Intestate Succession Claims of Illegitimate Children in California

I. INTRODUCTION

On May 20, 1968, the United States Supreme Court took what appeared to be the first major step on a long road toward ushering America's illegitimate into the Twentieth Century. On that day it decided the much celebrated, much criticized *Levy v. Louisiana.*

Much has been written about this case which allowed the five illegitimate children of Louise Levy to claim under Louisiana's Wrongful Death Act for the untimely passing of their mother. In so doing, the Court struck down the state's interpretation of its wrongful death statute, which prevented the children from claiming due to their illegitimacy, as an unconstitutional denial of equal protection under the Fourteenth Amendment of the United States Constitution.

*Levy,* however, has not proven to be the balm of Gilead for the ills of the nation's illegitimate. Although the potential is there, many courts have not seen fit to use *Levy* as a springboard for further liberalization of the plight of the bastard in today's society. More importantly for the purposes of this article, the Supreme Court itself has not seen the necessity in applying the rationale of *Levy* to the subject of this discussion — intestate succession. Speaking for the majority in *Labine v. Vincent,* Mr. Justice Black thought it sufficient to leave the question of illegitimate children and their inheritance rights to the legislatures of the several states:

But the power to . . . regulate the disposition of property left in Louisiana by a dying man there is committed by the constitution of the United States and the People of Louisiana to the legislature of that State . . . . It is for that legislature, not the life-tenured judges of this court, to select from among possible laws.

A scathing attack on the Court's inaction in *Labine* is mounted by

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2 The Louisiana courts had interpreted the word "children" in LA. CIV. CODE ANN. ART. 2315 (Supp. 1967) to mean legitimate children. The United States Supreme Court in *Levy* reinterpreted that word to include illegitimate children as well as legitimate children.
4 *Id.* at 538, 539.
Justice Brennan in his dissent. He aligns the situation in Labine with the result in Levy and concludes that the Fourteenth Amendment requires illegitimates to be placed on a part with legitimates regarding inheritance rights:

I think the Supreme Court of North Dakota stated the correct principle in invalidating an analogous discrimination in that State's inheritance laws: "This statute, which punishes innocent children for their parents' transgressions, has no place in our system of government, which has as one of its basic tenets equal protection for all." 6

The question of equal protection and just treatment under the laws of our states is much too important to be swept under a rug of tradition. It must be brought out into the open to be judged by every man's sense of justice. We have never been free to deny groups of people rights freely given to others without first examining the circumstances involved and the interests at stake. It should be no different now with respect to persons of illegitimate birth and their inheritance rights. In determining the position of the illegitimate regarding inheritance, the starting point must be the Constitution, the first source of all individual rights.

II. THE EQUAL PROTECTION ARGUMENT

A. WHICH TEST TO APPLY

The Fourteenth Amendment makes it unconstitutional to deny any person within the jurisdiction of the United States the equal protection of the laws. This amendment does not guarantee equal treatment of similar groups in all instances, however. According to its interpretation, a state might be able to subdivide the category of children into two groups, legitimate and illegitimate, and treat the two divisions differently. The crucial question is: On what basis may a state do so?

Under the Warren Court, the Equal Protection Clause was approached on one of two levels, depending on the nature of the interest involved. 7 If the interest were deemed fundamental, 8 or if a

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5The facts in Labine are as follows: An illegitimate girl was duly acknowledged by her father as being his natural child, in fact the father, the child and the child's mother lived together as a family until the man's death. However, because Louisiana only allows illegitimate children to claim against their father's estate if they are mentioned in his will, and because Mr. Vincent left no will, Louisiana courts would not allow the girl to share in her father's estate. Here, there was of course no question of paternity.


8See, e.g., Harper v. Virginia Board of Education, 383 U.S. 663 (1966) (voting);
suspect classification\(^9\) were involved, the Court would require a showing of compelling state interest before allowing state interference with the right in question. This placed a heavy burden of proof on the state to show that the discrimination was necessary or the “least restrictive means” in dealing with a problem which neededremedy. In practice, if the individual successfully placed himself within the fundamental right or suspect classification categories, he was almost invariably on the winning side. The Court would study the state interest involved with strict scrutiny to determine whether the discrimination would be allowed to stand. Under strict scrutiny, almost none were allowed to remain.\(^10\)

On the other hand, if the interest involved could not be raised to the level of a fundamental right or suspect classification, a different result was likely to occur. The state was allowed a much freer hand in classifying lesser social and economic interests.\(^{11}\) If an individual challenged one of a state’s classifications, he bore a heavy burden of proof in showing that the classification was arbitrary and unreasonable. The Court applied a minimal scrutiny test of reasonableness. Any reasonable basis would uphold the classification. In practice, the Court itself frequently hypothesized reasonable grounds for the state’s classification. The Court rarely, if ever, struck down the state

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and Douglas v. California, 372 U.S. 353 (1963) (right of the criminally accused to a proper defense).


\(^10\)Gunther, supra note 7.

\(^{11}\)On March 21, 1973, the court decided the case of San Antonio Independent School District v. Rodriguez, ___ U.S. ___, 93 S. Ct. 1278 (1973). The exact meaning of this case remains to be seen by further elaboration in future opinions. However, the case at first glance appears to be something of a milestone. The court held that education is not a fundamental right within the meaning of the equal protection doctrine because education is not within the limited category of rights recognized by the majority as being guaranteed by the Constitution. In other words, before a right may be deemed fundamental it must be grounded in the Constitution. Under the Warren court such constitutional grounding was not a prerequisite to a fundamental right. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 630 (1969), “We have no occasion to ascribe the source of this right to travel interstate to a particular Constitutional provision.” Some of the language in Rodriguez seems to indicate that the equal protection label of fundamental right will be given grudgingly by the Burger Court. “Only where state action impinges on the exercise of fundamental Constitutional rights or liberties” must the strict scrutiny test be applied (p. 1306). The implication is that suspect classifications will also only embrace constitutional rights. This does not mean that the Burger court will retreat from any of the express holdings of the Warren court according fundamental right or suspect classifications status to any particular interest (here the court left itself a way out by saying that if the right is explicitly or implicitly guaranteed by the Constitution, it will be deemed fundamental). But Rodriguez can be read for the proposition that the lists of fundamental rights and suspect classifications have been nearly exhausted. This would spell the end of endeavors aimed at achieving suspect classification status for illegitimacy.
statute in question. Noninterference from the bench was the “rule.”

