to the rights of dependent, unacknowledged illegitimates than to legitimate and acknowledged illegitimate children.\(^\text{112}\) The *Weber* opinion\(^\text{113}\) is the first "which attempts a reasoned explanation of its holding"\(^\text{114}\) and in so doing formulates a new test which balances the degree of state interest against the fundamentality of the personal rights involved. But, while the Court’s discussion is by far the most informative of all the illegitimacy opinions to date it is far from comprehensive.\(^\text{115}\)

Perhaps the greatest shortcoming in the *Weber* opinion is in its attempt to distinguish *Labine*. Justice Powell first reiterates the broad scope of state discretion\(^\text{116}\) in the regulation of inheritance. He then recapitulates the two state interests which the *Labine* Court put forward to distinguish that case from *Levy*: the importance of a prompt and stable determination of land titles following death and the insurmountable nature of the discrimination in *Levy* and *Weber*, as opposed to *Labine*. Powell reminds us that in *Labine* the father could have assured a legacy to his daughter by either marrying her mother or leaving a will. The fallacy of this argument was discussed earlier: the impediment to wrongful death recovery for the

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108. 401 U.S. at 559; cf. text accompanying note 82 supra.
109. 391 U.S. at 72; see text accompanying note 70 supra.
110. *In re Estate of Jensen*, 162 N.W.2d 861 (N.D. 1968).
113. See text accompanying notes 65 and 70 supra.
115. Id. at 486.
116. 406 U.S. at 170.
Levy plaintiff could have been eliminated by acknowledgement. The question of insurmountability thus can not be determinative. Nevertheless, Powell equated the insurmountabilities of Levy and Weber, where a statute prohibited acknowledgement of illegitimates when the parents were incapable of marriage at the time of conception, and used this similarity to distinguish Labine.

The inability of the Weber Court to identify a fundamental right which would permit it to distinguish the Labine minimum rationality test from the one which it may embody (strict scrutiny) and the one which it espouses (a middle-level balancing test) and the one which it probably covertly applies (the Reed test) has left Justice Rehnquist and commentators in a quandary. If the fundamental personal right which the classification may endanger is the right of a child to a relationship with his father, including the normal concomitants of care and support, Labine is indistinguishable. The fundamental personal right could surely not be a child’s right to statutorily created workmen’s compensation benefits. These statutes were created relatively recently, afford exclusive remedies, and are in derogation of the common law. By preserving Labine, the Court in Weber stopped short of labeling illegitimacy a suspect classification, though perhaps this would have been the more candid course.

4. Gomez and Cahill

Though Gomez v. Perez follows Weber in time, it conspicuously fails to follow Weber’s analytic formula or even to mention state interest. Gomez has perhaps the greatest potential application of all the illegitimacy cases in that it directly involved the illegitimate child’s right to support. The appropriate holding could have a far greater impact on equalizing the economic life of the illegitimate child than could decisions involving inheritance, workmen’s compensation and wrongful death actions. Perhaps a consideration of this impact prompted the Court to forego analysis in favor of conclusory language.

Texas gave no right of support to illegitimates and provided no

117. See text accompanying note 70 supra.
118. LA. CIV. CODE ANN. art. 204 (West 1952).
119. See text accompanying notes 70-72 supra.
122. Id.
123. Id. at 483-84.
mechanism for establishing paternity other than voluntary acknowledgment. Labine is not mentioned; Levy and Weber are interpreted as holding that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." To deny substantial benefits is thus "invidious" discrimination. Presumably the only statute denying rights to illegitimates which would be permissible under this principle is one that granted only insubstantial benefits. This language and the precise formulation of the holding go far beyond the facts of the case:

We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its natural mother. For a State to do so is "illogical and unjust."

The denial could be "illogical and unjust" for two reasons. First, legitimate and illegitimate children are similarly situated in their dependency needs. Thus a non-support statute which excludes them is under-inclusive. Or, secondly, due process does not permit their deprivation as a result of their parents' having created them extramaritally and then failing to marry. If the former reasoning is intended, the application of the case could be restricted to support provisions. But it is arguable that this language mandates equal, identical treatment for legitimates and illegitimates in both the duration and amount of support. If the second interpretation was intended, we cannot but conclude that no differential treatment of illegitimates is permissible. In this sense, they would become a suspect class.

In the interim between Gomez and the Supreme Court's next decision, New Jersey Welfare Rights Organization v. Cahill, the Kentucky Supreme Court, in Pendleton v. Pendleton, denied paternal inheritance to the child of a common law marriage. The marriage was valid in the state of the child's birth. The family moved to Kentucky, and the father died there. Kentucky does not recognize common law marriages. The court followed Labine (dealing, as

125. Texas now has a paternity statute which, except for its one year statute of limitations, is one of the most progressive in the country. See TEX. FAM. CODE ANN. tit. 2 § 13.01-09 (Vernon Supp. 1976).
129. 531 S.W.2d 507 (Ky. 1975).
it does, with both inheritance and illegitimacy). Justice Palmore, writing for a unanimous court, laments the Levy-Gomez line of precedents. Particularly he finds fault with the continued vitality of Labine resulting from Weber's superficial distinctions and Gomez's total failure to deal with it. His dilemma is expressed eloquently and since it is shared by many, it is set forth in the margin.130

The decision in New Jersey Welfare Rights Organization v. Cahill131 followed closely after Gomez in time and method. New Jersey's "Assistance to Families of the Working Poor"132 program limited benefits to those otherwise qualified families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child under the age of 18 residing with them, who shall be either the natural child of both, the natural child of one adopted by the other, or a child adopted by both."133 The Court found therein a violation of equal protection.

The statute differs from those in prior cases in the clear expression of its purpose: to assist the poor only insofar as consistent with the state's interest in promoting "legitimate" families. The Court

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130. It is readily apparent that the meaning of the equal protection clause cannot be ascertained from what it says, nor even from what the Supreme Court has said about it.

... Since it is now held by the court of last resort in the federal constitutional field that a child's right of support from its father is within the coverage of the equal protection clause and, if accorded to legitimate children in general, must be accorded to illegitimate children as well, it would be our inclination to hold that although a right of inheritance may not have the immediacy or social significance of a present need for support, yet a right is a right, the existence of which surely ought not to depend on whether it falls within the ambit of state-enforced welfare legislation. If a state cannot constitutionally force a father to support his children without including illegitimate children, we can find no justification in logic for its authority to deny illegitimate children the same right of inheritance conferred upon other children. Though the right has something of a fugitive nature in that the father may of course discriminate against any child, legitimate or illegitimate, it seems incongruous that the state should be allowed to do it for him. But after all, this is mere logic, which seems to have a declining importance in the world of constitutional jurisprudence.

We are equipped with neither a crystal ball nor the type of scales on which it is evident that a right must be weighed in order to determine whether it is heavy enough to register under the 14th Amendment. Nor are we willing to undertake the sophistry of distinguishing Labine v. Vincent . . . Suffice it to say that it has not been overruled by the court that has the exclusive power to overrule it and we think that as long as it remains the law it governs this case.

Id. at 510-11.

could not infer a solely compensatory purpose which would be unrelated to the denial of rights to illegitimates. Thus a strict means-analysis (does the classification reasonably effectuate the purpose of the statute) would result in upholding the provision. The receipt of welfare assistance could not be considered a fundamental personal right. The dicta in Weber about a due process doctrine\textsuperscript{134} and the Gomez argument that illegitimates are similarly situated in their needs for support\textsuperscript{135} constitute the "analysis" in Cahill.

The argument that a burden must bear a relationship to responsibility or wrongdoing is somewhat strained here. The discriminatory classification is the non-marital family unit which includes one or two responsible parties in addition to the innocent child, albeit less money to the mother spells less money for the child. It is clear that something more than the articulated rationale is present in the decision, otherwise all discrimination would be permissible in other circumstances against mothers and fathers of illegitimates. Glona held otherwise. The opinion thus may be read widely to mean that the State may not discriminate against illegitimate families. This conclusion had to remain unspoken because it would result in two further conclusions: the State's interest in promoting marriage is not a legitimate one and illegitimacy is an unacceptable classification even as applied to the responsible parties. The Court was clearly trying to draw a line short of the strict scrutiny standard.

5. Jimenez AND Lucas

The plaintiffs in Jimenez v. Weinberger\textsuperscript{136} and in Mathews v. Lucas\textsuperscript{137} were outside the scope of the Social Security Act's presumption of dependency provisions.\textsuperscript{138} The Jimenez children, born

\textsuperscript{134} "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing . . . . [Weber] 406 U.S. 164, 175." 411 U.S. 619, 620.

\textsuperscript{135} "[T]here can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well being of illegitimate children as to those who are legitimate." Id. at 621.

\textsuperscript{136} 417 U.S. 628 (1974).

\textsuperscript{137} 427 U.S. 495 (1976).

\textsuperscript{138} The presumptions of dependency are found in 42 U.S.C. § 402(d)(3) (1970). Section 402(d)(1) provides that "[e]very child (as defined in section 416(e) of this title) of an individual entitled to . . . disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child" has filed an application, is unmarried and under 18, or 22 if a full-time student, and was dependent upon such individual, is entitled to benefits on account of the insured individual's disability or death.

A child under § 416(e) includes a step-child and a legally adopted child. Section 416(h)(2)(A) adds that any child who, by state intestacy law, would be entitled to inherit from the insured individual would also be deemed his child. Section 416(h)(2)(B) adds children
after the onset of their father's disability, were statutorily denied benefits arising from that disability because, not falling under the statutory presumptions of dependency, they had to prove actual

who would have been legitimate except for a non-obvious defect in the parents' marriage.

Under § 402(d)(3) certain children are presumed dependent and need not offer proof of that fact for entitlement:

(3) A child shall be deemed dependent upon his father . . . at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual,
or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

(4) A child shall be deemed dependent upon his stepfather or a stepmother . . . .

