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Richard S. Haynes
University of Baltimore School of Law

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DISCRIMINATION ON THE BASIS OF ILLEGITIMACY IN MARYLAND'S WRONGFUL DEATH STATUTE

The author investigates the manner in which Maryland's wrongful death statute discriminates against illegitimate children. An evaluation of this statute is made in the light of recent Supreme Court decisions dealing with the rights of illegitimates. The author concludes that the current Maryland law as applied to an illegitimate child's right to recover for the wrongful death of his father is unconstitutional.

English common law established that a child was illegitimate if it was conceived and born out of wedlock.¹ If the parents were married at the time of the birth, the child was legitimate, even if they were not married at the time of conception. Marriage of the parents after birth would not legitimate the child, and a child was born illegitimate if born after the marriage of the mother to a man other than the father.²

The illegitimate suffered several disadvantages at common law. Chief among these was the prohibition against inheritance from his father or mother.³ In addition to the common law disabilities, illegitimate children have frequently been excluded from the benefits of social programs such as workmen's compensation and wrongful death statutes.⁴ For example, Maryland's wrongful death statute,⁵ as interpreted by the Court of Appeals,⁶ establishes the right of legitimate children to recover for the wrongful death of their father, but does not extend the same right to illegitimate children. The existence of this disability is aggravated by the high rate of illegitimacy. On a national level, ten percent of all births between 1960 and 1970 were illegitimate, and in some urban areas illegitimate births exceeded fifty percent.⁷

1. H. CLARK, LAW OF DOMESTIC RELATIONS 156 (1968) [hereinafter cited as CLARK]. The classifications of legitimate and illegitimate were made either because of the Church's view that marriage was sacred, or because the blood relationship could be proved with greater certainty where the offspring were born to married parents. *Id.* at 155.
2. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 419, 429 (1900). Soon, the illegitimate class was further subdivided and the status of members within the class came to be based on the degree of sinfulness of their parent's intercourse. Children born to maid servants were preferred over the offspring of casual unions, and lowest in status were the illegitimates born from adulterous or incestuous relationships. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 2 (1971) [hereinafter cited as KRAUSE].
3. Clark, *supra* note 1, at 155. He also had no claim on his father for support, but soon the poor laws gave him such a claim. *Id.*
4. See, e.g., the statutes considered in *Levy v. Louisiana*, 391 U.S. 68 (1969); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).
5. MD. ANN. CODE, Ct's & Jud. Proc. art., §§ 3-901 to -904 (1974).
6. *State ex rel. Holt v. Try, Inc.*, 220 Md. 270, 152 A.2d 126 (1959).
7. U. S. DEPARTMENT OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 48, 50 (1969); N.Y. Times, July 1, 1968, at 21, col. 1; U. S. NEWS & WORLD REP., Oct. 2, 1967, at 85.

Some relief has been given to the illegitimate, largely from a trend toward narrowing the definition of "born out of wedlock."⁸ In England, a presumption arose that children born to a married woman were the children of her husband and therefore legitimate, unless the husband was "beyond the four seas" or he could prove impotency.⁹ In the United States, statutory provisions were enacted which "legitimated" children when their parents married after the child's birth or when the identity of the father was established through a paternity proceeding.¹⁰

More direct relief has been provided to the illegitimate by a series of recent Supreme Court decisions.¹¹ These decisions, applying the equal protection clause of the fourteenth amendment, have held some forms of discrimination between legitimate and illegitimate children unconstitutional. After an analysis of the Maryland wrongful death statute and its interpretation, these recent cases and their effect on the Maryland statute will be discussed.

THE MARYLAND STATUTE AND ITS INTERPRETATION

At common law a cause of action for injuries intentionally or negligently inflicted was personal to the victim and died with him.¹² Nor were the family or relations of the deceased permitted to recover for his death.¹³ The result was a strange anomaly: the wrongdoer could be held accountable for his actions if his victim lived, but not if he died.¹⁴ Far worse, a family deprived of its means of support was without a remedy against the wrongdoer.¹⁵

To avoid this harsh result, Maryland adopted Lord Campbell's Act¹⁶ in 1852. The Maryland version¹⁷ created a right of action against the tortfeasor causing death for the benefit of designated claimants.¹⁸ The

8. KRAUSE, *supra* note 2, at 11.

9. *Id.* at 16; CLARK, *supra* note 1, at 156, 172.

10. "Every one of the fifty states has a statute of one kind or another enabling parents to legitimate their illegitimate children." CLARK, *supra* note 1, at 158. *E.g.*, MD. ANN. CODE art. 93, § 1-208 (1969).

11. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Labine v. Vincent*, 401 U.S. 532 (1971); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973).

12. W. PROSSER, *LAW OF TORTS* 901 (4th ed. 1971). Prosser speculates that the rationale for the rule was as follows:

[T]he early cases usually were those of homicide, for which the crown executed the defendant and confiscated all his property, so that nothing was left for tort compensation; and if not homicide, it was still to be expected that lesser crimes should be redressed by the crown rather than the successors of the deceased.

Id. at 898.

13. *Id.* at 901; *Stewart v. United Elec. & Power Co.*, 104 Md. 332, 65 A. 49 (1906).

14. W. PROSSER, *LAW OF TORTS* 902 (4th ed. 1971).

15. *Id.*

16. 9 & 10 VICT., c. 93 (1846).

17. Act of May 25, 1852, c. 299, [1852] *Laws of Maryland*.

18. The claimants were the wife, husband, parent or child of the deceased. *Id.*

The deceased's estate is not a claimant. The damages recoverable are primarily for loss of services or support. See 3 U. BALT. L. REV. 318 (1974). Since the recovery is not a

statute now provides: "An action under this subtitle shall be for the benefit of the wife, husband, parent, or child of the deceased person."¹⁹ This phrase, if it stood alone, might be interpreted to authorize a wrongful death action on behalf of an illegitimate child as well as a legitimate child in view of a separate statutory provision, article 1, section 16, which requires construction of the word "child" to include an illegitimate child "unless such a construction would be unreasonable."²⁰ But the statute defines the word "child" as follows: "'Child' means a person under 18 years of age and includes an illegitimate child of a deceased mother."²¹ This definition indicates that an illegitimate child may recover for the wrongful death of his mother, but implies that he may not do so for the wrongful death of his father.²² The conflict between this sentence and the statutory mandate that "child" be construed to include an illegitimate child unless such a construction would be unreasonable, was resolved in *State ex rel. Holt v. Try, Inc.*²³

In *Holt* illegitimate children were attempting to recover for the wrongful death of their putative father. They contended that Article 1, Section 16, required that the word "child" in the wrongful death statute be construed to include illegitimate children. The court disagreed. In 1937 an amendment to the wrongful death statute was

part of the deceased's estate, it is not subject to the claims of his creditors. *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 340, 65 A. 49, 52 (1906).