Under the Warren Court, for an individual to fail to have his interest termed fundamental or classified as a suspect classification meant defeat in the courts. Under that view of equal protection the course of this paper would be clear — identify illegitimacy as a suspect classification, thereby subjecting the state action to a strict scrutiny it could not survive.

Under the Burger Court, an individual’s success may not turn largely on his ability to have his interest raised to the level of a fundamental right or suspect classification. According to at least one commentator, the Supreme Court after Warren appears to be intervening, i.e., striking down discrimination, in areas which require less than strict scrutiny by the Court.

Under the emerging new approach, if indeed there is one, a new test is applied: whether the state action substantially furthers a legitimate state aim. What this would mean in practice is that the Court would be much less willing to supply justifying rationales for state action by exercising its own imagination. The burden would be placed on the state to come forward with proofs of the reasonableness of its action rather than the Court resorting to rationalizations of its own.

The new standard would be more rigid than the reasonable purpose test of the Warren Court yet less stringent than the strict scruti-

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12 Gunther, supra note 7.
13 Notwithstanding the potential futility of endeavoring to expand the list of suspect classifications mentioned supra, note 11, a sound analogy may be drawn between illegitimacy on the one hand and race and ancestry on the other. Classifications based on race and ancestry have been deemed inherently suspect and subject to the strict scrutiny test. Commentators have persuasively analogized the position of the disadvantaged illegitimate with those who have been discriminated against by reason of race or ancestry. A person is deemed illegitimate by reason of the circumstance of his birth, something over which he has no more control than he has over the color of his skin or his ancestral heritage. Discrimination based upon status of birth as well as race or ancestry is imposed without regard to the individual’s actions or capacities. Further, he is helpless to alleviate the discrimination because his stigma results from something which he was powerless to prevent and which he is powerless to change.

For purposes of constitutional analysis, there is one major difference between illegitimacy on the one hand and race and ancestry on the other. It is an acceptable state aim to eradicate illegitimacy while it is not permissible for the state to eradicate races or ancestral lines. However, as discussed in later sections, if the state wishes to put an end to illegitimacy, one obvious method to use is punishment of those responsible, i.e., the parents, not the innocent children who are powerless to change the situation.

If courts and legislatures will accept the analogy of illegitimacy to race and ancestry, the constitutional test would be one of strict scrutiny which can be overcome only with a showing of compelling state interest.
14 Gunther, supra note 7.
ny test which would continue to have application in appropriate cases.

An example of this possible new approach relevant to this article is given in the 1972 case of *Weber v. Aetna Casualty and Surety Co.* In that case the Burger Court held that to deny to dependent illegitimate children workmen’s compensation benefits accorded dependent legitimate children was a denial of equal protection. Mr. Justice Powell, speaking for the majority, said, "... this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." Because denying dependent illegitimate children workmen’s compensation benefits served no legitimate state aim, the denial was ruled an unconstitutional withholding of equal protection. In the case of *Gomez v. Perez,* decided this term, the Court cited *Weber* in holding that once a state grants a judicially enforceable right on behalf of legitimate children to support from their natural fathers, there is no constitutionally sufficient reason for denying such right to illegitimate children. "A state may not invidiously discriminate against illegitimate children by denying them the substantial benefits accorded children generally .... For a state to do so is illogical and unjust."

In both *Weber* and *Perez* the invalidation was effectuated without using a clearly strict scrutiny standard or a minimal scrutiny standard.

These cases, if viewed from the standpoint of an emerging new approach by the Court, are of real significance to the area of illegitimacy. They may mean that no longer must individuals convince the court that illegitimacy should be raised to the level of a suspect classification in order to succeed against adverse state action. Perhaps now the burden will be on the state to come forward with real proof that discriminating against illegitimates is a reasonable way to attain acceptable state goals. This would mean that no longer must the individual bear the burden of proof in a less than strict scrutiny case. No longer will courts manufacture rational reasons for upholding state actions. Genuine judicial inquiry would replace perfunctory court validation of state actions. This would serve as a great boon to the cause of the illegitimate in the area of inheritance, for, as later sections will attempt to show, often there are no rational reasons for denying bastards their intestate succession claims.

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\[\text{Footnotes:}\]

16 *Id.* at 172.
18 *Id.* at __, 93 S. Ct. at 875.
19 *See supra* note 11.
B. ILLEGITIMATES AND THEIR MOTHERS

Much criticism has been leveled at Justice Douglas’ majority opinion in Levy. Some critics claim that the reasoning is too imprecise to allow discovery and analysis of the exact meaning and import of the decision. Accordingly, different authors interpret the decision differently. Levy is read by some to prohibit laws which discriminate against the illegitimate child in his relationship with his mother because no rational legislative purpose supports such discrimination.

California came to this realization long before the Levy case was decided. The California statutes on support and inheritance are just two examples of this state’s position in regard to the illegitimate and his mother. The latter statute put the illegitimate child on an equal footing with his legitimate half-brother regarding their maternal inheritance rights.

The legitimate child is given support, maintenance, education, inheritance, and a myriad of other like-claims against his mother. These rights should not be denied another child of the same maternal stock simply because he had the misfortune of coming into the world in such a way as to be labeled illegitimate. The California Legislature and the United States Supreme Court, recognizing the needs of the illegitimate, both reached the same conclusion regarding a child’s claims vis-à-vis his mother — they have equated the illegitimate child with his legitimate half-brother.

C. ILLEGITIMATES AND THEIR FATHERS

But what of illegitimate children and their father? Do bastards and legitimate offspring stand on an equal footing with regard to their father? Decidedly not. Courts and legislatures alike have been slow to grant the illegitimate child rights against his father which the legitimate child has been free to exercise.


CAL. CIV. CODE § 196a (West Supp. 1972) requiring maternal support of the child.

CAL. PROBATE CODE § 255 (West Supp. 1972), giving the child inheritance rights against his mother’s estate and the estates of maternal kindred.

See, e.g., CAL. PROBATE CODE § 255 (West Supp. 1972), allowing the bastard limited inheritance rights of his father’s estate if the father has taken steps to publicly acknowledge him.