Section 416(h)(3) enumerates the "final" circumstances under which a child can be deemed legitimate in order to be eligible for benefits despite the absence of presumed dependency. It is subsection (3)(B) and (3)(C) of § 416(h) which are involved in Jimenez and Lucas, respectively. The subsections are set forth below:

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(B) in the case of an insured individual entitled to disability insurance benefits

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his son or daughter,
(II) has been decreed by a court to be the father of the applicant, or
(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter, and such acknowledgement, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of that applicant at the time such period of disability began;

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his son or daughter,
(II) had been decreed by a court to be the father of the applicant, or
(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter, and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

(emphasis added). The underlined portions were the last barriers which prevented the Jimenez and Lucas children from recovering. Subsection (3)(B) was held invalid; subsection (3)(C) was held valid.


140. See note 138 supra.
EQUAL PROTECTION FOR ILLEGITIMATES

acknowledgement and dependency prior to the onset of their father's disability.\textsuperscript{141} Since they were born two and five years after the disability commenced they could not demonstrate the requisite dependency.

The Lucas children were statutorily denied benefits sought as a result of their father's death\textsuperscript{142} because, not falling under the statutory presumptions of dependency,\textsuperscript{143} they had to prove that their father was either living with them or contributing to their support at the time of his death.\textsuperscript{144} Since the father did neither, they were precluded from receiving benefits under the statute.

Section 216(h)(3)(B) was found to violate Fifth Amendment equal protection in Jimenez; section 216(h)(3)(C) was held valid in Lucas. The reason for the disparate results is simply this: the statutory purpose put forth by the government in Jimenez was "to provide support for dependents of a disabled wage earner."\textsuperscript{145} Whereas the statutory purpose proclaimed by the government in Lucas was "to replace the support lost by a child when his father . . . dies."\textsuperscript{146}

Using a "means-analysis"\textsuperscript{147} approach, examining whether the legislative means substantially further legislative ends,\textsuperscript{148} the Jimenez Court concluded that since all dependents of the disabled wage earner were within the purview of the Social Security Act, the provisions were under-inclusive. The Jimenez children were actually dependent on their father but were not included. Conversely, many children, legitimate, legitimated and otherwise presumed dependent, could obtain payments without resort to proof of dependency-in-fact prior to the onset of the disability (including after-born illegitimates like the plaintiffs) though they were not actually dependent on him.

Since the Lucas Court accepted the government's characterization of statutory purpose as compensating for support lost, and the Lucas children were not in fact receiving support at the time of their father's death, they are not intended beneficiaries of the Act.

In both cases the Court took pains to explain the methods which they had applied: examining the relationship between statu-

\textsuperscript{142} 42 U.S.C. § 402(d) (1970).
\textsuperscript{143} See note 138 supra.
\textsuperscript{144} See note 138 supra, 42 U.S.C. § 416(h)(3)(C).
\textsuperscript{145} 417 U.S. at 634.
\textsuperscript{146} 427 U.S. at 507.
\textsuperscript{148} Id. at 20.
tory purpose and the classifications chosen to effectuate that purpose. The approach is superficially viable but it has two great drawbacks. First, if the Court continues to defer to the governmental characterization of statutory purpose, the government can assert any rationale which will assure that the statute is not underinclusive. Secondly, this approach emphasizes the proper drawing of statutes and de-emphasizes constitutional safeguards inherent in the concept of equal protection.

For example, a state may define the purpose of the support provision of its paternity statute as being to shift the burden of support from the state to the father whose moral and legal obligation it is to support his children. This purpose is served by a provision which imposes a duty on the father to pay an amount of support which will insure survival and no more. Under a strict means-analysis approach, we would not ask if the articulated purpose were "legitimate;" nor would we ask if there is an underlying rationale for granting illegitimates a right to a lesser amount of support than is due legitimate children whose parents are divorced. The latter would be entitled to support which takes into account the father's ability to pay as well as the child's needs.

The Jimenez Court was not slavish in following the government's assertions of purpose, however, since it noted that the government's secondary purpose, to prevent spurious claims, was not effectuated by the classifications. The possibility of fraudulent claims was just as great with other afterborn illegitimates who enjoyed the presumption of dependency.

The Lucas opinion is notable also for its explicit refusal to add illegitimacy to the brief list of suspect classifications. The Court compares the burdens of the illegitimates with those of women and blacks and finds them much lighter.

One further aspect of the Jimenez opinion remains to be discussed: "[T]he opinion has strong due process overtones . . . at times appearing to pay homage to the still novel, and I think unsupported theory that 'irrebuttable presumptions' violate due process."

150. See text accompanying notes 32-41 supra.
151. [P]erhaps in part because the roots of the discrimination rest in the conduct of the parents rather than the child, and perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes. Mathews v. Lucas, 427 U.S. at 506 (footnotes and citations omitted).
152. 417 U.S. at 638 (Rehnquist, J., dissenting).
Justice Rehnquist points to the language of the majority opinion to the effect that if the children were dependent, "it would not serve the purpose of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits." When a statute deprives an individual of liberty or property by presuming that person to be a member of a particular class, without giving him the opportunity to refute his status as a member of that class the irrebuttable presumption doctrine has been invoked. This presumption was present in the analysis in Stanley v. Illinois although that case was decided on equal protection grounds. Vlandis v. Kline was the first recent case to espouse the doctrine as its holding. In that case, a Connecticut student was precluded from proving a later-acquired residency because of a presumption that his legal address would continue to be his permanent address during his enrollment at the university. As a result, the student was required to pay higher tuition rates than in-state students. The policy of the differential treatment in Vlandis was undoubtedly to subsidize higher education for state residents to the degree possible within the finite amount allocated. Under the Dandridge v. Williams rationale, some discrimination is permissible when resources are limited. The purpose of aiding bona fide residents (whose parents are probably taxpayers of Connecticut) would be defeated if every out-of-state student could claim resi-

153. Id. at 639 (emphasis added).
156. Id. at 656-67 (footnotes omitted).
159. 397 U.S. 471 (1970) (Court upheld ceiling on benefits to AFDC families which gave maximum assistance to a family with five children and no more where there were six or more children).
dency upon arrival and thereby require Connecticut to subsidize all students. Nevertheless, the irrebuttable presumption was found to violate due process guarantees.

The principle argument against the extension, or even continued application, of the irrebuttable presumption doctrine is that a case-by-case determination for every individual in every class drawn by legislatures would pose an intolerable financial and administrative burden. 160

6. Trimble v. Gordon

*Trimble v. Gordon* 161 arose under the Illinois Probate Act 162 which provided for intestate inheritance by legitimate children from both parents, but by illegitimate children only from the mother. 163 In finding a violation of equal protection in this differential treatment, the Court stopped short of overruling *Labine* on its facts, but

160. For example, probably every state has a statute prohibiting marriage below a certain age. The state might propound three reasons to justify such a provision: first, its interest in protecting minors from the life-long consequences of a decision made when immature; second, to encourage more or less permanent unions which create a stable family environment; third, to assure that the partners are capable of self-sustenance. The incidence of divorce increases inversely with the age of newlyweds. The state therefore presumes irrebuttable that most people attain sufficient maturity by the age of 18, for example, to make a reasoned choice of partner and to be capable of supporting themselves.

Statutes make exceptions to the minimum age limit, for example, when the woman is pregnant or delivered a child and when the couple has parental consent.

Were a future court to find that the freedom to marry is a fundamental personal right, analogizing from *Loving v. Virginia*, 388 U.S. 1 (1967), then the irrebuttable presumption of maturity at age 18 could not stand. Adolescents who desired to marry would be permitted to demonstrate the wisdom of their decision and their ability to support the family unit.

Another example which demonstrates the preposterous consequences of this doctrine concerns the minimum age for being licensed to drive motor vehicles. In most states 16 is irrebuttably presumed to be the minimum age at which one acquires sufficient maturity and competence to drive. The so-called " privilege" to be licensed to drive could conceivably reach the status of a "right," linked to freedom of interstate travel, following *Shapiro v. Thompson*, 394 U.S. 618 (1969). What 15-year old would not seek an administrative determination that he is sufficiently skilled and mature to be licensed? If he failed the first time, would he not have the right to try again every two weeks?


162. ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1961). Effective January 1, 1976, § 12 and the rest of the Probate Act of which it was a part were repealed and replaced by the Probate Act of 1975. Public Act 79-328. Section 12 has been replaced by ILL. ANN. STAT. ch. 3, § 2-2 (Smith-Hurd Supp. 1977). That section was recodified without material change.

163. An illegitimate child is heir of its mother and of any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose parents inter-marry and who is acknowledged by the father as the father's child shall be considered legitimate.

it did overrule the *Labine* standard of scrutiny as applied to state intestacy laws.\(^{164}\)

The opinion is the most refined and articulate in the entire line of illegitimacy cases. It adequately details the analytic framework employed by the Court and leads us through the examination. While clarifying the predominant role of the *Reed* test\(^{165}\) in future equal protection cases, it preserves alternative doctrines\(^{166}\) and definitively rejects one as inappropriate.\(^{167}\)

While the opinion falls short of calling illegitimacy a suspect category, something it is clearly loathe to do, it implies that the scrutiny which will be applied to illegitimacy is almost indistin-

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\(^{164}\) The Illinois statute can be distinguished in several respects from the Louisiana statute in *Labine*. The discrimination in *Labine* took a different form, suggesting different legislative objectives . . . . In its impact on the illegitimate children excluded from their parents' estates, the statute was significantly different. Under Louisiana law, all illegitimate children, "natural" and "bastard," were entitled to support from the estate of the deceased parent . . . . Despite these differences, it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this differs from that in *Labine* the more recent analysis controls.

(emphasis added) 97 S. Ct. at 1468 n.17.

\(^{165}\) See text accompanying notes 52-60 supra.

\(^{166}\) Due process—punish not the innocent:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."

406 U.S. at 175 (footnote omitted).


Due process—irrebuttable presumptions:

The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed.

Id. at 1465.

\(^{167}\) The "insurmountable barrier" distinction, mentioned in *Labine* and *Weber* is rejected as an "analytic anomaly." Id. at 1467. See text accompanying notes 104-06 & note 106 supra.
guishable from strict scrutiny. A scheme which discriminates against illegitimates will be tolerated only where the statute is "carefully tuned to alternative considerations."\textsuperscript{168} Where the child can demonstrate paternity through an adjudication or a written acknowledgement, the state may not deny his right to an intestate share.