A separate statutory provision authorizes a deceased's personal representative to commence any action the deceased, if he had lived, would have had against the tortfeasor. MD. ANN. CODE art. 93, § 7-401(n) (Supp. 1973). The damages recoverable in this "survival action" include: pecuniary losses sustained by the deceased; conscious pain and suffering, *Tri-State Poultry Corp. v. Carey*, 190 Md. 116, 57 A.2d 812 (1948); funeral expenses not exceeding \$2,000, MD. ANN. CODE art. 93, § 7-401 (n) (Supp. 1973); and punitive damages, *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972). Since any recovery becomes part of the deceased's estate, it is subject to the claims of his creditors. *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 336, 65 A. 49, 51 (1906).

The "survival action" is of no benefit to an illegitimate child of a deceased father, unless the deceased provides for the child by will. The intestate succession statute authorizes inheritance from a father by "issue". MD. ANN. CODE art. 93, §§ 3-101, -103 (1969). "Issue" does not include an illegitimate child, *id.* § 1-209, although it does include a legitimated child, *id.* § 1-208. Thus, a child born illegitimate who has not been legitimated may not share in his father's estate. See *Dawson v. Eversberg*, 257 Md. 308, 315, 262 A.2d 729, 733 (1970). Cf. *Labine v. Vincent*, 401 U.S. 164 (1972).

19. MD. ANN. CODE, Ct's & Jud. Proc. art., § 3-904(a) (1974).

20. MD. ANN. CODE art. 1, § 16 (1968) provides: "The word child or its equivalent shall be construed to include any illegitimate child, except in matters of inheritance, descent or distribution of real and personal property, unless such a construction would be unreasonable."

21. MD. ANN. CODE, Ct's & Jud. Proc. art., § 3-901(b) (1974).

22. The statute defines "parent" as follows: "'Parent' includes the mother of a deceased illegitimate child." *Id.* § 3-901(c). This language implies that fathers may not recover for the wrongful death of their illegitimate children. No reported Maryland case has dealt with this subject; however, the following discussion of the right of an illegitimate child to recover for the wrongful death of his father should be applicable to discrimination against a father seeking to recover for his illegitimate child's wrongful death. See notes 51 & 70 *infra*.

23. 220 Md. 270, 152 A.2d 126 (1959). This case construed former MD. ANN. CODE art. 67, § 4 (1969), recodified in the present version, MD. ANN. CODE, Ct's & Jud. Proc. art., §§ 3-901 to -904 (1974).

proposed which would have enlarged the class of potential claimants. As originally introduced, the bill provided that, in certain circumstances, an action could be brought for the benefit of an illegitimate child for the wrongful death of his father. However, the portion authorizing such an action was eliminated from the bill before enactment. The court reasoned that this action manifested a legislative intent to exclude illegitimate children from such recovery. The court concluded that, since construction of the word 'child' to include an illegitimate child would be unreasonable in the face of such clear legislative intention to the contrary, no action could be brought under the Maryland statute for the benefit of the plaintiff's illegitimate children.

Despite the result in *Holt*, there are at least three possible instances in which an illegitimate child may recover when his father is killed. First, the wrongful death statute establishes two classes of claimants. The primary claimants are the spouse, parents and legitimate children of the deceased.²⁴ However, if there are no primary claimants, then an action is authorized on behalf of a secondary class of claimants. This second class of claimants includes "any person related to the deceased person by blood or marriage who was wholly dependent upon the deceased."²⁵

Clearly, even under the harsh common law doctrines, an illegitimate child is a "person";²⁶ and, equally as certain, if the deceased was his father they are related "by blood." If, then, an illegitimate child of a deceased father could prove that he was "wholly dependent" on the deceased, recovery should be authorized so long as no primary beneficiary qualifies. In *Holt* the court held that an illegitimate child was not a primary claimant in an action for his father's wrongful death. Since the deceased's mother (a primary claimant) was a party in the same action, the court expressed no opinion on whether the illegitimate children could recover as secondary claimants.²⁷ Nor has any other Maryland case been reported in which an illegitimate child was able to recover on this basis.²⁸

A second possible limitation on the result in *Holt* is Maryland's legitimation statute. The statute provides that a child "born to parents who have not participated in a marriage ceremony with each other shall be deemed to be the child of his mother, [but] shall be deemed to be

24. MD. ANN. CODE, Ct's & Jud. Proc. art., § 3-904(a) (1974).

25. *Id.* § 3-904 (1974) provides:

(a) *Primary beneficiaries*.—An action under this subtitle shall be for the benefit of the wife, husband, parent, and child of the deceased person.

(b) *Secondary beneficiaries*.—If there are no persons who qualify under subsection (a), an action shall be for the benefit of any person related to the deceased by blood or marriage who was wholly dependent upon the deceased.

See *Whittel v. Baker*, 10 Md. App. 531, 272 A.2d 57 (1970).

26. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

27. 220 Md. at 274 n.4, 152 A.2d at 128 n.4 (1959).

28. A deceased's sister is a secondary claimant, *McKeon v. State ex rel. Conrad*, 211 Md. 437, 127 A.2d 635 (1956).

the child of his father only" if one of four conditions is met. These four conditions are quite comprehensive, considerably narrowing the common law definition of illegitimate.²⁹ But the legitimation statute is found in the article on Decedents' Estates,³⁰ and there is some question as to its applicability to the wrongful death statute.³¹ If the legitimation statute is applicable to the wrongful death statute, then a legitimated child would be authorized to recover for the wrongful death of his father as a primary claimant.