See, Article, Plight of the Putative Father in California Child Custody Proceed-
In California illegitimate children have been given the rights of legitimate children toward their mother. To do otherwise would be a denial of equal protection under the Fourteenth Amendment. That is, no rational purpose supports treating illegitimates differently than legitimates regarding their mother. Similarly, the issue concerning fathers is whether there is a rational purpose which supports treating their illegitimate children differently than their legitimate children regarding paternal intestate succession. There must be a proper and constitutionally acceptable reason or reasons for discriminating against the illegitimate in the area of intestate succession.

Can the equal inheritance rights given by California to all children against the mother's estate be extended to cover similar rights against the father's estate? In order to answer this question two considerations must be met: 1) whether there are legislative purposes which support discriminatory legislation in the father-child context that are not present in the mother-child context, and 2) whether such other or additional purposes pass the rational-purpose test of the Fourteenth Amendment.26

D. POLICY REASONS AND THE FOURTEENTH AMENDMENT

Courts and legislatures have traditionally supplied the same set of public policy reasons for treating legitimates differently than illegitimates regarding their father. The reasons are: discouragement of promiscuity, protection of the family unit, actual relationship with the father, the father's choice, and uncertainty of paternity. These policy reasons have often been criticized and exposed as empty prohibitions against a group deserving much more than second class citizenship.27

1. DISCOURAGEMENT OF PROMISCUITY

The reasoning applied here is that if illegitimates are denied the claims of legitimate children, people will not have their children illegitimately, but will wait until after marriage before exercising their procreative power. This will be done by the parties involved in order to guarantee their children the rights of the legitimate child and to protect them from the legal stigma of an illegitimate birth.

This argument falls under the weight of common sense. Assuming

arguendo that it is an acceptable state aim,\textsuperscript{28} discouragement of promiscuity is not served by discriminating against the innocent products of illicit sexual relations. The rising rate of illegitimacy\textsuperscript{29} attests to that. Further, the question immediately arises "whether a law may properly punish one in order to evoke guilt feelings in another whose conduct is being affected."\textsuperscript{30} In \textit{Aptheker v. Secretary of State}\textsuperscript{31} the Court reiterated the familiar and basic principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."\textsuperscript{32} In our discussion this principle would mean that if a state desired to discourage sexual promiscuity it should pass legislation which dealt \textit{directly} with the two people responsible and not indirectly through the innocent victim who is powerless to do anything about the situation. If the legislature truly wanted to discourage promiscuity it should place heavy economic burdens upon the fathers of illegitimate children for these children instead of rewarding them for their illicit behavior by freeing them of some of the financial responsibility for their bastard offspring. Furthermore, in \textit{King v. Smith},\textsuperscript{33} an AFDC case, the Supreme Court declared that Federal law, as promulgated by Congress, has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures punishing innocent children. This is, of course, federal policy and not binding on the states. However, the states are free to adopt federal policy as they see fit.

2. \textit{PROTECTION OF THE FAMILY UNIT}

The reasoning behind this stated policy goes something like this. Equating the illegitimate child with the legitimate child would discourage marriage since no advantage would remain to be gained from the marriage institution.

The answer to this policy reason is similar to the one given for the discouragement of promiscuity theory. If the state wants to protect

\textsuperscript{28}It is not within the purview of this paper to discuss the relative merits of marriage in today's society. There are many arguments, pro and con, on the issue of the matrimonial state. It is not the purpose of this article to take a stand on either side of that issue. If it appears in some sections of the paper that a side is being taken, it is only because the policy reasons traditionally given in support of discriminating against illegitimates and their rebuttals lend themselves, by their nature, to such an interpretation.

\textsuperscript{29}Interview with Jack Thompson, Executive Secretary of the State Social Welfare Board, in Sacramento, Dec. 20, 1972.


\textsuperscript{31}378 U.S. 500 (1964).

\textsuperscript{32}Id. at 508.

\textsuperscript{33}392 U.S. 309 (1968).
marriage, then it should do so by directly punishing the "promiscuous" parties involved. The innocent victims of adulterous liaisons are not the proper target for condemnation. Further, the state should offer realistic incentives for marriage if its encouragement is the state aim.

In striking down a state policy which treated legitimates more favorably than illegitimates in the matter of workmen's compensation benefits, the United States Supreme Court met and rejected a state assertion of protection of the family unit. "We do not question the importance of that interest [protection of the family unit]; what we do question is how the challenged statute will promote it . . . . [It cannot] be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."34

Similar reasoning results in the realization that the denial of inheritance rights to illegitimate children is not a deterrent to persons engaging in "illicit relations," nor is it an effective way of encouraging marriage.

3. ACTUAL RELATIONSHIP WITH THE FATHER

The reasoning behind this policy consideration is simple enough. The legitimate child who has had daily association with his father is entitled to his father's estate. The illegitimate child who is shunned and kept a secret has no claim against the estate.

This is a curious argument. In the first place, inheritance laws are nowhere dependent upon daily association with the decedent. This is simply not the criteria. Secondly, many legitimate children do not live with their fathers, especially if they are the children of a marriage that ended in divorce. Yet such children are granted rights of intestate succession from their father's estate. Furthermore, it is possible for illegitimate children to live their lives with their fathers and still be precluded from inheriting any part of the father's estate, Section 230 of the California Civil Code notwithstanding.35

35 CAL. CIV. CODE § 230 (West 1956): Adoption of Illegitimate Children. According to this section, four criteria must be met in order for the child to be adopted:
   1) Father publicly acknowledges child as his own,
   2) Father receives it as such into his family,
   3) With the consent of his wife, if married,
   4) And otherwise treating it as if it were a legitimate child.

The courts generally interpret this statute very liberally with the exception of the third requirement. The wife's consent requirement is very strictly construed. Thus, if a married man leaves his wife and lives with his mistress, the child of such union will never be able to assert a claim against her father's estate based on § 230 because of the lack of his father's wife's consent. Laugenor v. Fogg, 48 Cal. App. 2d 848, 120 P.2d 690 (1942).
4. THE FATHER'S CHOICE

Intestacy laws are viewed as interpreting and enforcing the typical intestator's presumptive intent. Therefore, the estate will be distributed as most people, dying with a will, would have distributed it. The theory here is that the illegitimate child is an embarrassment. In most cases men try to keep their mistakes a secret. Therefore, it is safe to assume that the decedent would not intend that anything should be left to his bastard. Thus, the child receives nothing.

This theory falters when Section 90 of the California Probate Code is considered. It allows fathers to disinherit their children by executing a will which excludes them. In our situation, if the father does not wish his illegitimate child to inherit, he would remain free to disinherit the child by will. This is a much more equitable solution than assuming that because a child is illegitimate his father feels no love for him and wishes him to remain unprovided for after the father's death.