This means that the courts will take a more activist role in finding equal protection violations. In the narrow gap between this standard and strict scrutiny, however, state legislatures will find space to rest comfortably with current legislation. There will be no legal compulsion to put illegitimates on a parity with legitimate children; the effect of moral compulsion on the legislatures has been lamentable. As long as state legislatures can carefully frame their state purpose for denying full equality, they will be able to discriminate with impunity.

IV. **DEFECTS IN CHAPTER 742, FLORIDA STATUTES AND COMPARISON WITH OTHER JURISDICTIONS**

Only six states\textsuperscript{169} have not enacted a statutory procedure for the determination of paternity, but even these have non-support legislation which has been applied to illegitimate children in recent years.\textsuperscript{170}

A. **Standing**

1. **FLORIDA**

Florida provides that "[a]ny unmarried woman who shall be pregnant or delivered of a child may bring [paternity] proceedings."\textsuperscript{171} The Supreme Court of Florida judicially excised the word "unmarried" from this provision in 1976, finding such classification an "unreasonable and invidious discrimination."\textsuperscript{172} The court based the finding of a denial of equal protection on two grounds. First, the state's interest in protecting a child from being publicly bastardized by its married mother was found less significant than that child's right to support, regardless of the marital status of the mother.

\textsuperscript{168} Mathews v. Lucas, 427 U.S. 495, 513 (1976).

\textsuperscript{169} Alaska, Louisiana, Missouri, Pennsylvania, South Carolina and Virginia.


\textsuperscript{171} FLA. STAT. § 742.011 (1975).

\textsuperscript{172} Gammon v. Cobb, 335 So. 2d 261, 267 (1976).
Secondly, many similarly situated (i.e., adulterine) bastards in Florida are given support rights or other substantial benefits under conflicting provisions of Florida law.

2. OTHER JURISDICTIONS

The statutes of several other jurisdictions permit the mother to maintain the paternity action only if she is unmarried, although two relax the rule. In the remaining statutes, the mother can bring the suit regardless of her marital status. If the mother is dead or disabled suit may be brought by her personal representative. Only eight states allow the putative father to initiate a paternity suit and two extend this right to his personal representative after his death. Less than half the states give the right to sue to the child.


175. D.C. Code § 16-2342 (1973) (unmarried to the putative father); W. Va. Code § 48-7-1 (1976) (unmarried woman or woman who has not cohabited with her husband for one year or longer).


through a guardian or best friend\textsuperscript{180} and several permit his suit only in the event of his mother's death or disability.\textsuperscript{181} Next of kin\textsuperscript{182} and other persons having legal custody\textsuperscript{183} are added in a few statutes. Most recent amendments have given standing to welfare authorities to initiate a paternity action.\textsuperscript{184} Some amendments, however, explicitly restrict the welfare authorities' right to sue to situations where the mother fails to bring suit,\textsuperscript{185} the agency is contributing to the support of the mother or child in whole or part,\textsuperscript{186} or the mother\textsuperscript{187} or child\textsuperscript{188} or both\textsuperscript{189} are likely to become a public charge. In two

\begin{itemize}
\item 181. Indiana, Nevada, New Mexico, South Dakota and Wyoming. See statutory sections in note 180 supra.
\item 185. Connecticut, see note 184 supra; Vermont, VT. STAT. ANN. tit. 15, § 373 (Supp. 1977)(if mother does not charge a person with being its father within 30 days after the child is born, the commissioner of social welfare may make a complaint).
\item 186. Illinois, Kentucky, Michigan and Oregon. See note 184 supra.
\item 187. COLO. REV. STAT. § 19-6-101 (1973).
\item 189. N.Y. FAM. CT. ACT § 522 (McKinney Supp. 1976); N.C. GEN. STAT. § 49-16 (1976).
states the district attorney\textsuperscript{190} has standing. Delaware,\textsuperscript{191} Washington,\textsuperscript{192} and all the states which have enacted the Uniform Act of Paternity (UAP)\textsuperscript{193} and those which have enacted its successor, the Uniform Parentage Act (UPA),\textsuperscript{194} (in some cases where there is a “presumed”\textsuperscript{196} father) permit any interested person to bring an action.

3. THE UNIFORM PARENTAGE ACT

The UPA was approved by the National Conference of Commissioners on Uniform State Laws in 1973. The substantive portion of the Act, defining the parent and child relationship and extending it to every child and every parent regardless of legal status, comprises the first two sections. Presumptions of paternity from state statutes are compiled in section 4(a). Where one or more circumstances obtain, formal proceedings to establish paternity are not necessary. The enumerated presumptions of section 4(a) are rebuttable by “clear and convincing evidence.”\textsuperscript{196} Section 6 lists persons with standing to bring a paternity action.\textsuperscript{197} The section is designed to give presumed biological family members the fullest opportunity to be accorded the rights and duties of a legal family relationship where the parents have at least attempted marriage before or after the child’s birth. In that event, only the parents and child would be interested in an adjudication of the existence of the father and child relationship, and they may seek it at any time.\textsuperscript{198}

Where there has been no attempted marriage the presumption of paternity is slightly weaker. In this case the presumption arises from the presumed father’s openly acknowledging the child by accepting him into his home and holding him out to be his child, or by a formal, filed acknowledgement.\textsuperscript{199} It would be rare for one other than the child’s true father to perform these acts. However, if he did, he could not defeat the rights of the father who as an

\textsuperscript{190} CAL. CIV. CODE § 7006 (West Supp. 1977); N.M. STAT. ANN. § 22-4-8 (Supp. 1975); WIS. STAT. ANN. § 52.23-.25 (West Supp. 1976-1977).
\textsuperscript{191} DEL. CODE ANN. tit. 13, § 1321 (1974).
\textsuperscript{194} California, Hawaii, Montana, North Dakota, Washington and Wyoming. For the list of statutory sections, see note 180 supra.
\textsuperscript{195} Section 4, UPA. See test accompanying notes 196-201 infra.
\textsuperscript{196} UPA § 4(b).
\textsuperscript{197} UPA § 6(a)-(c).
\textsuperscript{198} UPA § 6(a).
\textsuperscript{199} UPA § 4(a)(3)-(5).
“interested party” could initiate proceedings at any time.200

Where the child has no presumed father under the provisions of section 4, an action can be brought by the child, his mother, or his personal representative, the personal representative or parent of his mother if she is dead, a man alleging himself to be the father, or his parent or personal representative if he is a minor or dead.201 By enumerating possible plaintiffs, the section has precluded an interpretation that any of the parties listed are not “interested.” The individuals named are those most likely to have an interest in the welfare of the child. It is very difficult to conceive of a situation in which no party is able to assert rights for the child as, even after his death, his personal representative may enforce his rights for the benefits of his heirs.

The state’s interest is not forgotten. The appropriate state agency can sue where there is no presumed father.202 There is no doubt but that a state is an interested party when it is, or may be, required to support the child in place of the father. Assuming he is capable, it is the father’s duty (not the state’s) to support and maintain his children irrespective of his marital status.

4. Trimble Applied

A need for swift, efficacious paternity proceedings is crucial to the realization of a child’s support rights. In the absence of presumptions of paternity, a proceeding is his only avenue toward a parity with legitimate children in terms of familial rights and duties. It is incumbent on those states which rely on criminal non-support proceedings to enforce the child’s rights to enact legislation that is now constitutionally mandated.

Trimble reiterated the means-analysis test used in Jimenez and Lucas; the constitutionality of the statutory provision “depends upon the character of the discrimination and its relation to legitimate legislative aims.”203

At a minimum, the purpose of the paternity statutes is to determine the child’s parentage and thereby insure that he receives some measure of support from his father. Denying the child and certain other interested persons the right to bring the action operates directly to contravene those purposes.

A provision which restricts standing to bring the action in a way

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200. UPA § 6(b).
201. UPA § 6(c).
202. Id.
that could prevent a child’s determination of paternity is unjustifiable under Trimble. It is irrelevant to say that the discrimination is aimed at the omitted “next of kin” or the omitted “deceased mother’s personal representative” when the effect of that omission is so prejudicial to the child.

Florida and six other jurisdictions permit only the child’s mother to sue. This was justified by the probability that her knowledge was the most relevant and accurate and because the child was most often in her custody. Thus, support payments following a finding of paternity would be sent to her for the child’s benefit. While the presumptions are accurate they are not true in every case. There are certainly many illegitimate children who are not living with their mothers and there are other ways to have paternity established than to rely on the testimony of the mother when she is recalcitrant. There are mothers who wish to conceal the father’s identity and many who execute releases with the putative father in an attempt to extinguish all paternal rights and obligations. Such releases have been held not to bar the child’s right to have his parentage determined and his right to paternal support enforced. If a mother’s affirmative action in contracting to release the father cannot deter the suit, it is inconceivable that her inaction should be allowed to do so.

B. Statute of Limitations

1. Introduction

Several reasons have been asserted to justify limiting the period during which a paternity action may be brought, including the following: to protect a man from having to defend himself against an action brought years after the birth of the child; to bar stale claims; and to bring an end to litigation. The limitations period is meant to encourage the mother to sue promptly when the child is young and most in need of support (to enable his mother to care for him). There is a fear that the risk of perjury is increased as time passes and that difficulties of proof loom greater.

The Supreme Court in Gomez v. Perez recognized the right
of an illegitimate child to receive support from his father, where the state has created a judicially enforceable right in a legitimate child to such support. An illegitimate child is also entitled to support during his minority. Thus his claim, like that of a legitimate child, is not "stale" while the duty to support exists. While it is desirable to encourage the mother to bring the action promptly, her failure to do so cannot constitutionally bar the child's right to support.