The thrust of the legitimation statute is toward inheritance. An introductory section of the Decedents' Estates article qualifies the definition of "legitimated child" by saying, "when used in this article. . ."³² A later section says that the rules of construction are to be "applied in construing all provisions of this article and the terms of a will."³³ Yet despite this thrust, a Maryland court has held that the legitimation statute is not limited in application to inheritance matters only.³⁴ The court's rationale was that, at common law and in its statutory derivatives, inheritance rights were regarded with the most solemn reverence, and if the law provided a method of legitimation for the purposes of inheritance, such a procedure was of sufficient legal validity to establish other rights. However, so far the application of the legitimation statute has been expanded only to the areas of support,³⁵ and the rights of the father to notification of adoption proceedings and removal of his children from Maryland.³⁶ No reported case has considered whether a child who has been legitimated by conformance with one of the four conditions in the legitimation statutes is a "child" for purposes of the wrongful death statute.

There are, however, good reasons why the application of the legitimation statute should not be limited to inheritance matters. Application to other areas is consistent with the general trend toward mitigating the impact of illegitimacy and lessening the severity of the com-

29. MD. ANN. CODE art. 93, § 1-208 (1969) provides:

A person born to parents who have not participated in a marriage ceremony with each other shall be deemed to be the child of his mother. He shall be deemed to be the child of his father only if his father (1) has been judicially determined to be the father in a proceeding brought under § 66E of Article 16, (2) has acknowledged himself, in writing, to be the father, (3) has openly and notoriously recognized the person to be his child, or (4) has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

At common law a child was illegitimate if it was both conceived and born out of wedlock. 1 W BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 419, 429 (1900).

30. MD. ANN. CODE art. 93 (1969) deals with "Decedents Estates."

31. At first glance the problem may appear similar to that decided in *Holt*, but here the question concerns the definition of the word "legitimate" rather than the construction of the word "child."

32. MD. ANN. CODE art. 93, § 1-101 (1969).

33. MD. ANN. CODE art. 93, § 1-201 (1969).

34. *Thomas v. Solis*, 263 Md. 536, 542, 283 A.2d 777, 780 (1971).

35. *Id.* at 545, 283 A.2d at 782. See also *Dawson v. Eversberg*, 257 Md. 308, 315, 262 A.2d 729, 733 (1970) (dictum) (legitimate child's duty to support his father).

36. *Thomas v. Solis*, 263 Md. 536, 542, 283 A.2d 777, 782 (1971).

mon law rules.³⁷ In addition, the wrongful death statute and the inheritance statute have similar purposes. The inheritance statute provides for the distribution of an intestate's property among his family and relations according to his presumed intent.³⁸ Presumably, his intent would be to provide for those who are dependent on him.³⁹ Thus, at least one purpose of the statute is to provide support for the deceased's family and relations.

The wrongful death statute has a similar purpose and achieves a similar result. The claimants are authorized to recover damages equivalent to the benefit they would have received from the earnings of the deceased had he lived.⁴⁰ Since the two statutes may be said to have a similar purpose, and to achieve a similar result, it would seem reasonable to conclude that a determination of those who are to benefit from the two statutes should be made by applying the same test. If the legitimation statute were applied to define who is an illegitimate child for purposes of the wrongful death statute, then some children would be authorized to recover despite being illegitimate under the far stricter common law definition.

A third limitation on the disability of an illegitimate child to recover for his father's wrongful death arises from Maryland's workmen's compensation statute.⁴¹ The statute authorizes compensation to any "dependent" of an employee who is killed in the scope of workmen's compensation-covered employment,⁴² and treats dependent legitimate and illegitimate children equally.⁴³ When an employee is killed under circumstances which create liability in someone other than the employer, the dependents may proceed either by wrongful death action against the tortfeasor or against the employer for workmen's compensation benefits. If the latter course is elected and workmen's compensation is awarded, the employer or his insurance company is subrogated to the right the dependents have against the tortfeasor.⁴⁴

In *Storrs v. Mech*,⁴⁵ the dependent sister of a workman who was killed on the job by a tortfeasor, rightfully recovered as a "dependent" under the workmen's compensation statute. A question then arose as to whether the workman's employer, who had paid the award to the dependent sister, could bring a wrongful death action to enforce for his own benefit the liability of the tortfeasor. The tortfeasor challenged the employer's suit, contending that since the sister was not a spouse,

37. *Id.* at 542, 283 A.2d at 780; *Rowe v. Cullen*, 177 Md. 357, 361, 9 A.2d 585, 587 (1939). "The trend of the courts throughout the country is to give a liberal interpretation to legitimation statutes. . . ." MD. ANN. CODE art. 93, § 1-208, Comment (1969).

38. *Barron v. Janney*, 225 Md. 228, 234, 170 A.2d 176, 180 (1961).

39. MD. ANN. CODE art. 93 §§ 3-102 to -104 (1969).

40. *Jennings v. United States*, 178 F. Supp. 516, 531 (D. Md. 1959).

41. MD. ANN. CODE art. 101 (1964).

42. MD. ANN. CODE art. 101, § 15 (Supp. 1973).

43. *Huber v. Baltimore & O.R.R.*, 241 F. Supp. 646 (D. Md. 1965).