5. UNCERTAINTY OF PATERNITY

This argument is perhaps the strongest for denial of illegitimates' rights. All of the other public policy reasons previously mentioned fade when exposed to the light of logic and common sense. But the uncertainty of paternity remains a legitimate obstacle to the endeavors of those who would accord illegitimates the same status enjoyed by legitimate children.

Uncertainty of paternity, then, is not only a psychological handicap but a legal one as well. However, California has provided a means whereby the legal handicap may be overcome. Civil Code Section 231\textsuperscript{36} allows for a suit to determine paternity or, in official terminology, a declaration of paternal relation.

A paternity suit in California has one major drawback — inheritance rights do not attach to a decision naming the defendant father of the child in question. In California there are only three ways whereby an illegitimate child may claim part of his father's unwilled estate. That is, by claiming under Section 215 of the Civil Code,\textsuperscript{37} Section 255 of the Probate Code,\textsuperscript{38} or Section 230 of the Civil

\textsuperscript{36}CAL. CIV. CODE § 231 (West 1956): "An action may be brought for the purpose of having declared the existence or nonexistence between the parties of the relation of parent and child, by birth or adoption."

\textsuperscript{37}CAL. CIV. CODE § 215 (West 1956): "A child born before wedlock becomes legitimate by the subsequent marriage of its parents."

\textsuperscript{38}CAL. PROBATE CODE § 255 (West Supp. 1972):

Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same
Code. Section 255 of the Probate Code only provides for limited succession. The child, even after the father's compliance with the acknowledgement requirements, still may not inherit from paternal kindred. His parents must intermarry, or his father adopt him before inheritance from paternal kindred is possible.

Exploring the policy considerations up to this point, there is no reason for denying the illegitimate child inheritance rights if his paternity has been determined. If the father is known and if there be no existing social policy reason validly justifying denial of inheritance rights, the child should not be prevented from enjoying the succession claims given to his legitimate counterpart. Perhaps there is one more social policy reason not yet considered — that is, the interest the state has in the security of title to property.

This argument contends that illegitimates can be constitutionally precluded from inheriting on the ground that otherwise all titles would be insecure because of possible claims of illegitimates in later years.

The answer to this worry is that other states have been able to maintain stability of land titles while granting inheritance rights to bastards, by requiring that the paternity of such children be established during the father's lifetime. What rational reason remains for denying inheritance rights to a child whose paternity has been established via Section 231 of the Civil Code? The clue to the mystery is supplied by Sidney Schatkin, among others, in his numerous articles and books on the subject.

\[\text{manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral.}\]

\[\text{CAL. CIV. CODE § 230 (West 1956):}\]

\[\text{The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereby deemed for all purposes legitimate from the time of its birth.} . . . .\]

\[\text{There is serious doubt in some critics' minds as to whether such an arrangement would be constitutional. Such statutes raise in a new context the Due Process question as to whether a child can be denied rights because of the failings of another person. See, e.g., Gray and Rudovsky, The Court Acknowledges the Illegitimate: Levy v. Louisiana and Giona v. American Guarantee and Liability Insurance Co., 118 U. PENN. L. REV. 1 (1969). However, this constitutional concern can probably be overcome by the legitimate, compelling state interest in the security of land titles.}\]

\[\text{E.g., S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (3d ed. 1953);}\]
According to Schatkin, too many defendants are the innocent victims of extortions by women seeking a respectable or wealthy father for their illegitimate children. 42

Paternity suits, which in California are civil proceedings requiring the civil standard of proof, serve to keep some children at least off the public support rolls by supplying parental support for them. 43 However, according to some critics, 44 paternity suits are too easily filed and too difficult to defend, especially if the civil standard of proof is required. The implication is that society will tolerate the lower civil standard of proof in paternity decisions so long as the judgment does not place an intolerable burden on the defendant. The successful child receives support and education, nothing more.

Even in a civil paternity suit, the complaining mother must establish paternity by a preponderance of the evidence. In many cases the defendant’s “moral” guilt is established beyond question (i.e., plaintiff has shown that she and defendant did engage in “illicit” sexual relations during or near the probable time of conception) but too often his legal paternity has followed unquestioned on that fact alone. 45 Faced with the situation of the innocent child versus the “morally” guilty defendant the child wins and is awarded support and education until majority. Due to the tenuous basis of the decision, however, the financial burden is not extended to cover inheritance.

If this line of reasoning is correct the obvious answer would be to raise the standard of evidence in paternity suits to the criminal standard of proof beyond a reasonable doubt. This, in fact, is the case in several states, 46 and is called for by numerous critics of the civil quantum of evidence. 47

The uncertainty and criticisms of the standard of proof that should be required in paternity suits is sufficient to merit discussion in any article touching upon the area of paternity. 48 The following

Schatkin, Should Paternity Cases Be Tried in a Civil or Criminal Court?, 1 CRIM. L. REV. (N.Y.) 18 (1954). Mr. Schatkin was for many years engaged in prosecuting affiliation cases in the Court of Special Sessions of the City of New York.

Schatkin, Should Paternity Cases Be Tried in a Civil or Criminal Court?, 1 CRIM. L. REV. (N.Y.) 18 (1954) (hereinafter cited as Schatkin).

This has been recognized by the United States Supreme Court as a legitimate social goal since at least 1831. See, Hildreth v. Overseers of Poor, (Sup. Ct. 1831).


Even the eminent professor, Harry D. Krause, concedes that a higher standard of proof may be more acceptable when inheritance is involved. See Krause, Bringing the Bastard into the Great Society: A Proposed Act on Legitimacy, 44 TEX. L. REV. 829 (1966).


This is not to say that the quantum of proof issue is the only obstacle in the
section attempts to deal with the question of an appropriate standard of proof in paternity suits.

III. THE STANDARD OF PROOF IN PATERNITY SUITS

Debate continues in academic circles over the standard of proof to be applied in filiation proceedings. To some, the suit should be considered criminal in nature thus requiring proof of guilt beyond a reasonable doubt. To others the standard should be the "clear and convincing" requirement of quasi-criminal proceedings. To still others the quantum of evidence should be the preponderance of the evidence since paternity suits today are largely considered to be civil in nature. The central argument in this confrontation is over the general soundness of paternity decisions. Too many hapless defendants may be saddled with support orders because the quantum of proof required is too low.