The risk of perjury is always present to some degree in paternity cases and may even increase with time, but since the provisions of the statutes allow for tolling and revivals, other plaintiffs would not be barred from suing many years after birth despite the risk of perjury. The only truly effective means of reducing perjury is to compel extensive blood testing and to educate the parties as to the degree of accuracy now achieved by modern testing procedures. As the Court remarked in *Gomez*: "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

2. FLORIDA

The four year limitations period relating to paternity adjudication in Florida can be found in Florida Statute section 95.11. This limitation is tolled by the absence of the putative father from the State and by voluntary payments by the putative father, during the time of those payments.

211. Id.
213. See text accompanying notes 312-25, 332-42 infra.
215. "95.11 Limitations other than for recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(3) Within four years
(b) An action relating to the determination of paternity." Fla. Stat. § 95.11 (1975).
216. "95.051. When limitations tolled.—
(1) The running of the time under any statute of limitations . . . is tolled by:
(a) Absence from the state of the person to be sued.

(e) Voluntary payments by the alleged father of the child in paternity actions during the time of the payments." Fla. Stat. § 95.051 (1975).
217. Id.
3. OTHER JURISDICTIONS

Eight states\(^{218}\) currently provide no limitation period in their paternity statutes. This has been interpreted to mean that no limitation is imposed on the bringing of the action.\(^ {219}\) In the five states which have adopted the Uniform Parentage Act,\(^ {220}\) the action also may be brought at any time, with certain reservations where the presumed father has married or attempted to marry the mother.\(^ {221}\) The majority of the states impose statutory limitation periods of one year,\(^ {222}\) two years,\(^ {223}\) three years,\(^ {224}\) four years,\(^ {225}\) five years\(^ {226}\) or six years.\(^ {227}\) Specific provision for tolling the statute during the father's absence from the state is found in seven paternity statutes.\(^ {228}\) A separate, longer limitations period applies to welfare authorities.

\(^{218}\) Arizona, Arkansas, California, Delaware, Maine, Massachusetts, Minnesota and Ohio.


\(^{220}\) California, Hawaii, Montana, North Dakota, and Washington. For a list of statutory sections, see note 180 supra.

\(^{221}\) See text accompanying note 244 infra.


\(^{223}\) Alaska, Arizona, Arkansas, California, Delaware, Maine, Massachusetts, Minnesota and Ohio.


\(^{225}\) California, Hawaii, Montana, North Dakota, and Washington. For a list of statutory sections, see note 180 supra.

\(^{226}\) See text accompanying note 244 infra.


\(^{228}\) See text accompanying note 244 infra.
in two states. 229 In addition where the putative father has acknowledged the child230 or contributed to his support231 or where his paternity has been judicially established232 the statute of limitations may be tolled, may begin to run again or may cease to apply.

Several states (and the UPA) provide for the contingency that a father may flee the jurisdiction prior to the child’s birth and thus

229. N.Y. FAM. CT. ACT § 517(b) (Consol. Supp. 1976)(if the action is brought by a public welfare official not more than 10 years after birth of child); TENN. CODE ANN. § 36-224 (1977) (welfare authorities can bring suit anytime before the child reaches 18 years old if he is likely to become a public charge).


permit the mother to initiate the suit during pregnancy. In such case, the action is stayed until after birth.

One device that has been used by courts to evade the harshness of the limitations rule is to assert that it applies only to the mother. The child still may sue after the limitations period, presumably as long as the support obligation exists. "The right of an illegitimate child to assert a claim for parental support is too fundamental to permit its forfeiture by its mother’s failure to timely institute a filiation proceeding . . . . The law places no similar barrier to the enforcement of a legitimate child’s right."

A New York court avoided the two-year statute of limitations by asserting that it does not apply to matrimonial actions wherein the paternity of the child is open to challenge.

The Illinois Supreme Court was the first state supreme court to hold unconstitutional a limitations period in a paternity statute as a violation of the equal protection clause. The Illinois provision is less harsh than others in providing for two-year “revivals” of the limitation period where the father acknowledges paternity in open court, in a sworn written statement, or by contributing to the “support, maintenance, education, and welfare” of the child. The time is also tolled during the putative father’s absence from the state. Nevertheless, the court found that “[u]nder either the ‘rational basis’ test or the ‘overinclusive or underinclusive’ test,

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234. See note 233 supra.


236. The Supreme Court of Washington in State v. Bowen concluded that the Washington two year statute of limitations does not signify a legislative intent that a putative father should escape liability for child support if a filiation proceeding is not instituted within the 2-year period, inasmuch as there is no similar limitation upon the time within which the prosecutor can bring an action to enforce support under R.C.W. 26.20 [criminal non-support statute].


241. Id.

242. Id.

243. Id.
Chapter 106 ¾, Section 54 denies equal protection of law to the illegitimate child and to the mother of the illegitimate child." 244

4. UNIFORM PARENTAGE ACT

Section 7 of the UPA treats the conflicting interests of initiating a prompt action to establish the parent-child relationship and protection of the child’s rights. Where the parents were married or attempted marriage and other conditions are met under section 4,245 the child, his mother and the presumed father may bring an action at any time to declare the existence of the presumed father-child relationship. Where the purpose of the action is to prove the non-existence of this relationship a five-year maximum limitation is imposed.246 Where the presumption of paternity arises in the absence of marriage or attempted marriage247 the action may be brought at any time.

Different standards obtain where the child has no presumed father under section 4 of the UPA.248 The action may not be brought later than three years after the birth of the child. However, this limitation does not apply to actions brought by or on behalf of a child whose paternity has not been determined. In the latter case, an action can be maintained until three years after the child reaches majority. The time periods here and in section 6 are intended to have no effect on the time within which one may assert a right to inheritance or to a succession beyond the time provided by law for the closing of decedents’ estates.

5. RECOMMENDATION

Adopting the standards of the Uniform Parentage Act, sections 6 and 7, protects the alleged father against stale claims where his conduct has not raised a presumption of paternity. The overriding concern for the child’s right to support mandates that, even in the absence of a presumed father, the time limitation should be enforceable against him only after he has reached majority. It would be irrational to equalize the support rights of illegitimate children with legitimate children by statute and then prohibit the realization of these rights through arbitrary time bars.

244. 28 Ill. App. 3d at 891, 329 N.E.2d at 863.
245. UPA § 4(a)(1)-(3).
246. Id. § 6(a)(1)-(2).
247. Id. §§ 4(a)(4), (5). See text accompanying notes 199-200 supra.
248. UPA § 4.
C. Amount of Support

1. INTRODUCTION

Gomez v. Perez, read broadly, mandates identical treatment for illegitimates in the amount and duration of parental support. Nearly all of the statutes are drawn in vague terms. Since the determination of the support obligation is within the court's discretion, it can award anything from a pittance to a parity share.

The standards used in determining child support awards for legitimate children following their parents' divorce or separation are rationally drawn and ought to apply to illegitimates. In such cases the amount depends on the need of the child and the father's ability to pay. In addition to the actual needs of the child, the father is under a legal duty to provide his child with those advantages which are reasonable to his financial condition and status in society. Where the child's needs exceed the father's ability to pay, the court should award only such amount as the father may reasonably be able to pay.

In those states where the entire burden of support is on the father if he has the means, then if the father has the means the mother's ability to contribute should not diminish his obligation. In those states where the duty rests on both parents to support their children to the extent of their abilities, the father should still be required to contribute to the children's support as far as he is capable.

It is a perplexing question, and one well beyond the scope of this article, as to how the duty of child support should be allocated between the parents. A number of states impose by statute or case law an equal duty of support on the mother, some say that this is

249. E.g., Neckman v. Neckman, 298 So. 2d 534 (Fla. 3d Dist. 1974); Simonet v. Simonet, 279 So. 2d 35 (Fla. 4th Dist. 1973). See also Annot., 1 A.L.R.3d 324, 335 (1965); Annot., 1 A.L.R. 3d 382, 396 (1965); Annot., 2 A.L.R.3d 537, 545 (1965); Annot., 56 A.L.R. 2d 1207, 1216, 1223 (1957).
252. E.g., Dworik v. Dworik, 111 So. 2d 70 (Fla. 2d Dist. 1959).
253. Id.
mandated by the state’s adoption of the Equal Rights Amend-
ment. But there is much to be said for reducing the mother’s need
to work so that she personally may attend to the needs of the pre-
school child.

Other features of the support provisions that merit attention
are the duration of the support obligation, whether the award can
be modified, and whether the court can order periodic payments. As
with the questions of the degree of support and the allocation be-
tween parents, there seems no reasonable justification for treating
illegitimate children differently from legitimates.

Two cases which recently came out of the New York Family
Courts illustrate why a definitive declaration of full equality in
amount of support is vastly preferable to the less precise standards
embodied in most statutes. The New York legislature was candid
in formulating the standards for support of illegitimates as con-
trasted with legitimate children. Section 413 of the Family Court
Act applies to legitimate children and establishes the tests for
both the amount of the award due to a child born “during wedlock”
and the apportionment of that award to his parents. The father is
primarily responsible for the support of the children; the mother’s
liability exists only in the event of the father’s incapability, death
or disappearance. He is liable to pay “a fair and reasonable sum
according to his means.” In contrast, section 513 of the Family
Court Act makes both parents jointly and severally liable for the
“necessary support and education of the child born out of wedlock.”

Section 545 of the Family Court Act establishes the standard by
which the award is to be apportioned to the parents. The court may
impose all or part of the obligation on the father. Three factors are
to be considered: the welfare of the child, the financial capacity of
the parents, and the station in life of the mother. Such a formula
is not harsh but it is unequal.

In Ellen N. v. Stuart K. the court upheld the disparity as
being “rationally based on the government’s interest in the welfare
of children born in wedlock and those born out of wedlock to their
parents.” In so holding, it rejected the conclusion of Storm v. None,
which had found Levy v. Louisiana to require identical

258. N.Y. FAM. CT. ACT § 413 (McKinney 1975).
259. Id. § 513.
260. Id. § 545.
262. Id.
263. Id. at 372.
equality in standards for support between illegitimate and legitimate children. The Storm court held that section 413 standards applied to illegitimates as well as to children born in wedlock.