44. MD. ANN. CODE art. 101, § 58 (Supp. 1973).

45. 166 Md. 124, 170 A. 743 (1934).

parent or child of the deceased,⁴⁶ she could not maintain a wrongful death action. He then argued that under the theory of subrogation the employer could stand in no better position than the dependent sister to whom he had paid benefits. His argument was not accepted. The court reasoned that the act of the wrongdoer was as responsible for the employer's having to pay damages to the deceased's dependent sister, as it would have been if the sister were a spouse, parent or child. The court could not see any equitable reason why the employer should have the right to compel the tortfeasor to reimburse him in one case but not the other. In effect, the court held that since the sister was entitled to recover under the workmen's compensation law, she was added to the class of claimants who may recover under the wrongful death statute. Therefore, the employer could maintain a cause of action against the tortfeasor in the name of the sister, and recoup from the tortfeasor the payments he made to the sister. Any recovery in excess of the workmen's compensation award would be paid to the dependent of the deceased.⁴⁷

This doctrine was followed in *Taylor v. State ex rel. Mears*,⁴⁸ in which dependent illegitimate children of a deceased father, who also had living legitimate children (primary claimants), were found to be entitled to recover against the negligent party for the wrongful death of their father. The court, however, was careful to limit its holding:

We do not mean to qualify in any way the holding in *State ex rel. Holt v. Try, Inc.*, . . . [i]f these illegitimate children in this appeal had not been entitled to sue as dependents under the Workmen's Compensation Act, but had proceeded solely under the wrongful death statute, they would have had no standing to sue . . . Whatever doubts may exist concerning such a legal incongruity we feel bound by our prior decisions, . . . any change that may be deemed advisable must come, we feel, from legislative enactment and not by judicial construction.⁴⁹

Therefore, if the *father of dependent illegitimate children* is killed by a tortfeasor in the scope of his employment, a claim for workmen's compensation benefits against the employer and an action for wrongful death may be maintained on behalf of his illegitimate children, even when a primary claimant is a party in the same action. But, if the father

46. At that time the wrongful death statute did not provide for the second class of claimants under which, today, the sister could have maintained the wrongful death action. Act of May 25, 1852, c. 299, § 2, [1852] Laws of Maryland.

47. *Mech v. Storrs*, 169 Md. 150, 157, 179 A. 525, 529 (1935); *Clough & Molloy, Inc. v. Shilling*, 149 Md. 189, 131 A. 343 (1925).

48. 233 Md. 406, 197 A.2d 116 (1964).

49. *Id.* at 413, 197 A.2d at 119-20. See *Flores v. King*, 13 Md. App. 270, 282 A.2d 521 (1971), which emphasizes that for the workmen's compensation statute to expand the class of wrongful death claimants, the deceased had to be killed in the scope of covered employment by a tortfeasor.

was not in covered employment or was not killed within the scope of his employment, and had a wife, parent or legitimate child living at the time of his wrongful death, his dependent illegitimate children would be denied recovery.

To summarize, there are three instances in which Maryland law may possibly be construed so as to entitle an illegitimate child a cause of action for the wrongful death of his father. But these are exceptional cases under a statute which generally discriminates against illegitimate children in relation to their father. The *Holt* courts' interpretation of the word "child" as not including an illegitimate child means that illegitimates may not recover wrongful death benefits as a primary claimant. The statute allows an illegitimate child to recover as a claimant only if no primary beneficiary qualifies and thus clearly does not treat legitimate and illegitimate children equally.

THE RECENT SUPREME COURT DECISIONS

A series of recent Supreme Court decisions has cast doubt on the constitutionality of statutes which discriminate on the basis of legitimacy. In *Levy v. Louisiana*,⁵⁰ the United States Supreme Court held that a Louisiana statute which denied illegitimate children the right to maintain an action for the wrongful death of their mother, but granted that right to legitimate children, was unconstitutional. In a companion case, *Glonn v. American Guarantee and Liability Insurance Co.*,⁵¹ the same statute was also found to be invalid because it, conversely, stated that the mother of a legitimate child could maintain an action for the wrongful death of her child, but that the mother of an illegitimate child had no such right.

The rationale of these decisions is not clear. In determining whether a particular state or federal statutory classification contravenes the equal protection clause of the fourteenth amendment, courts have generally applied one of two distinguishable tests: the *rational basis test* or the *compelling state interest test*. The traditional standard is the rational basis test, which requires the one who is attacking a statutory classification as unconstitutional to carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.⁵² The compelling state interest test is a stricter standard which applies in the exceptional cases where either a "suspect classification" or a "fundamental right" is involved. A statute which denies rights to a particular

50. 391 U.S. 68 (1968).

51. 391 U.S. 73 (1968). Although *Glonn* involved a mother seeking to recover for the wrongful death of her illegitimate child, the Court's rationale should apply to the Maryland statute which does not authorize recovery by a father for the wrongful death of his illegitimate child. See note 70 *infra*.

52. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *Morey v. Doud*, 354 U.S. 457, 463 (1957).

class solely on the basis of a condition over which members of the class have no control is inherently suspect.⁵³ A fundamental right is one which is either expressly or impliedly protected by the Constitution.⁵⁴ Thus, suspect classifications would encompass discrimination on the basis of race,⁵⁵ ancestry,⁵⁶ and alienage,⁵⁷ while fundamental rights would include statutes which affect the right to vote⁵⁸ and procreate.⁵⁹

If the compelling state interest test is the proper standard to be used, the statute is presumed to be unconstitutional and, therefore, the burden of justifying the classification shifts from the challenging party to the state.⁶⁰ For a state interest to be shown to be compelling, the government must establish that the classification is necessary to protect against "the gravest abuses, endangering paramount interests. . . ."⁶¹ Rarely can the state meet such a heavy burden, and, in fact, it has been said that a compelling state interest exists only in theory.⁶² Thus, the decision as to which test should be applied is usually decisive of the equal protection claim.⁶³

The *Levy* decision does not clearly indicate which equal protection test the Court applied.⁶⁴ Justice Douglas, writing for the majority, first stated: "Though the test has been variously stated, the end result is whether the line drawn is a rational one."⁶⁵ But he later said: "[W]e have been extremely sensitive when it comes to basic civil rights. . . ."⁶⁶ The former language is indicative of the rational basis

53. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). *In re Griffiths*, 413 U.S. 717, 721 (1973).

The inherently suspect classification argument has in the past been made using the due process clause rather than the equal protection clause. *Robinson v. California*, 370 U.S. 660 (1962); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decision on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 347 (1968-69).

54. Schwartz, *Municipal Services Litigation After Rodriguez*, 40 BROOKLYN L. REV. 93, 95 (1973). See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to travel); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (religious freedom); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (freedom of association).

55. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

56. *Korematsu v. United States*, 323 U.S. 214 (1944).

57. *Graham v. Richardson*, 403 U.S. 365 (1971).

58. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

59. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

60. *In re Griffiths*, 413 U.S. 717 (1973); *Loving v. Virginia*, 388 U.S. 1, 9 (1957).

61. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

62. "For the law to require that the town must show a compelling interest to justify the priorities it establishes in making capital improvements simply requires the impossible." *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1180 (5th Cir. 1972).

63. Compare *Shapiro v. Thompson*, 394 U.S. 618 (1969), with *Dandridge v. Williams*, 397 U.S. 471 (1970).

64. This lack of clarity has resulted in considerable confusion. *Levy* has been cited as an example of an application of the rational basis test. *United States v. Weatherwood*, 471 F.2d 47, 51 (7th Cir. 1972). On the other hand, it has also been cited as an application of the compelling state interest test. *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973); *United States v. Craven*, 478 F.2d 1329, 1338 (6th Cir. 1973); *Beatty v. Weinberger*, 478 F.2d 300, 308 (5th Cir. 1973).

65. 391 U.S. 68, 71 (1968).

66. *Id.*

test, while the latter is relevant to a compelling state interest. Because the Court's rationale was not clear, it is necessary to discuss which equal protection test should be applied.

The right to recover wrongful death benefits probably is not a fundamental right. In cases decided after *Levy* the Supreme Court has held that there is no explicit or implicit constitutional right to an education,⁶⁷ housing,⁶⁸ or welfare benefits.⁶⁹ These rights are similar to the right to recover wrongful death benefits in that all are wholly statutory in nature. Since they are not constitutionally guaranteed, strict scrutiny is not required. Nevertheless, application of the compelling state interest test would appear appropriate because illegitimacy is an inherently suspect classification—denial of wrongful death benefits solely because the claimant is illegitimate is discriminating against him on the basis of a factor over which he has no control. However, this reasoning, although applicable in *Levy* where the claimants were illegitimate children, would not apply in *Glon* where the mother was the claimant. The mother could have avoided the "sin" which resulted in the child's birth or presumably brought a paternity action to legitimate the child. She could control her status and thus no suspect classification was involved. The *Glon* result, therefore, appears justifiable only as an application of the rational basis test, and, indeed, the Court's opinion is clearer in that regard.⁷⁰

The foregoing indicates that there is an argument that the compelling state interest test applies to state statutes, such as Maryland's wrongful death statute, which discriminate against illegitimate children. Nevertheless, the following discussion will assume that the appropriate test is the rational basis one. For if the statute cannot even survive that test, there is no need to consider whether it serves a compelling state interest.⁷¹

Since the *Levy* decision, several state courts have considered the question of whether it is unconstitutional for a state to discriminate against illegitimates in relation to their father. Most of these courts⁷²

67. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

68. *Lindsey v. Normet*, 405 U.S. 56 (1972).

69. *Dandridge v. Williams*, 397 U.S. 471 (1970).

70. In *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968), the state argued that since the mother had control over her actions and had committed a "sin", the state should be allowed to punish her by denying her certain rights which non-sinners enjoy. Yet the court felt that there was no possible rational basis in the state's contention that denying mother's of illegitimate children the right to recover for their children's wrongful death, would reduce the rate of illegitimacy.

It would indeed be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the "sin," which is, we are told the historic reason for the creation of the disability.

Id. at 75. See KRAUSE *supra* note 2, at 67.

71. Schwartz, *Municipal Services Litigation After Rodriguez*, 40 BROOKLYN L. REV. 93, 95-96 (1973).

72. *Cannon v. Transamerican Freight Lines*, 37 Mich. App. 313, 194 N.W.2d 736 (1971);

have held that, on the basis of the *Levy* decision, it is unconstitutional to discriminate against illegitimate children with regard to either parent. Only Mississippi⁷³ and Florida⁷⁴ have held otherwise, and it appears that their decisions are clearly erroneous.

In the leading state case which found *Levy* applicable to the father-child relationship, a cause of action was maintained on behalf of five dependent illegitimate children for the wrongful death of their natural father.⁷⁵ The effect of the state wrongful death statute involved was that the illegitimate children could recover for the wrongful death of their mother, but could only recover for the wrongful death of their father if the parents should marry and treat him as their child. The court, holding the statute incompatible with the equal protection clause as applied in *Levy*, concluded that *Levy* could not be confined to those cases which deal with the relation of an illegitimate child and his mother. "[I]t can be of no logical moment whether the parent was the mother or the father."⁷⁶

A different result was reached by the Mississippi Supreme Court.⁷⁷ The Mississippi wrongful death statute did not permit an illegitimate child to recover damages for the wrongful death of his father, but allowed that cause of action for the wrongful death of his mother. The

Weaks v. Mounter, —Nev.—, 493 P.2d 1307 (1972); *Schmoll v. Creecy*, 54 N.J. 194, 254 A.2d 525 (1969); *In re Estate of Perez*, 69 Misc. 2d 538, 330 N.Y.S.2d 881 (Sur. Ct. 1972); *In re Estate of Ross*, 67 Misc. 2d 320, 323 N.Y.S.2d 770 (Sur. Ct. 1971); *In re Estate of Ortiz*, 60 Misc. 2d 756, 303 N.Y.S.2d 806 (Sur. Ct. 1969). *Cf. R. 000 v. R. 000*, 431 S.W.2d 152 (Mo. 1968).

The Louisiana Supreme Court apparently has interpreted *Levy* as applying to the illegitimate child—father relationship. In its opinion on remand from the Supreme Court, the Louisiana court stated: "The United States Supreme Court has held that . . . when a parent openly and publicly recognizes and accepts an illegitimate to be *his or her* child and the child is dependent upon the parent, such an illegitimate is a child as expressed in [the Louisiana wrongful death statute]." *Levy v. State ex rel. Charity Hosp.*, 253 La.73, 75, 216 So. 2d 818, 820 (1968) (emphasis added).

An interesting case is *Jenkins v. Collette*, 335 F. Supp. 47 (E.D. La. 1971). A wrongful death action was brought under the Louisiana statute considered in *Levy* on behalf of legitimate children by their mother, a Mississippi citizen. The defendants were Louisiana citizens so diversity apparently was established. But the deceased had a second family with two illegitimate children in Louisiana. On the defendants' motion the court dismissed the Mississippi mother's action for failure to join the illegitimate children as indispensable parties. The effect of joinder would have been to destroy diversity jurisdiction. In order to find that the illegitimate children were indispensable parties, the court must have believed that they could recover under the statute for their father's wrongful death.