A. TREATMENT BY STATES GIVING INHERITANCE RIGHTS TO PATERNITY SUITS

Several states attach inheritance rights to paternity decisions. With the exceptions of New York and Wisconsin, these states apply the civil preponderance of the evidence standard to filiation proceedings. None of the states involved require the criminal quantum of proof. Some of the states demand corroboration of the complaining mother's testimony.

The states of Arizona and Oregon, which have abolished the status of illegitimacy, both require the civil standard. The Oregon statute, however, calls for the mother's testimony to be corroborated beyond a reasonable doubt. The state of Indiana also treats filiation proceedings as a civil matter requiring the civil standard, but it demands that the mother's accusations be corroborated by another way of allowing inheritance rights to attach to paternity decisions. However, it is the obstacle in many states and according to some critics, as the next section will demonstrate.

49 Schatkin, supra note 42.


51 10 C.J.S., Bastards, § 94, p. 179 (1938).


54 State ex rel Dickerson v. Tokstad, 139 Ore. 63, 8 P.2d 86 (1932).

55 Id.
person if the purpose of the proceeding is inheritance rights. If the suit is merely for support and education, no corroboration of the mother's testimony is necessary.\textsuperscript{56}

Iowa,\textsuperscript{57} Tennessee,\textsuperscript{58} and Maryland\textsuperscript{59} require that guilt be established by the preponderance of the evidence, with no corroboration required. New York, which treats paternity suits as a hybrid of the civil and criminal laws, requires the quasi-criminal "clear and convincing" standard because of the difficulty that defendants have in defending against a paternity charge.\textsuperscript{60}

Fewer and fewer states are requiring the criminal standard.\textsuperscript{61} Part of the reason for this trend is the realization that guilt no longer carries a criminal liability, and the increasing awareness that science is rapidly advancing to the point of pin pointing the man responsible for fathering the child in question.

\section*{B. BLOOD TESTS}

Sections 890-897 of the California Evidence Code provide for the use of blood tests to determine paternity in filiation proceedings. The Legislature and the courts of California have concluded that blood grouping tests are scientifically reliable when used to exclude a male as a potential father.\textsuperscript{62} However, the courts and the Evidence Code have not kept pace with the more recent medical developments concerning the possibilities for the uses of blood testing. According to researchers in Europe (and now in the United States) blood testing cannot only exclude possible defendants but it can also pinpoint with 99.5\% accuracy the man responsible for the child's paternity.\textsuperscript{63}

If the progress in the law of evidence would keep pace with the progress of the scientific developments regarding blood testing, the possibility of holding a non-father liable in a paternity action may soon disappear as a realistic concern.\textsuperscript{64} Accordingly, regardless of

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\item[56] Solomon v. Fenton, 144 Ind. App. 100, 244 N.E.2d 228 (1969).
\item[57] Spears v. Veasley, 239 Ia. 1185, 34 N.W.2d 185 (1948).
\item[58] Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W.2d 467 (1964).
\item[59] Baker v. Lease, 236 Md. 246, 203 A.2d 700 (1964).
\item[61] See, e.g., the recent Wisconsin change from the criminal beyond a reasonable doubt [Prochnow v. Prochnow, 274 Wis. 491, 80 N.W.2d 278 (1957)] to the quasi-criminal "clear and convincing" [State ex rel Kurtz v. Knutson, 5 Wis. 2d 609, 93 N.W.2d 348 (1958)].
\item[63] See Krause, supra note 27, at n. 58.
\item[64] In a letter from Michael E. Barber, Supervising Deputy District Attorney, Domestic Relations Division, Sacramento District Attorney's Office, to Carole Bartlett, March 15, 1973, Mr. Barber had this to say concerning the percentage of defendants excluded by blood tests:

According to my investigators, no more than 2\% [of the paternity defendants are excluded by blood tests]. Now one point should be made in discussing defendants in this context. We will conduct blood
\end{enumerate}
\end{footnotesize}
the label given a paternity proceeding, the testimony of the complaining mother coupled with the all important blood tests results will produce unchallengable judgments.65

C. MULTIPLE POTENTIAL DEFENDANTS

The area which lends the greatest credence to the claims that paternity decisions are unreliable is that involving multiple potential defendants. In situations of this kind the complaining mother will select one of the possible fathers for trial. A judgment is eventually rendered against that one (assuming blood tests do not exclude him) because his only defense is the existence of the other men, who refuse to testify on his behalf. It is in cases like this that the charge of unreliability comes the closest to reality. How sound are decisions in this kind of a situation?

In a recent study conducted in two California counties, the State Social Welfare Board compiled statistics concerning Welfare paternity actions.66 Of the 259 cases interviewed by the District Attorney's offices involved, a decision was made to proceed with the paternity action in 162 (or 62%) of the cases. Of the 97 (or 38%) complaints that were not taken up by the counties, 29 (or 30%) were declined because there were too many potential fathers.67 These statistics

65 Indeed, illegitimates, armed with favorable paternity decisions, will know their father's identify when in some cases legitimate children will not. This is due to California's Conclusive Presumption of Legitimacy. See CAL. EVID. CODE § 661 (West 1968). If H and W are cohabitating and if H is not impotent, then there is an irrebuttable presumption that H is the father of W's children born during their marriage or a seasonable time thereafter. This steadfast position of California law leads to many inequitable results. See, e.g., Hess v. Whitsitt, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (1967) where the presumption of legitimacy resulted in the legal innocence of a Negro defendant and the naming of the Caucasian husband as legal father of his Caucasian wife's child despite the obvious and undeniable Negro characteristics of the child.

66 This study was conducted in August, 1972. Welfare paternity actions comprise the vast majority of paternity suits in California. These welfare cases are handled by the district attorneys' offices throughout the state.

67 Paternity complaints were also turned down by D.A.'s offices because of:

1) Incarceration of the father 3%
2) Death of the father 0%
3) Disability of the father 1%
4) Absence of the father from the state 38%
5) Incomplete evidence (16 of the 17 mothers could not identify the father) 18%
6) Absolute marital presumption (legal child of husband) 3%
7) Mother refused to cooperate 1%
indicate that it is not only the academics that realize the potential danger and unfairness of a conviction under these circumstances. The daily practitioners, faced with the realities of the situation, are often forced to deny aid to mothers and their innocent children due to the inequities involved in proceeding against any one of the possible fathers. (And all of this in a state which requires only a preponderance of the evidence for a conviction.)