The "rational basis" for the Ellen N. decision is adduced from the fact that a man is not required to support the mother of his child unless he is or was married to her. Thus it is possible for the parents of the child to enjoy very different standards of living. The entire improbable argument reads as follows:

The legislature has determined that the out of wedlock child should not be given support according to the father's standard of living solely. This would tend to cause strife in the child's household where there is a great disparity between the standards of living of the father and mother. This could create a situation of the child eating filet mignon and the rest of his household eating gruel, where the standard of living of the father is vastly higher than that of the mother. When the father has limited means and the mother a substantially higher standard, the child would be placed in a "Cinderella" role in the family unit. Since the legislature deems it in the best interest of an out of wedlock child to be within the relative life style of the members of his household, Sec. 513 F.C.A. provides a reasonable and rational test.26

The absurdity of this remark requires no comment. The legitimate child in New York, in contrast, is entitled to receive support according to his father's standard of living because it is assumed that he lived in a household which included both parents. His accustomed standard is that of his father and should be maintained. The distinction is rational only if we accept the premise that nearly all children of divorced families lived in a two parent home and that nearly all illegitimate children lived in a one parent home with other siblings (who receive little or no support from one other than the mother or welfare bureau). In fact, more than one-quarter of American children—more than one half of the black children—are not living with their biological fathers. Less than one-third of the children whose parents are separated or divorced see their fathers on a regular basis.267 The classification is vastly over-inclusive in denying illegitimate children who have no siblings and those who may have lived for many years with their fathers the same amount of support to which similarly situated legitimate children would be entitled.

If the legislature's purpose is to look to the welfare of the child,

266. 387 N.Y.S.2d at 373.
it would give every illegitimate child the greatest amount of support which the father could reasonably afford in order to compensate the child for the legal, social and economic burdens which flow from the father's failure to legitimize the child. If the mother derives some benefit from the additional funds for her child, no particular harm is done. In many cases she has assumed full responsibility for rearing the child alone.

In the month following Ellen N. a different New York Family Court dealt with a second "minor" example of differential treatment in the support provisions of the Family Court Act. Shan F. v. Francis F. deals with section 516 which denies to the mother and child all remedies allowing for an increase in the amount for support or education of the child where the father has completely performed a court-approved compromise. In the case of legitimate children, support is always subject to escalation on the basis of increased needs of the child or means of the parent. The court held that this disparity is "unconstitutional under the equal protection guarantee, as applied to illegitimate children . . . whose paternity was clear at the time of the agreement." The test used to determine the constitutionality of a differentiation based on legitimacy "eschews mere conceptual, possible rationality; instead it requires a realistic consideration of whether the measure will in fact substantially advance the State purpose and also of whether the purpose could be obtained by means other than a discrimination against illegitimates as a class." After enumerating the customarily invoked interests of the state in dealing with illegitimacy, the court failed to find a rational connection between these purposes and a classification which permits the father of an illegitimate to "buy his peace." By reducing the liability of the father, the mother's support burden is correspondingly increased, but in many cases it is the state which will have to fulfill the child's needs above the amount provided for in the father's compromise.

Section 516, by barring paternity and support actions, might provide an incentive for fathers to execute support agreements. This...
could benefit illegitimates as a class, but it gives no advantages to those children whose paternity is clear.

The *Shan F.* court interprets the parental support duty under New York law as requiring “support of children on a standard of living approximating the parent’s own—a rule which by Constitutional necessity applies to illegitimate children equally with legitimate children.”

Such a variance in interpretation, especially in courts which are bound by the same precedents, bespeaks the need for a formula giving absolute equality of support rights to illegitimates.

2. **FLORIDA**

In Florida, illegitimate children fare even worse. Florida Statutes section 742.041 prescribes a fixed scale of payments depending on the child’s age and invests discretion in the judge to increase or reduce those amounts “depending upon the circumstances and ability of the defendant.” No mention whatsoever is made of the child’s needs! While the clause granting discretion rescues this support standard from being prima facie unconstitutional, in practice the schedule is followed “like a gospel.” The rule of construction, enunciated in *Clarke v. Blackburn*, asserts that the statutory sup-

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275. Id. at 601.
276. (1) The court shall order the defendant to pay monthly for the care and support of such child the following amounts:
   (a) From date of birth to 6th birthday—$40 per month.
   (b) From 6th birthday to 12th birthday—$60 per month.
   (c) From 12th birthday to 15th birthday—$90 per month.
   (d) From 15th birthday to 18th birthday—$110 per month.

278. FLA. STAT. § 742.041(2) (1975).
279. Interview with Quentin T. Eldred, Director, Domestic Relations Staff, Dade County, Fla. (June 30, 1977).
279. 151 So. 2d 325, 329-30 (Fla. 2d Dist. 1963).

At common law the putative father is under no legal liability to support his illegitimate child. If such liability exists, it must be that imposed by statute. If imposed by statute, the father is liable within the limits and subject to the provisions of the statute and it is permissible to enforce such liability only in the manner specified in the statute.

The case refused extradition of a Florida resident to North Carolina for trial on the charge of non-support of an illegitimate child. Defendant lived in North Carolina at time of fathering and in Florida at time of non-support. The court reasoned that since illegitimates are not protected under the Florida non-support statute and since there was no prior Florida determination of paternity, he was under no obligation to support the child. He was not permitted to initiate a chapter 742 proceeding to disprove paternity because of the § 742.011 standing restrictions. This “Catch-22” was corrected by a 1965 amendment adding subsection (2), making it a crime to withhold support from an illegitimate child whose paternity has been established in this or an other jurisdiction.
port schedule should be followed strictly because the remedy is in
derogation of the common law. In only one reported case has there
been a substantially higher award and it was made in light of the
father's $6 million in assets and his 6-figure income.280

Although Gomez281 did not articulate full equality of support,
it arguably can be so interpreted, and since illegitimacy cases
through Trimble282 will permit only those discriminatory classifica-
tions which are "carefully tuned to alternative considerations," we
cannot but conclude that the Florida statutory provision fails. The
approach which has been more or less consistently applied since
Reed in Weber, Jimenez, Lucas and Trimble is to examine whether
the avowed purpose of the statute is significantly promoted by the
classification.

One expression of the avowed purpose of Florida's paternity
statute is found in Flores v. State:283 "The statute was not designed
to punish the accused for crime, but to make him contribute to the
support of the child... [I]t is a civil procedure to enforce a police
regulation designed to secure immunity of the public from the
child's support."284 Since the first purpose is only to make the father
contribute, rather than to make him the primary supporter (as is
the case with the legitimate children in Florida),285 it is effectuated
by the classification. The second purpose of immunity is served only
if the prescribed amounts are sufficient to make the child ineligible
for welfare benefits. We will assume that the court will increase the
award in all circumstances where the father is able to pay more and
thereby fully immunize the state in every situation. Of course,
where the parents are unable to provide for their children the state
must assume this burden, and an action for non-support would not
lie.

Clearly means-analysis is not entirely helpful in deciding sup-
port cases which discriminate against illegitimate children. What is
needed is a recognition that the right of a child to the support of his
parents is sufficiently akin to a fundamental personal right that any
distinction made by legislatures between classes of children is im-
permissible regardless of where the lines are drawn: legitimate, legi-
timated, illegitimate, adopted, male, female, gifted, handicapped.
They are all children, all wholly dependent on the support of others

283. 73 So. 234 (Fla. 1916).
284. Id. at 236-37.
285. Dworkis v. Dworkis, 111 So. 2d 70 (Fla. 3d Dist. 1959).
(parents or welfare authorities) and thus similarly situated in terms of support needs so that any classification which excludes some of them is underinclusive.

3. OTHER JURISDICTIONS

Fewer than twenty paternity statutes use language which shows an intent that the father's duty is to be fully equal with regard to the support of his children, whether legitimate or illegitimate. Typical phrasing is that he is subject to all obligations for the "support," "maintenance," "care," and "education of the child." A slightly lesser number of statutes use language which implies a lesser obligation, for example, "not less than $10 monthly," "as under the

286. ALA. CODE tit. 26, § 12(4) (1975) (subject to all obligations for care, maintenance and education); GA. CODE § 74-202 (1975) (father bound to maintain); ILL. ANN. STATS. ch. 106 1/2, § 52 (Smith-Hurd Supp. 1976) (to the same extent as if a legitimate child); KANS. STAT. § 38-1106 (1973); KY. REV. STAT. § 406.011 (Supp. 1976) (liable for necessary support to the same extent as if legitimate child); MS. REV. STAT. ANN. tit. 19, § 271 (Supp. 1976-1977) (identical to Kentucky provision, UAP); MD. ANN. CODE art. 16, § 66H (Supp. 1976); MISS. CODE ANN. § 93-9-7 (1972) (identical to Kentucky provision, UAP); NEB. REV. STAT. § 13-102 (1974) (father liable as if child were born in lawful wedlock); N.C. GEN. STAT. § 49-15 (1976) (rights, duties and obligations of the mother and father with regard to support and custody remain the same as if the child were the legitimate child of the mother and father; however, under § 49-14, the establishment of paternity does not have the effect of legitimation); OKLA. STAT. ANN. tit. 10, § 83 (West Supp. 1976) (liable for support and education to the same extent as the father of a child born in wedlock); TENN. CODE ANN. § 36-223 (1977); W. VA. CODE § 48-7-4 (1976) (such sums as the court may deem proper for maintenance, education and support); WIS. STAT. ANN. § 48-7-4 (1976) (all past support from birth and all future support to 18); UPA § 2 provides that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Facts which the court may consider in determining the actual amount of the support obligation are listed in § 15(e) and resemble those used by courts to determine the amount of support owed legitimate children following the separation or divorce of their parents. These provisions are applied in the six states which have adopted the UPA (California, Hawaii, Montana, North Dakota, Washington, Wyoming) except that California omits the list of factors.