The Virginia Court of Appeals, relying on its own earlier decisions, has held that the word "children" in Virginia's wrongful death statute includes an illegitimate child seeking to recover for the death of his father. *Carroll v. Sneed*, 211 Va. 604, 179 S.E.2d 620 (1971).

73. *Sanders v. Tillman*, 245 So. 2d 198 (Miss. 1971).

74. *City of West Palm Beach v. Cowart*, 241 So. 2d 748 (Dist. Ct. App. Fla. 1970); *cf. Baston v. Sears*, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968) (support), apparently overruled by *Gomez v. Perez*, 409 U.S. 535 (1973).

75. *Schmoll v. Creecy*, 54 N.J. 194, 254 A.2d 525 (1969).

76. *Id.* at 201, 254 A.2d at 529.

77. *Sanders v. Tillman*, 245 So. 2d 198 (Miss. 1971).

court upheld the statute as constitutional and distinguished *Levy* as applying only to the mother of illegitimate children. The court felt that its statutory distinction was based upon a logical classification of claimants.

It is a simple matter to prove the maternity of an illegitimate child, but it is infinitely more complex to prove the paternity. It is only necessary for the father to be present at the laying of the keel, not at the launching of the ship. The mother must be present at both, and it is not at all difficult to prove who launched the ship.^{7 8}

The Mississippi court's rationale is fallacious. The relevant question is not whether maternity is easier to prove than paternity. Because the action was brought by an illegitimate child seeking to recover for the wrongful death of his father, proof of maternity was irrelevant. The material question is whether proving *paternity of an illegitimate child* is so far more difficult than proving *paternity of a legitimate child* that it provides a rational basis for the discrimination. Whether the proof problem provides a rational basis will be discussed later.^{7 9}

The state cases interpreting the impact of *Levy* on the illegitimate child-father relationship in the area of wrongful death were decided prior to the Supreme Court's decision in *Weber v. Aetna Casualty & Surety Co.*^{8 0} In that case dependent, unacknowledged, illegitimate children sought to recover benefits under Louisiana's workmen's compensation laws for the death of their natural father on an equal basis with his dependent legitimate children. The challenged statute permitted unacknowledged illegitimate children the right to recover death benefits only to the extent that decedent's legitimate children had not exhausted the maximum payable compensation.^{8 1} The court used *Levy* as precedent for their decision holding the statute unconstitutional.

78. *Id.* at 200.

79. See p. 265 *infra*.

80. 406 U.S. 164 (1972).

81. The deceased father in *Weber* had four legitimate and two illegitimate children all of whom were dependent upon him for their support. After his death, workmen's compensation claims were filed on behalf of all six children. Prior to any payment under workmen's compensation, the four legitimate children recovered against the third party tortfeasor who was responsible for their father's death, an amount in excess of the maximum benefits allowable under Louisiana's workmen's compensation statute. The trial judge in the subsequent compensation case declared that, because any amount recovered from the tortfeasor is set off from the workmen's compensation payment, the award had been satisfied from the tort settlement and the illegitimate children therefore got nothing.

The illegitimate children challenged the decision on the ground that the Louisiana workmen's compensation statute denied them equal protection of the law. The Supreme Court of Louisiana, affirming, distinguished *Levy* as applying only to a statute which excluded all illegitimates from any possible recovery. Under this compensation statute, "the unacknowledged illegitimate child is not denied a right to recover compensation, he is merely relegated to a less favorable position as are other dependent relatives such as parents. . . ." *Stokes v. Aetna Cas. & Sur. Co.*, 257 La. 424, 433-34, 242 So. 2d 567, 570 (1970).

Even though the statute did not absolutely bar illegitimates from benefits, the court found it to be an unconstitutional denial of equal protection of the law since it denied them rights available to other dependent children.^{8 2}

Weber indicates that discrimination in the illegitimate child-father relationship in the area of workmen's compensation is unconstitutional. Both workmen's compensation and wrongful death statutes are state created compensation schemes designed to provide for dependents of the deceased after his accidental death.^{8 3} Because of this similarity it does not appear likely that the Supreme Court would hold the discrimination constitutional if wrongful death were at issue when it has already held invalid a similar workmen's compensation statute.^{8 4}

ATTEMPTING TO JUSTIFY THE DISCRIMINATION

Levy established that discrimination between legitimate and illegitimate children in the recovery of wrongful death benefits in relation to their mother was unconstitutional. *Weber* extended that principle to the illegitimate child-father relationship in a workmen's compensation case. Although these cases have been discussed, the arguments set forth to justify the discrimination have not. State officials seeking to preserve state statutes have asserted four state interests. None of these interests would seem to provide a rational basis for the discrimination advanced by Maryland's wrongful death statute.

Historically illegitimates were viewed as "sin turned into flesh," and thus one asserted justification for discrimination against illegitimates has been that a state may pass legislation which discourages illicit sexual

82. The *Weber* court had to distinguish *Labine v. Vincent*, 401 U.S. 532 (1971), in which the Supreme Court upheld as constitutional a Louisiana statute which discriminated against illegitimate children in the area of intestate succession. Three distinguishing characteristics were set forth. First, *Labine* involved state regulation of the disposition of property at death, an area in which the states have traditionally been given broad discretion. Second, the substantial state interest in stability of land titles and prompt determination of ownership of property left by decedents was not involved in a workmen's compensation action. Finally, in *Labine* the intestate could have insured that his illegitimate child would have taken equally by executing a will or marrying the child's mother. The deceased could not have given his illegitimate child such protection in *Weber* because the Louisiana statute prohibited acknowledgment of children whose parents were incapable of contracting marriage. The father in *Weber* remained married to his first wife, not the illegitimate children's mother, until his death. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972).

83. In extending the *Levy* rationale the *Weber* Court relied on the similarity between workmen's compensation and wrongful death statutes. 406 U.S. at 171.