Not only do District Attorneys weed out unsound complaints, blood tests eliminate numbers of potential defendants. In any case, if there is a proof problem in situations involving multiple potential defendants, the solution lies in updating the procedures and methods used in determining paternity (such as aligning the evidence codes with the scientifically proven capabilities of blood testing), not in denying the innocent child his rights to an inheritance.

D. SOME PRACTICAL CONSIDERATIONS

At a time when the state of Wisconsin required the criminal standard of evidence in paternity actions, its courts decided the case of Prochnow v. Prochnow, which contained the following quotation, evincing the attitude and practice of most jurisdictions irrespective of the quantum of proof required:

8) Child nearing age of emancipation 2%
9) Child has limited life expectancy 1%
10) Application for public assistance withdrawn 1%
11) Mother is an illegal alien 2%

68 During the course of the letter mentioned supra, note 64, Mr. Barber responded to questions concerning the problems of multiple potential defendants:

What about the plaintiff who selects from among a number of possibilities for prosecution? We take the position that even if the plaintiff believes that a particular individual is the father of her child, barring some obvious genetic discrepancy, such as one based on race, if there are two possible fathers, that is two people who had intercourse with the girl during the possible period of conception, we do not go forward on those cases. Consequently, there is no such situation as you describe. Now, on occasion, men have tried to come up with possible fathers as defense witnesses. The only case that I can think of where even such a case went to hearing and we were unable to shake the defense testimony, we dropped the case after a hearing for temporary support. Consequently we have no such convictions, at least in our records . . . . What percentage [of paternity suits] involved multiple potential defendants? To the best of my knowledge, none of them. We have filed one or two cases where the blood test has resulted in eliminating the alleged father and with the result that the mother has indicated that there were other potential defendants on being confronted with this evidence. The situation, however, that results in this is so rare that I can say that only about 1% of our cases have ever been filed in which there were multiple defendants subsequently discovered.

69 274 Wis. 491, 80 N.W.2d 278 (1957).
Even with this legal principle [beyond a reasonable doubt standard of conviction] in his favor, in a bastardy action the testimony of the woman that she had timely intercourse with the man and that she had none with anyone else, if believed by the jury, is sufficient to support a verdict that he is the father of the child.\textsuperscript{70} Such is the common rule in jurisdictions not requiring corroboration.\textsuperscript{71} Therefore, there is no practical or substantive gain to be made by raising the standard of proof required when the evidence sufficient for conviction remains the same. Where corroboration is demanded, the character and quality of the proceeding tends generally to be the same as in criminal cases.\textsuperscript{72}

Presently in California the standard of proof is preponderance of the evidence with no corroboration necessary. It is up to the District Attorneys' offices, blood tests, and the jury to weed out the unfounded paternity claims. In the case of the District Attorneys' offices, their heavy caseloads presently demand more time than is available. These offices are looking to ease this pressing burden, not to increase it. Therefore, they must be convinced that the man named in the complaint is the father of the child before they will accept the case. Case acceptance is not weighed against "preponderance of the evidence" or "beyond a reasonable doubt." These offices must be convinced that the man is the father.\textsuperscript{73} If anything,

\textsuperscript{70} 80 N.W.2d 278 at 281.  
\textsuperscript{71} See, 110 C.J.S. 179, Bastards, § 94 (1938). This is the situation, for example, in Iowa, with preponderance of the evidence standard (see, Spears v. Vaseley, 239 Ia. 1185, 34 N.W.2d 185 (1948)); Tennessee, with preponderance of the evidence standard (see, Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W.2d 467 (1964)); New York, with the clear and convincing standard (see Holland v. Tracy, 285 App. Div. 1197, 140 N.Y.S. 2d 549 (1955)); Wisconsin, with the clear and convincing standard (see State ex rel Kurtz v. Knutson, 5 Wis. 2d 609, 93 N.W.2d 348 (1958)); and Maryland, with the preponderance of the evidence standard (see, Baker v. Lease, 236 Md. 246, 203 A.2d 700 (1964)).  
\textsuperscript{72} See, 10 C.J.S., Bastards, § 94 (Cumm. pocket part 1972); Lockman v. Fulton, 162 Neb. 439, 76 N.W.2d 452 (1956).  
\textsuperscript{73} In the letter mentioned supra, notes 64 and 68, Mr. Barber responded to questions concerning paternity complaints and paternity judgments: How many paternity complaints are filed with your office? In excess of 100 per month. What percentage of those referred are accepted by your office? About 98%. What percentage of those accepted result in confessions of judgment or stipulations? About 30%. Of those that eventually go to trial, what percentage results in successful judgments? 100%. In your opinion, are paternity decisions resulting in judgments sound or are some shaky? In general, the question cannot be answered this way. The question really is do we prove our cases in every situation beyond the preponderance of the evidence meeting the burden required by the statute, and following the requirements of minimal evidence necessary in a civil case. My answer, yes we far and away exceed the requirements of minimal evidence. I do not feel that they are in anyway shaky, I believe that there is no concealment of facts on our part that would in any way affect the case. We cooperate in any way possible pre-trial with defense counsel.

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this attitude favors a potential defendant rather than weighs against him.\textsuperscript{74} In the area of blood tests much has already been said. The only thing that remains is to reiterate the urgent need for the law to recognize and accept medical science as an invaluable ally in not only excluding possible fathers but in pinpointing the man responsible. And blood tests do not worry about such niceties as quantums of proof. The more recent improvements can show either that the defendant is the father or that he is \textit{not} the father. In the case of the jury, it must be conceded that they often rely on their emotions and sense of moral indignation rather than the finer points of the law and legal guilt. Raising the standard of proof would probably not do much to alleviate this problem given the reason for its existence—human emotion. Hopefully, with the increased acceptance of newer blood testing methods and results, the jury’s emotionalism will play a decidedly decreasing to nonexistent role in the determination of paternity.

The states should adopt the attitude of the United States Supreme Court in the area of proof of paternity. “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.”\textsuperscript{75}

\section*{IV. THE APPEAL TO THE LEGISLATURE}

\subsection*{A. THE TREND IN CALIFORNIA LAW}

At common law an illegitimate child “was held to be \textit{filius nullius} or \textit{filius populi} (son of no one or son of the people), it was without right even to the name of its natural father, and being without inheritable blood it could acquire nothing except by its own efforts.”\textsuperscript{76} The bastard in Blackstone’s day was precluded from inheriting from or through either one of his natural parents. The only method of legitimation was by special act of Parliament.\textsuperscript{77} Such was the Common Law.