287. ARK. STAT. ANN. § 34-706 (1962) (not less than $10 monthly from birth to age 16); D.C. CODE ENCYCL. § 16-2349 (West 1966) (payments for maintenance and education commensurate with father's ability to pay); FLA. STAT. § 742.041 (1975) (see note 276 supra); IDAHO CODE § 7-1121 (Supp. 1977) (a fair and reasonable sum); IND. CODE ANN. § 31-4-1-19 (Burns Cum. Supp. 1976) (adequate support); IOWA CODE ANN. § 675.1 (West 1946); MASS. GEN. LAWS ANN. ch. 273, § 14 (West 1970) (such order as may be considered expedient); MICH. STAT. ANN. § 257.261 (West Supp. 1977) (proper and adequate); MO. REV. CODE ANN. § 3111.17 (Page Supp. 1976) (reasonable weekly sum); N.D. REV. STAT. § 109.155 (Supp. 1975) (appropriate sum for past and future support); OH. REV. CODE ANN. § 3111.17 (Page Supp. 1976) (reasonable weekly sum); OR. REV. STAT. § 109.155 (Supp. 1975) (appropriate sum for past and future support); PA. STAT. ANN. tit. 18, § 4323 (Purdon 1973) (fine or in addition payment of periodic sums); S.D. COMPILED LAWS ANN. § 25-8-1 (1976) (obligation of parents to support children under the laws for the support of the poor applicable to children born out of wedlock); VT. STAT. ANN. tit. 15, § 339 (1974) (in such manner and proportion as the court judges proper and for such time as the child is likely to be unable to support himself and no longer).

laws for the support of the poor"\textsuperscript{289} and "adequate support."\textsuperscript{290} Only a thorough examination of case law would reveal how such provisions are interpreted. In some states specific authority is given for the payments to be periodic\textsuperscript{291} and the award modifiable.\textsuperscript{292} Both of these factors are indispensable to the welfare of the child and, one may hope, are being applied by the courts regardless of their absence from the statutes.

The duration of payments varies from "for such time as the child is likely to be unable to support himself and no longer"\textsuperscript{293} to sixteen,\textsuperscript{294} eighteen,\textsuperscript{295} more than eighteen under certain circumstances,\textsuperscript{296} to twenty-one\textsuperscript{297} and beyond if incapacitated.\textsuperscript{298} The father's duty may cease before that time in the event of legal emancipation\textsuperscript{299} or adoption.\textsuperscript{300} An occasional provision allows for the recoupment of

\begin{footnotesize}
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\item \textsuperscript{289} S.D. Compiled Laws Ann. § 25-8-1 (1976).
\item \textsuperscript{290} Ind. Code Ann. § 31-4-1-19 (Burns Cum. Supp. 1976).
\item \textsuperscript{294} D.C. Code Encl. § 16-2349 (West 1966); S.D. Codified Laws § 25-8-29 (1976).
\item \textsuperscript{296} Colo. Rev. Stat. § 19-6-105 (1973) (until 21 in the discretion of the court; past 21 if unable to care for self because of physical or mental handicap); Idaho Code § 7-1121 (Supp. 1977) (if continues education past 18 court can order payments until 21 or discontinue); Md. Ann. Code art. 16, § 66H (Supp. 1976) (after 18 if mental or physical infirmity); Nev. Rev. Stat. § 126.230 (1975) (if male, until 21); N.Y. Fam. Ct. Act § 545 (McKinney 1975) (in every case until 21); Or. Rev. Stat. § 109.155 (Supp. 1975) (while the child is attending school until 21); R.I. Gen. Laws § 15-8-10 (1969) (if child is incapacitated by physical or mental disability to at least 21).
\item \textsuperscript{297} Nev. Rev. Stat. § 126.230 (1975) (if male, until 21); N.Y. Fam. Ct. Act § 545 (McKinney 1975) (in every case until 21).
\item \textsuperscript{298} Colorado, Maryland and Rhode Island; see note 296 supra.
\end{itemize}
\end{footnotesize}
past care and support paid by the mother\textsuperscript{301} or third parties.\textsuperscript{302}

In a number of states a paternity determination results in the criminal or civil non-support statutes becoming applicable to the "illegitimate" child as well.\textsuperscript{303} But in only two states,\textsuperscript{304} in addition to the five\textsuperscript{305} which have adopted the Uniform Parentage Act, does the finding result in legitimation for all purposes. Tennessee finds the child legitimate for the purposes of support and inheritance.\textsuperscript{306}

4. THE UNIFORM PARENTAGE ACT

Once a determination of paternity is made under the UPA the judgment is determinative of the parent-child relationship for all purposes.\textsuperscript{307} The court may order a new or amended birth certificate when necessary.\textsuperscript{308} The order may contain other provisions directed against the appropriate party concerning the duty of support, custody and guardianship of the child, visitation privileges and any other matter in the child's best interests.\textsuperscript{309} Ordinarily, the support award will be periodic, but a lump sum or the purchase of an annuity may be ordered when in the child's best interest.\textsuperscript{310}

Nine factors are enumerated in section 15 to illustrate what the court should consider in fixing the amount to be paid by the father for support: (1) the needs of the child; (2) the standard of living and circumstances of the parents; (3) the relative financial means of the parents; (4) the earning ability of the parents; (5) the need and

\textsuperscript{302} Iowa Code Ann. § 675.4 (West 1946).
\textsuperscript{305} California, Hawaii, Montana, North Dakota and Washington.
\textsuperscript{307} UPA § 15(a).
\textsuperscript{308} Id. §§ 15(b), 23.
\textsuperscript{309} Id. § 15(c).
\textsuperscript{310} Id. § 15(d).
capacity of the child for education, including higher education; (6) the age of the child; (7) the financial resources and earning capabilities of the child; (8) the responsibility of the parents for the support of others; and (9) the value of services contributed by the custodial parent.

Section 15 provides the flexibility necessary for the appropriate orders and amount of support to be made, as with legitimate children in a divorce proceeding. It is adaptable by all states regardless of how the state allocates the responsibility of support between the parents.

The first eight criteria under section 15(e) are generally accepted. The last, "the value of the services contributed by the custodial parent," has not been uncovered in the author's research. Regardless of its novelty it represents a sensible effort to more equally shift the responsibility for the child's existence. Declaring that parents are equally responsible and then permitting the father to discharge his obligation by paying fifty percent of the child's anticipated needs is inequitable. While child-rearing can be a joy, it also represents an enormous expenditure of time and energy. The mother is performing her own moral and legal obligation in caring for the child but she is also relieving the father of that responsibility.

V. BLOOD TESTING

A. Necessity for Blood Testing

In the appraisal of one judge: "Without . . . [blood grouping tests], the rules of evidence relating to proof of paternity have not changed much since our judicial ancestors threw witches into a New England pond and judged them according to whether they sank or swam."

The Department of Health, Education and Welfare has proposed offering massive support to states to identify and locate fathers of both legitimate and illegitimate children. The regulations recommend the use of blood tests and polygraphs to establish paternity. These proposals were enacted in 1975.

313. Id. § 304.20(b)(2)(i)(B).
Florida's paternity statute is conspicuously lacking any provision relating to the use of blood tests. Apparently they are used as a standard practice on the request of the defendant for the purposes of exclusion only. The omission of blood tests is unforgiveable for five reasons: (1) they deter a woman from bringing false claims; (2) they help detect false charges of paternity; (3) a blood test exclusion overcomes the presumption of legitimacy; (4) blood tests have shown that thirty percent of the men brought before the New York City Court who deny paternity and demand a blood test are actually not the fathers of the children in question; (5) blood tests have shown that eighteen percent of the men who admit paternity are actually not the fathers of the children they acknowledge.

"It has long been suspected—even recognized—that there is considerable perjury committed in the trial of disputed paternity cases." The temptation to perjure oneself flows naturally from the nature of the act sought to be proved. Generally speaking, the mother alone (and in some circumstances, not even she) can be certain when and with whom conception occurred. To present her case, the mother need only demonstrate that she had sexual intercourse with the alleged father at some time during the three-month period surrounding the date of the child's probable conception. The alleged father usually asserts one of two defenses: he may deny any sexual intercourse with the mother during the three-month period, or he may claim that the mother also had intercourse with other men during this period—the defense of exceptio plurium concumbentium. Without additional, impartial evidence, the court or jury must reach a verdict on the testimony of these parties alone.

A study has revealed that 93 percent of the tested parties in 312 disputed paternity cases over a six year period, "lied in some respect when they testified in court as to their sexual relationship." Fifty-seven percent of the witnesses who testified in court that they, too, had sexual intercourse with the mother during the

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315. These reasons are enumerated in S. Schatkin, 1 Disputed Paternity Proceedings § 18.01 (1975) [hereinafter cited as Schatkin].
316. Id.
317. Id. at § 18.02.
318. Id.
320. Id. at 215.
relevant three-month period confessed to the lie detector examiner that they had not.\(^{321}\) Over forty percent of the tested mothers admitted to having had sexual relations with others during the period of possible conception.\(^{322}\)

The actual known error at the Reid laboratories (where the lie detector tests were carried out) over the six year testing period was less than .0007.\(^{323}\) Arther and Reid report that when lie detector tests are properly administered they should achieve an accuracy of 95 percent, with a four percent margin for possible error.\(^{324}\) Despite this high degree of accuracy, the results of lie detector tests are generally not admissible as evidence unless both parties agree to submit to them and agree that the results will be admitted regardless of their outcome.\(^{325}\) However, the results of blood testing are afforded greater weight as scientific evidence than the results of the newer, less reliable polygraph tests.

B. Constitutionality

Compulsory blood testing has withstood every imaginable constitutional challenge\(^{326}\) including: invasion of privacy,\(^{327}\) denial of the privilege against self-incrimination,\(^{328}\) illegal search and seizure,\(^{329}\) and a denial of fourteenth amendment due process guarantees.\(^{330}\)

C. Accuracy

Numerous books and law review articles have recently reported on the degrees of accuracy which are attainable in the determination of paternity through blood tests. Only three of a possible 57 blood tests are frequently performed in the United States, testing the A-B-O, M-N, and Rh-Hr systems.\(^{331}\) This combination yields an exclusion level of approximately 53 percent.\(^{332}\) One writer estimates

\(^{321}\) Id.
\(^{322}\) Id.
\(^{323}\) Id. at 216 n.5.
\(^{324}\) Id.
\(^{325}\) Id. at 215.
\(^{330}\) Id.; Rochin v. California, 342 U.S. 165 (1952).
\(^{331}\) H. Krause, ILLEGITIMACY: LAW AND SOCIAL POLICY 130 (1971); Schatkin, supra note 315 at § 8.04 (rev. 4th ed. 1977); Larson, supra note 326.
\(^{332}\) Krause, supra note 331, at 128.
that the use of additional tests would bring the probability of exclusion to over 90 percent; a more recent estimate raises this figure to over 99 percent. Schatkin maintains a probability of exclusion of practically 100 per cent.