84. The *Weber* Court did not decide whether the rational basis test or the compelling state interest test was the proper standard. After discussing cases applying both tests, the Court stated: "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?" 406 U.S. at 173. The Court considered several asserted state interests and rejected each as not being promoted by the statute. The Court concluded: "[T]he classification is justified by no legitimate state interest, compelling or otherwise." *Id.* at 176.

intercourse.⁸⁵ This argument assumes that an unmarried couple contemplating sexual intercourse will be so concerned about the discrimination which awaits an illegitimate child, that they will refrain from the sexual activity. It is doubtful that the couple would be versed in this area of the law and therefore they probably would not know whether state law discriminated against illegitimates; and even if they did, it is highly unlikely that their conduct would be deterred. Further, it is not logical to punish the child to deter the conduct of his parents.⁸⁶ Certainly the parent's conduct would be more effectively altered if they, rather than their progeny, were risking serious legal consequences which could result from their illicit activity. Therefore, although a state may have a valid interest in preventing sin, it is readily apparent that the denial of rights to illegitimate children has no connection with the goal of discouraging illicit relations.⁸⁷

States have also argued that discrimination against illegitimate children serves the important state interest of preserving the family unit. The rationale for this argument is that the parents will be encouraged to marry if greater rights are given to legitimate offspring than those born of extramarital unions.⁸⁸ To repeat, it is doubtful that those who are about to enter into an illicit relationship contemplate the discrimination which awaits illegitimate offspring. Further, marriage after birth of the child would not be encouraged by this state discrimination, because marriage alone does not legitimate the child.⁸⁹ Finally, it is unjust and illogical to punish the child for the faults of the parents. As was the case for the state interest in preventing sin, there is no causal connection between denial of rights to illegitimate children and preservation of the family unit.

States may validly confine recovery of wrongful death benefits solely to those who are dependent on the deceased.⁹⁰ A child who is not being supported by the deceased simply does not need the protection the statute is intended to provide. Using this premise, one state has attempted to defend a statute which discriminated against illegitimate children on the basis that such children normally do not have a close living relationship with their parents.⁹¹ This amounts to saying that an illegitimate child is not likely to be dependent on one or both of his parents. Since the statute in that case required proof of dependency before authorizing recovery, the court found the argument to be without merit.⁹² Maryland's statute requires proof of dependency

85. KRAUSE, *supra* note 2, at 2.

86. *Labine v. Vincent*, 401 U.S. 532, 557 (1971) (dissenting opinion).

87. *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968).

88. *Levy v. Louisiana*, 192 So. 2d 193, 195 (La. Ct. App. 1967).

89. *See* p. 255 *supra*. But marriage of the parents before the child's birth would legitimate the child at common law. *Id.* Assuming that the definition of illegitimate child in Maryland's inheritance statute, MD. ANN. CODE art. 93, § 1-208 (1969), applies to the wrongful death statute, marriage of the parents after the child's birth would legitimate the child if the father acknowledged the child to be his.

90. *See* MD. ANN. CODE art. 101, § 36(8) (Supp. 1973).

91. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

92. *See* Note, 82 HARV. L. REV. 1065, 1078 (1969).

before an illegitimate child may recover, but does not so require for a legitimate child. Even if an illegitimate child can conclusively establish that he was wholly dependent on his deceased parent, the statute still denies recovery if a legitimate child or other primary claimant were a party. Since the statute provides unequal treatment even though the illegitimate child may in fact be wholly dependent, it is apparent that dependency is not the basis for Maryland's discrimination. Therefore, the dependency argument cannot provide a rational basis.

The three state interests discussed thus far have been asserted to justify discrimination against illegitimate children in relation to both parents. The fourth argument attempts to justify discrimination against the illegitimate primarily in relation to his father. The argument is that illegitimate birth furnishes less convincing evidence of paternity than does birth in wedlock.⁹³ By denying all illegitimate children the right to recover for the death of their father, the state minimizes the danger of fraudulent claims of paternity. Once again, the assumption on which this argument rests is of doubtful validity. Illegitimate children stand in the same blood relationship with their fathers as legitimate children. Modern scientific techniques have made proof of paternity far more reliable than in the past.⁹⁴ In addition, the child may have other non-scientific evidence of paternity, such as his mother's testimony. Moreover, it is the function of the trier of fact to determine the validity of paternity claims.⁹⁵ It is clearly irrational to deny recovery to an illegitimate child who is ready and able to prove paternity simply because some claimants may try to do so and fail.⁹⁶

In order for a court to find that a rational basis exists for the

93. *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968) (dissenting opinion); *Sanders v. Tillman*, 245 So. 2d 198 (Miss. 1971).

94. *KRAUSE*, *supra* note 2, at 127-36.

Whereas exclusions can be established with scientific, absolute certainty, inclusions can be established by degrees of probability. At the extreme end of the spectrum, paternity can be all but determined positively, because some genes are so rare that, if the same genes are found in the putative father and the child, "the possibility of coincidence being responsible is so remote as to make the odds astronomical."

Id. at 127, *citing* L. SUSSMAN, *BLOOD GROUPING TESTS—MEDICOLEGAL USES* 83 (1968).

Note that MD. ANN. CODE art. 16, § 66G (1973), denies children the right to introduce blood tests as evidence in "Paternity Proceedings" unless the test results would establish that the defendant was not the father. *See* *Buford v. Bunn*, 247 Md. 203, 230 A.2d 636 (1967). Although no case has arisen, the statute may be construed to be applicable to an illegitimate child attempting to establish paternity so that he may recover wrongful death benefits. If so, proof of paternity would be more difficult to establish.

95. *Carroll v. Sneed*, 211 Va. 640, 643, 179 S.E.2d 620, 622 (1971): "But a person who claims to be decedent's child has the burden of proving that the decedent was his parent. We should not assume that finders on fact will not intelligently and justly resolve issues of paternity based on the evidence before them and guided by the law."