Few jurisdictions today adhere to that rigorous rule. “From an early day the states began to regard and deal with this unfortunate

\footnotesize{and with the defendant directly. It is because of this that we have had the tremendous track record that we have had in terms of winning our paternity cases.}

\footnotesize{\textsuperscript{74}The statistics listed \textit{supra}, note 67, bear out the fact that the counties do not take an unrealistic approach to paternity actions. They (the counties) cautiously consider and weigh the factors involved before deciding to proceed with a prosecution.}

\footnotesize{\textsuperscript{75}Gomez v. Perez, \underline{___} U.S.\underline{___}, 93 S. Ct. 872, 875 (1973).}

\footnotesize{\textsuperscript{76}Annot., 73 A.L.R. 935 (1931).}

\footnotesize{\textsuperscript{77}Pfeifer v. Wright, 41 F. 2d 464 (10th Cir. 1930).}
condition (illegitimacy) in a more humane and just way . . . .”\textsuperscript{78} In the mid-nineteenth century, California began liberalizing the common law position of discriminating against illegitimates. The forerunner of Section 255 of the Probate Code was enacted in 1850.\textsuperscript{79} Forerunners of Civil Code Sections 215 and 230 were enacted in 1870.\textsuperscript{80} Former Chief Justice Traynor stated in \textit{Estate of Garcia}, “the trend of legislation governing the rights of persons born illegitimate is to give them the same status as those born legitimate.”\textsuperscript{81} The California courts have reiterated this principle again and again.\textsuperscript{82}

This well established predisposition of the Legislature to accord equal status to all children has resulted in such statutes as Section 4453 of the Civil Code,\textsuperscript{83} Section 196a of the Civil Code,\textsuperscript{84} Section 205 of the Civil Code,\textsuperscript{85} and Section 661 of the Evidence Code.\textsuperscript{86}

\textbf{B. THE PRESENT STATE OF CALIFORNIA LAW}

At present there are three ways illegitimate children can inherit from their father. Civil Code, Section 215\textsuperscript{87} grants the children in-

\begin{itemize}
\item \textsuperscript{78}See \textit{Estate of Lund}, 26 Cal. 2d 472 at 480, 159 P.2d 643 at 648 (1945).
\item \textsuperscript{79}See \textit{Estate of Garcia}, 34 Cal. 2d 419, 210 P.2d 841 (1949).
\item \textsuperscript{80}Id.
\item \textsuperscript{81}Id. at 422, 210 P. 2d at 843.
\item \textsuperscript{83}\textbf{CAL. CIV. CODE} § 4453 (West 1970):
The issue of a void or voidable marriage is legitimate, and a judgment of nullity does not affect the legitimacy of children conceived or born before the issuance of such judgment . . . .\textsuperscript{88}
\item \textsuperscript{84}\textbf{CAL. CIV. CODE} § 196a (West Supp. 1972):
The father as well as the mother of an illegitimate child must give him support and education suitable to his circumstances . . . .
\item \textsuperscript{85}\textbf{CAL. CIV. CODE} § 205 (West Supp. 1972):
If a parent chargeable with the support of a child dies, leaving it chargeable to the county, or leaving it confined to a state institution to be cared for in whole or in part at the expense of the State, and such parent leaves an estate sufficient for its support, the supervisors of the county or the director of the state department having jurisdiction over the institution involved . . . . may claim provision for its support from the parent’s estate . . . . and for this purpose may have the same remedies as any creditors against that estate, and against the heirs, devisees, and next of kin of the parent.
\item \textsuperscript{86}\textbf{CAL. EVID. CODE} § 661 (West 1968):
A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage . . . . In a civil action, this presumption may be rebutted only by clear and convincing proof.
\item \textsuperscript{87}\textbf{CAL. CIV. CODE} § 215 (West 1956): “A child born before wedlock becomes legitimate by the subsequent marriage of its parents.”
\end{itemize}
heritance rights if their parents intermarry subsequent to the birth of the children. Civil Code, Section 230\textsuperscript{88} allows a father to adopt his illegitimate child. Probate Code, Section 255\textsuperscript{89} provides for a limited succession statute for the acknowledged bastard.

While the latter two sections appear to lay down clear-cut requirements, the courts of California have given a very broad interpretation to the statutory language in order to give the child his inheritance rights in situations not contemplated by the Legislature.\textsuperscript{90} As the majority of the California Supreme Court stated in Estate of Lund.

The view of the common law has given way in large measure to the concept that the onus for the act of the parents cannot be visited justly upon the child and that placing responsibility for the support of the child upon the father equally with the mother, permitting it to become legitimated and to have a right to his name and to inheritance from him, will tend as well or better to deter the potential father than did the common-law doctrine of irresponsibility, and at the same time conform more closely to our present ideas of justice. Indeed, aside from considerations of justice, it may be suggested that the complete freedom from legal responsibility for illegitimate children, which the common law afforded the father, may have been a doctrine which to the male in licentious moments was more encouraging than deterrent, and was better abandoned.\textsuperscript{91}

\textsuperscript{88}CAL. CIV. CODE \textsuperscript{\textcopyright} § 230 (West 1956):

The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth . . .

\textsuperscript{89}CAL. PROBATE CODE \textsuperscript{\textcopyright} § 255 (West Supp. 1972):

Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral.

\textsuperscript{90}See Litvin, Legitimation: The Liberal Judicial Trend in California, 19 HAST.L. J. 232 (1967). See also, e.g., Lavell v. Adoption Institute, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960) (Legitimation under § 230 may be accomplished prior to the birth of the child). Hurst v. Hurst, 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (1964) (Evidence that illegitimate child, his mother and father lived together as a family in a hotel for approximately one month adequately supports finding that father adopted child within the letter of § 230).

\textsuperscript{91}26 Cal. 2d 472, 480-481, 159 P.2d 643, 648 (1945).
Clearly, the California courts endeavor to equate the illegitimate with the legitimate whenever the words of the statutes will permit.

So in most instances where the illegitimate child lives with his father or his father chooses to acknowledge him he is blessed in California with paternal inheritance rights. However, the child who never had the opportunity of living with his father, or the child whose father refuses to acknowledge him, is in a very different position. His paternity may have been legally determined through filiation proceedings; yet, because his father does not or cannot comply with the statutory requirements, the child is forever precluded from asserting a claim against the estate.