Thus, blood tests can accurately identify the non-father and by negative implication, the father. How reliable are they? Schatkin’s belief in the “unerring accuracy of blood tests” is substantiated by the mother’s confessions subsequent to paternity exclusions. He reports that in 656 blood tests carried out in affiliation cases in New York City during a ten year period, there were 65 exclusions. “[E]ach and every one of those 65 exclusions was followed by the mother’s subsequent confession, for the first time, of sexual relations with another man about the time she became pregnant.”

He also reports similar results from the records of the Children’s Court in Buffalo, New York. One hundred one blood tests resulted in 13 exclusions. “Twelve of the mothers thereupon admitted sexual relations with other men around the conception period (which fact had been suppressed up to then) and the thirteenth withdrew her complaint.” The number of blood tests carried out in continental Europe (where they are routine and compulsory in paternity proceedings) is in the tens of thousands. “What convinced the European Courts of the utter infallibility of the test was the fact that the thousands of exclusions obtained were almost invariably followed by the mother’s belated confessions, and prosecutions and convictions for perjury.”

Almost as revealing as the actual test results is the suspicious behavior of the mother who has brought the suit. She may refuse initially to submit to tests, delay unduly before taking them and be visibly apprehensive pending the test results.

Schatkin summarizes seven factors which, he contends, all but confirm the conclusive accuracy of blood tests in paternity cases: (1) mother’s confessions subsequent to exclusions; (2) highly frequent incidence of exclusions in doubtful cases; (3) almost 100 percent incidence of inconclusive results where the prosecution is con-

333. Larson, supra note 326, at 739.
335. Schatkin, supra note 315, at § 8.04.
336. Id. § 11.01.
337. Id.
338. Id.
339. Id.
340. Id.
341. Id. § 11.02.
342. Id.
vinced of the mother's veracity; (4) high percentage of exclusion
where the mother betrayed apprehension about taking the tests; (5)
unconvincing nature of the mother's testimony in those cases which
went to trial despite the finding of exclusion; (6) frequency of exclu-
sion in annulment actions which involved antenuptial sex relations;
(7) multiple exclusion under the different systems A-B-O, M-N Rh-
Hr.

D. Current State Provisions

Considering the constitutionality, predictability and accuracy
of blood tests in determining paternity, one might well assume that
all states would have encouraged the use of these tests through
legislation which compels their use in paternity proceedings, estab-
lishes uniform standards for testing and evidentiary use, and pro-
vides for the creation of a centralized laboratory which is highly
specialized in the newer, sophisticated tests. Nevertheless, a scant
majority of the states specifically allow for the use of blood tests in
paternity proceedings and only eight have adopted the Uniform Act
on Blood Tests to Determine Paternity (UBTA). In many states,
the court may order blood tests only on the motion of the alleged
father; although in other states, including those which have
adopted the UBTA and the UPA, the motion may be made by any
interested party or the court may order tests on its own initia-
tive.

Utah Code Ann. §§ 78-45a-7 to 78-45a-17 (Supp. 1975).

(1976); Ohio Rev. Code Ann. § 3111.16 (Supp. 1976); Tenn. Code Ann. § 36-228 (1977); W.

345. See note 343 supra for list of states which have adopted the UBTA. UPA adopting
states are: California, which has also enacted the UBTA, Cal. Evid. Code §§ 890-97 (West
1968) and therefore deletes the UPA provisions; Haw. Rev. Stat. § 584-1 to -26 (Supp. 1975);


Montana, North Dakota and Washington citations see note 345 supra; for the Utah citation,
see note 343 supra.
The effect of a party's refusal to submit to blood tests is not uniform. In some states the fact of refusal is admissible against the mother\textsuperscript{348} or child,\textsuperscript{348} or against the alleged father.\textsuperscript{350} Refusal may result in a dismissal\textsuperscript{351} or in the possibility of an unfavorable ruling.\textsuperscript{352} In one jurisdiction, the results of blood tests are admissible only if the putative father does not object.\textsuperscript{353} In two non-uniform UBTA states and in eleven others,\textsuperscript{354} results are admissible only if there has been exclusion. In the remaining fourteen states\textsuperscript{355} results are admissible with all available evidence if the experts disagree on the question of exclusion and the results tend to show the possibility of paternity. And contrary to common sense, in only six states other than the eight which have adopted the UBTA\textsuperscript{356} does a conclusive exclusion result in dismissal.


350. Massachusetts, Ohio, Rhode Island, Texas, Wisconsin. For statutory citations see note 348 supra.


E. Comparison of the Uniform Act on Blood Tests to Determine Paternity with Relevant Provisions of the Uniform Act on Paternity and the Uniform Parentage Act

The three attempts to achieve uniform standards are remarkably similar in most respects. Three similarities are of particular significance: (1) when blood tests will be ordered; (2) what evidentiary effect will be given the results; and (3) by whom the compensation of experts and costs of the tests will be paid.

All three Acts provide that the court may order blood tests on its own initiative and shall order them at the request of the mother, child or putative father.357

Under section 4 of the UBTA and section 10 of the UAP an exclusion will result in dismissal; and if the experts disagree in their findings or conclusions, the question will be submitted on all the evidence. If the experts conclude that the blood tests show the possibility of the alleged father’s paternity, the court has discretion to admit this evidence depending on the infrequency of the blood type.358 The UPA represents a significant evolution from the other two Acts. It provides that “[e]vidence relating to paternity may include . . . blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father’s paternity . . . .”359

Provisions for the compensation of expert witnesses and test costs under the UBTA are virtually identical in providing for proportionate allocation of expenses at the discretion of the court among the parties and the appropriate public authority.360

F. Recommendations

It is submitted that all three Acts are deficient in failing to make the use of blood tests compulsory in actions involving paternity.361 The sanction against the mother’s refusal—a dismissal of her suit—fails to consider the principal party whose interests are at stake in the paternity proceeding. While her refusal may reflect poorly on the merits of her claim, the child should not thereby be

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357. UBTA § 1; UAP § 7; UPA § 11.
358. UAP § 10.
359. UPA § 12(3).
360. UBTA § 3; UAP § 9; UPA § 16.
deprived of the opportunity of learning that the putative father is
or is not his own.

Similarly, the costs for the tests initially should be at public
expense, without regard to the financial ability of the mother and
putative father362 to pay. The parties who stand most to benefit by
competent accurate testing are the child (who is dependent and
thus "indigent") and the state which may thereby be relieved of its
responsibility in parens patriae for the child's support. When pa-
ternity is established, the father might then be required to pay the
costs of the test, along with other court costs.363 A survey of laborato-
ries found that the charge for administering three standard tests to
three individuals ranged from $10 to $150, with a mean charge of
$42.364 Another commentator estimates that the costs for the entire
battery of 57 serologic tests would be approximately $150 per per-
son.365

Another serious shortcoming in the Acts is the failure to estab-
lish evidentiary guidelines. The two earlier acts specify that a con-
clusive exclusion will result in dismissal. The UPA has no such
provision. In only fifteen states366 will a dismissal be mandated. This
seems contrary to logic.367 Apart from this provision, the language
of the UPA is satisfactory.

According to one scientist: "In the United States it would not
be difficult at present to perform tests providing a 70% chance of
exclusion. As demands and interest increase, it may be possible in
the near future to use tests providing more than a 90% chance of
exclusion."368 In order to take advantage of this potential, guidelines
must be established to assure that parties and specimens are accur-
ately identified,369 tests are performed only in qualified laborato-
ries,370 and that results are admissible into evidence through verified

362. Id. at 268-69.
363. Id.
364. Polesky and Krause, Blood Typing in Disputed Paternity Cases—Capabilities of
Rev. 41, 58 (1975).
UAP states: Kentucky, Maine, Mississippi, Montana, New Hampshire, and Utah. Also,
North Carolina, Texas and Wisconsin.
(1975).
369. See Joint AMA-ABA Guidelines, Present Status of Serologic Testing in Problems
370. Krause, supra note 361, at 269-70; Joint AMA-ABA Guidelines, supra note 369, at
293; Larson, supra note 326, at 735; Lee, supra note 368, at 633.
certificates which assure compliance with the proper procedures.

VI. OTHER COMMENDABLE ASPECTS OF THE UNIFORM PARENTAGE ACT AND SUGGESTIONS FOR THEIR IMPROVEMENT

Section 5 of the Act gives summary, but nonetheless adequate, treatment to the parentage of a child produced by artificial insemination of semen donated by one other than the mother's husband. The husband is treated in law as if he were the natural father provided that he has consented in writing to the procedure. The choice of phrase "natural father" is unfortunate because although the UPA proclaims equal rights and duties between parents and children regardless of marital status, "natural" connotes a biological, not "legal" relationship. Surely the drafters intend for no further action to be needed to confirm such a child's legitimate status. A less ambiguous statement can be found in section 742.11, Florida Statutes: "Any child born within wedlock who has been conceived by the means of artificial insemination is irrevocably presumed to be legitimate, provided that both husband and wife have consented in writing to the artificial insemination."  

The long-arm provision of section 8(b) of the UPA is "novel," but more rational and straightforward than the strained approach taken in Poindexter v. Willis. In that case the general long-arm statute was applied by treating the father's failure to support his illegitimate child as a "tortious act." Section 8(b) of the UPA provides that "[a] person who has sexual intercourse in this State thereby submits to the jurisdiction of the courts of this state . . . with respect to a child who may have been conceived by that act of intercourse." This section is clearly in keeping with the prevalent belief that fathers should not be able to evade their parental obligations by skipping from one jurisdiction to another. The Uniform Reciprocal Enforcement of Support Act, or its 1968 revision, has been adopted in every state, the District of Columbia, Guam, Puerto Rico and the Virgin Islands. Another device to thwart eva-

371. Joint AMA-ABA Guidelines, supra note 369, at 282-83; Krause, supra note 361, at 270.
374. U.R.E.S.A. dates from 1950 and was amended in 1952 and 1958. The 1950 version has been adopted in 26 states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands.
sion is the Parent Locator Service,\textsuperscript{376} which was created to give more people access to information which could assist in locating the absent parent. The Texas long-arm statute,\textsuperscript{377} applicable to suits "affecting the parent-child relationship," is more delicately phrased than section 8(b) of the UPA and is as far-reaching as is constitutionally permissible and thus is preferable to the uniform version.\textsuperscript{378}

A guardian (general or ad litem) shall represent a minor child in the action, pursuant to section 9 of the UPA. This provision is a necessary safeguard to the child's rights against the possible collusion of his parents. For example, the mother might prefer a lump-sum settlement even though smaller periodic payments would be in the best interest of the child. Without a guardian the child's interest would not be properly represented.

Section 10 makes provision for pre-trial proceedings: the public shall be barred; witnesses and parties can be compelled to testify; if their testimony is compelled following a refusal on the grounds of self-incrimination they may be granted immunity from all criminal liability on account of the testimony (except perjury); rules of evidence need not be followed; and relevant medical evidence is not privileged. These procedures are aimed at facilitating the ascertainment of truth. By guaranteeing privacy, compelling testimony but granting immunity where necessary and relaxing evidentiary rules, many of the impediments under state statutes are removed. Similarly, section 20 promotes the pursuit of the truth by guaranteeing the confidentiality of hearings and records.

\textsuperscript{376} Formerly only state or local welfare agencies were authorized to obtain the absent parent's address or last known employer's address from the Department of Health, Education and Welfare (under 42 U.S.C. § 1306(c)(1)(A) (1974)) or the Internal Revenue Service (under 42 U.S.C. § 610 (1974)) under certain conditions. Now, under 42 U.S.C. § 653 (1975), authorized persons include: any parent, guardian, or attorney acting on behalf of an abandoned child; any official of a court having jurisdiction to issue a support order in the case; and any agency of a state participating in the federal AFDC program. For a thorough discussion of the new child support provisions see Bernet, The Child Support Provisions: Comments on the New Federal Law, 9 Fam. L.Q. 491 (1975).


\textsuperscript{378} In a suit affecting the parent-child relationship, the court may exercise personal jurisdiction over a person whom service of citation is required or over the person's personal representative, although the person is not a resident or domiciliary of this state, if:

1. the child was conceived in this state and the person on whom service is required is a parent or an alleged or probable father of the child;

2. the child resides in this state . . . as a result of the acts or directives or with the approval of the person on whom service is required;

3. the person on whom service is required has resided with the child in this state; or

4. notwithstanding Subdivisions (1), (2), or (3) above, there is any basis consistent with the constitutions of this state or the United States for the exercise of personal jurisdiction.
A pre-trial settlement opportunity is incorporated into section 13 of the UPA. After evaluating the evidence of the hearing, the judge shall make "an appropriate recommendation for settlement" which may include the following: dismissal with or without prejudice; a compromise by which paternity would not be established but the alleged father would agree to undertake an economic obligation for the benefit of the child; and a voluntary acknowledgement of paternity by the father. If the parties agree to the judge's proposals judgment will be entered. If the parties do not agree the case will be set for trial.

A significant step toward abolishing the *exceptio plurium concumbentium* defense was taken in section 14(b) and (c). This defense permits the alleged father to refute paternity by proving that the mother had sexual intercourse with other men during the three-month period of possible conception. That defense is a fertile ground for perjury because it is one of the few available to an accused man. The others—impotence and sterility, for example—could be substantiated medically. The *exceptio* defense has resulted in sordid and wanton attacks on the mother's character. What is more serious, however, is that establishment of the fact of intercourse with another man at or about the time of probable conception will preclude determination of which man is the father, unless the father's identification is possible through blood tests or other means. Thus, absent thorough blood testing, a woman's "indiscretion" can deprive her child of all the rights which attach to a child whose paternity is established through adjudication.

Section 19 of the UPA adopts the criminal law mandate that

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379. UPA § 13(a).
380. (b) Testimony relating to sexual access to the mother by an unidentified man at any time or by an identified man at a time other than the probable time of conception of the child is inadmissible in evidence, unless offered by the mother.
   
   (c) In an action against an alleged father, evidence offered by him with respect to a man who is not subject to the jurisdiction of the court concerning his sexual intercourse with the mother at or about the probable time of conception of the child is admissible in evidence only if he has undergone and made available to the court blood tests the results of which do not exclude the possibility of his paternity of the child. A man who is identified and is subject to the jurisdiction of the court shall be made a defendant in the action.
381. See Commentary to UPA § 14.
382. Yarmark v. Strickland, 193 So. 2d 212 (Fla. 3d Dist. 1966). Here a child was denied the opportunity to establish a parent-child relationship with his father because the "other man" was not joined as a defendant and no blood tests were performed. Notwithstanding the economic and social implications of bastardy to the child, the court refused to permit the trier of facts to determine which of the two men was the father where the result would be based on speculation.
counsel be appointed for a party who is financially unable to obtain counsel. This provision reflects the serious nature of the paternity suit. By extending the right to counsel to either party it recognizes the important consequences to the child if paternity is established, and the burden which may be imposed on the proven father. The inherent difficulties those types of actions raise, especially in the area of proof, and the necessity for a correct judgment, are additional concerns which are to be safeguarded. Representation of counsel for all parties, to insure that all defenses are presented and a judgment reached on all competent (and only competent) evidence, will best serve the competing interests involved.

Under section 21 the applicable provisions of the UPA may be used to determine the existence of a mother-child relationship. The need for such a proceeding would arise infrequently. Nevertheless it is wise to have the same procedures and safeguards applicable to these actions.

Finally, section 24 of the UPA is addressed to the custodial proceedings necessary should the mother choose to relinquish the child for adoption. Before the termination of the father’s parental rights is possible, extensive procedures are required to guarantee his right to due process. If the efforts to identify and locate the father are successful he is entitled to notice and a hearing. If the father cannot be identified, the rights of the child’s adoptive family prevail to finally cut off the natural father’s parental rights six months after a court decree to that effect. This, or a similar framework, is constitutionally required by Stanley v. Illinois. There the Supreme Court held that the fathers of illegitimate children could not be deprived of their right to custody without the same hearing and proof of neglect to which unmarried mothers and divorced and married parents are entitled.

One last recommendation remains to be noted: the use of polygraph tests in pre-trial procedures involving paternity questions. Both Krause and Schatkin advocate the use of lie detector tests

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386. S. Schatkin, supra note 333, §§ 18.01-.17.
in the determination of paternity. Their degree of reliability remains in dispute so that mandatory use and admission of the results in evidence at trial is not yet advisable. But they can perform a valuable function at the pre-trial stage in discouraging perjury and eliciting post-result confessions from witnesses who are informed that they have lied to the examiner. As with blood testing, the strictest precautions must be taken to assure the competency of the examiner. The Reid laboratories found an actual known error of less than .0007 for a six year period but warn: “Far less accuracy will prevail, however, when the examiner is lacking in basic qualifications, adequate training, sufficient experience, general competence, or complete honesty. The lie-detector is far from the automatic device some persons think it to be.”

VII. CHILD SUPPORT ENFORCEMENT MECHANISMS IN BRIEF

Eight billion dollars went to recipients of Aid to Families with Dependent Children (AFDC) in 1974. In eighty-three percent of the families one parent was absent. It is not surprising that Congress has enacted amendments to the Social Security Act to reduce the mounting figures and discourage desertion. Their efforts have been directed three ways. To be eligible, applicants for AFDC must: (1) furnish the state agency with their social security number; (2) assign the state their accrued rights (or those of a recipient family member) to support from another person; and (3) cooperate with the state in establishing the paternity of an illegitimate child for whom aid is claimed and assist in obtaining support payments due the applicant for the child. A recipient-parent who fails to cooperate will face termination of the AFDC payments. The payments to eligible children will continue as protective payments despite the parent’s non-cooperation.

388. See text accompanying notes 319-24 supra.
389. Schatkin, supra note 315, at § 18.02.
391. Id. at 320.
392. HEW found that desertion affected as many families as did divorce and that its incidence is highest among those in the lower socio-economic classes. Quenstedt, The Disrupted Family as a Public Responsibility, 3 Fam. L.Q. 24 (1967).
397. Id.
One writer estimates that "the amount the government realistically can expect to collect if paternity is established for every child [receiving AFDC] (an unlikely prospect) is in the range of $28 million per week." The potential recovery, even assuming a determination of paternity in only half the cases, is quite significant.

Constitutional challenges to the new child support enforcement provisions on the grounds of equal protection and privacy have been intelligently evaluated by several commentators and are beyond the scope of this comment.

VIII. Conclusion

The Child Support Enforcement mechanisms applicable to AFDC recipients are hindered by unresponsive paternity statutes. The economic interests of illegitimate children and of the government which have been examined in this article are not served by provisions which make it difficult to bring suit against the putative father. These interests are further stymied by anachronistic proceedings. Without the establishment of paternity, the equality mandated by the Supreme Court remains an empty promise. It is in the hands of the legislatures to see that this promise is fulfilled.

398. Poulin, supra note 398, at 922. The figure was derived as follows:

The average support order entered in paternity suits, according to a study of one Michigan county, is about $20 per child per week. Thus, if each child had a support order entered on its behalf, the amount owed could be about $40 million per week. There is evidence, however, that the amount collected under support decrees generally falls short of the amount owed. In a random sample of paternity cases from one county, about 70 percent of the amount owed was paid. Therefore, the amount the government realistically can expect to collect if paternity is established for every child (an unlikely prospect) is in the range of $28 million per week. Although tenuous, these figures do prove an indication of the fiscal results sought through parental support enforcement schemes.

Id. at 921-22 (footnotes omitted).