This is clearly not the case with children of legitimate birth. Their inheritance rights do not rest on the whim of their fathers. Indeed, the legitimate child will inherit unless his father executes a will excluding him while the illegitimate child will not inherit unless his father takes affirmative action and complies with the legal requisites.

If the father of the illegitimate child is known, the child's position does not meaningfully differ from that of the offspring of divorced parents. For inheritance purposes the child of divorced parents, even though he may never have lived a day with his father and even though his father has never acknowledged his existence, is entitled to and receives a share of his father's estate under the intestacy laws. The circumstances of the illegitimate child is certainly no different. With a decision from a paternity suit, he stands on equal ground beside his legitimate half-brother. No more should be asked of him in order for him to receive what is given to another whose circumstances are in all essentials similar.

C. IT'S UP TO THE LEGISLATURE

The states of North Dakota, Oregon, and Arizona have carefully considered the plight of the child born out of wedlock. Each state has discarded the traditional rationales for treating the illegitimate as a second-class citizen. Each state has seen fit to statutorily abolish the label of bastard and each has placed all children on an

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91N.D. CENT. CODE § 56-01-05 (1969):
Every child is hereby declared to be the legitimate child of his natural parents, and is entitled to support and education, to the same extent as if he had been born in lawful wedlock. He shall inherit from his natural parents, and from their kindred heirs lineal and collateral ....

92ORE. REV. STAT. § 109.060 (1963):
The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married.

93ARIZ. REV. STAT. ANN. § 14-206 (1956): "Every child is the legitimate child of its natural parents ...."
equal plane.

The state of California has done much to place all children on an equal footing regarding inheritance. Yet there is still a need for further liberalization of the inheritance laws.95

The North Dakota Legislature abolished illegitimacy in response to that state's High Court's decision declaring their intestacy statute unconstitutional.96 The unsatisfactory statute had been patterned after California's present Section 255 of the Probate Code.97 In so doing, the North Dakota Supreme Court concluded: "This statute, which punishes innocent children for their parents' transgressions, has no place in our system of government, which has as one of its basic tenets equal protection for all."98

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95 On January 8 of this year, California State Senator Song introduced the Uniform Probate Code into the California Legislature (S. 73, 74, Gen. Sess. (1973)). As is the practice with bills of this nature, the UPC was sent to committee for consideration. On February 8, the Judiciary Committee opened hearings on the relative merits of the Code. It was estimated by Senator Song's Administrative Assistant that the hearings will continue for at least one year and very likely extend to two years while Committee members decide which of the code sections to adopt and which, if any, to change before adoption.

Section 2-109 of the Uniform Code contains a provision on the intestate succession of illegitimates. It states that for the purposes of intestate succession, . . . a person born out of wedlock is a child of the mother. That person is also a child of the father, provided:

1. The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

2. The paternity is established by an adjudication before the death of the father, or is established thereafter by clear and convincing proof, except that the paternity established under this paragraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

In its second criterium, the UPC [§ 2-109(b)(2)] grants inheritance rights to those illegitimates whose paternity has been legally determined. Indeed, it allows the child whose father is deceased to initiate paternity proceedings with an eye toward claiming part of the inheritance. This last allowance has been criticized as leaving land titles insecure and should be carefully considered before being adopted. However, the general granting of inheritance claims to illegitimates whose paternity has been judicially determined is to be applauded.

Whether and how § 2-109 is to be adopted remains to be seen. The California State Bar Association has voiced many reservations about the UPC. Whether the Association objects to § 2-109 will weigh greatly on its chances of adoption.

It is the fervent hope of this article that in the next few months those involved will make good their opportunity to accord inheritance rights to the illegitimate whose paternity has been successfully litigated.

*In re* Estate of Jensen, 162 N.W.2d 861 (1968).

97 N.D. CEN. CODE § 56-01-05 (Repealed 1969): Every child born out of wedlock is an heir of the person who in writing signed in the presence of a competent witness acknowledges himself to be the father of such child. In all cases such child is an heir of his mother . . . .

*In re* Estate of Jensen, 162 N.W.2d 861, 878 (1968).
After *Labine v. Vincent* the course is clear. The mandate for change has been passed to the legislatures. It is up to the elected representatives of the people of California to protect the rights of their innocent charges — the illegitimate children of the state. The California Supreme Court in *Estate of Lund*\(^9\) enunciated the policy that our Legislature has been responding to for one hundred years: "It cannot be seriously disputed that the public policy of California disavows the common-law tenets and favors legitimation."

Our Legislature has come a long way toward ushering the bastard into the Twentieth Century. One of the most glaring of the remaining statutory discriminations is the law of intestate succession. To allow a child whose paternity has been legally determined via Civil Code, Section 231 to assert an inheritance claim against his father’s estate is the next logical step in this state’s untiring efforts toward erasing a legal stigma that has no place in modern society.

V. CONCLUSION

When the plight of the innocent child of unmarried parents is weighed against any other interest, the other interest pales into insignificance. When the fear of defrauding a person’s rightful heirs in favor of a child who is actually not a blood relation has been quieted by a filiation proceeding in the child’s favor, no reason remains for denying him his rightful inheritance claim. Only the prejudice that an unthinking, unfeeling society might still harbor, stands in his way.

The weight of undoing this prejudice has been left on legislative shoulders. If the present law is allowed to stand unchanged, what result? We would continue to deprive a child of rights that would otherwise be his because of something as completely out of his control as the color of his skin.

Blackstone wrote of the common-law: "The incapacity of a bastard consists principally in this, that he cannot be heir to anyone . . . ."\(^1\) Today, while we have thought it proper to give all children inheritance rights from and through their mother, illegitimates still may not claim from or through their father except as the father voluntarily chooses. So, even in our modern society, inheritance remains one of the principal incapacities of bastardy.

An English writer, speaking of the legal treatment of illegitimacy generally and intestate succession specifically, says that the state of the law today is "the most outstanding example of legal discrimination against innocent people to be found in the law . . . ."\(^2\)

*Carole A. Bartlett*

\(^9\)26 Cal. 2d 472, 159 P.2d 643 (1945).
\(^1\)Id. at 481, 159 P.2d at 648.
\(^2\)1 BLACKSTONE'S COMMENTARIES 459.