96. *Levy v. Louisiana*, 391 U.S. 68 (1968). Nor may the discrimination be justified through the assertion that by denying illegitimate children the right to recover benefits the state avoids the burden of hearing paternity claims. "[E]ven though the State's interest in achieving administrative efficiency 'is not without some legitimacy,' '[t]o give a mandatory preference . . . merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

discrimination against illegitimates, it must find a constitutionally permissive objective and a causal connection between that objective and the means chosen to achieve it.⁹⁷ In applying this test the Supreme Court has in the past upheld a discriminatory classification if the means chosen serves any conceivable legitimate state purpose.⁹⁸ In more recent cases, however, the Court has not been willing to consider hypothetical purposes, but has looked to what it considers to be the real purpose of the discriminatory classification.⁹⁹ Assuming the objectives asserted in the preceding arguments are the real objectives to be furthered by the discriminatory classification, and assuming further that the objectives are valid state interests, those objectives simply are not promoted by denial of equal rights to illegitimates.

Even if the statute is found to satisfy the rational basis test, it may be argued that the more stringent compelling state interest is the appropriate standard.¹⁰⁰ Maryland's wrongful death statute certainly cannot satisfy this test, which requires the state to show not only that its objective is constitutionally permitted, but also that it has chosen the "least restrictive alternative" which would accomplish that objective.¹⁰¹ For each of the four interests asserted there are better methods of achieving the state's objective than denying rights to illegitimate children. The only logical conclusion is that Maryland's wrongful death statute as construed in *Holt* is unconstitutional as applied to an illegitimate child's right to recover for the wrongful death of his father.

INVALIDITY OR EXPANSION OF STATUTE

Assuming that the Maryland wrongful death statute, as construed, is found unconstitutional, a question arises whether the court should enlarge the reach of the statute, thus allowing recovery of benefits on behalf of illegitimate children for their father's wrongful death, or whether the portion of the statute referring to children should be stricken so that no child, legitimate or illegitimate, may recover.

97. See Note, 82 HARV. L. REV. 1065, 1078 (1969).

98. *McGowan v. Maryland*, 366 U.S. 420 (1961). "Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them. . . ." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

99. *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (citation omitted):

Conceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "[e]vils . . . of different dimensions and proportions, requiring different remedies," we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the . . . law.

"But in *Baird* the Court did not adhere to these highly tolerant standards of traditional judicial review. . . ." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 104 (1973) (Marshall, J., dissenting).

100. See p. 260 *supra*.

101. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973). See also *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

As a general proposition, courts construing statutes must attempt to ascertain, and then to effectuate, the legislative intent.¹⁰² Thus when the statute is unambiguous and the intention of the legislature is clear, the court must give effect to it as written, unless the effect is constitutionally prohibited.¹⁰³ However, when the statute is susceptible of two different constructions, one of which would render the statute unconstitutional, the court should give effect to the construction which will preserve the statute rather than invalidate it.¹⁰⁴ The court may only do this if in fact the statute is susceptible to two different constructions. A court has no power to construe statutes to mean more than the legislature obviously intended and thereby legislate by judicial fiat.¹⁰⁵

The Maryland court may avoid holding the statute unconstitutional by simply changing their own prior interpretation of the word "children" so that it will now include illegitimate children, assuming the statute is susceptible to such a construction. For example, prior to the Supreme Court's decision in *Levy*, the Louisiana court had construed the word "children" in that state's wrongful death statute to include only legitimate children. On remand after the Supreme Court had held the statute unconstitutional, it was argued that the entire article creating wrongful death rights in children had to be declared invalid because "judicial review may not legislate by amendment but must accept a legislative act as enacted or declare it unconstitutional."¹⁰⁶ However, the court held that its definition of the word "children" would be changed to include illegitimate children, and to do so would not be judicial legislation.¹⁰⁷

The Maryland Court of Appeals has construed the word "child" in the Maryland wrongful death statute so as not to include an illegitimate child whose father is wrongfully killed. The court could change its definition of "child" as did the Louisiana court. In doing so it would not be legislating judicially, but merely changing its interpretation of what the legislature meant by the word "child" as used in the statute. As the prior discussion indicated, there is an apparent ambiguity in the construction of the word "child" in the wrongful death statute when read in conjunction with article 1, section 16. Applying the rule that a statute susceptible to two different interpretations should be given the construction which renders it most effectual, the court could construe the word "child" to include an illegitimate child, thus avoiding constitutional invalidity.

102. *Unsatisfied Claim & Judgment Fund Bd. v. Bowman*, 249 Md. 705, 241 A.2d 714 (1968); *Domain v. Bosley*, 242 Md. 1, 217 A.2d 355 (1966).

103. *Janda v. General Motors Corp.*, 237 Md. 161, 205 A.2d 228 (1964); *Rogan v. Baltimore & O.R.R.*, 188 Md. 44, 52 A.2d 261 (1947).

104. *Rogan v. Baltimore & O.R.R.*, 188 Md. 44, 52 A.2d 261 (1947); *Schmeizl v. Schmeizl*, 184 Md. 371, 46 A.2d 618 (1946).

105. *Maryland Indus. Dev. Fin. Auth. v. Meadow-Croft*, 243 Md. 515, 221 A.2d 632 (1966).

106. *Levy v. State ex rel. Charity Hosp.* 253 La. 73, 75, 216 So. 2d 818, 820 (1968).

107. *Id.*

The *Holt* court, however, believed the legislature clearly intended that illegitimate children be excluded. In the face of such a strong precedent, the court may feel that the statute is not susceptible to any other construction of the word "child." The court may then be unwilling to save the statute through a change in construction.

Even if the court reaffirms the prior interpretation of the statute, it need not deny recovery for illegitimate children. Another court¹⁰⁸ was faced with a statute which could not be saved by a change in interpretation. The problem was handled in this way:

Defendant contends the judiciary cannot enlarge the reach of a statute, for that is solely a legislative function. The proposition is obvious enough, and it is equally true that a court may not restrict the scope of a statute. But neither proposition is involved when the question is whether a statute must fall because of a constitutional defect. Rather the question is whether the Legislature would want the statute to survive, and that inquiry cannot turn simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover. Although cases may be found which seem to speak in such mechanical terms, we think the sounder course is to consider what is involved and to decide from the sense of the situation whether the Legislature would want the statute to succumb.

And so here the question is whether the Legislature was so intent upon denying protection to illegitimate children that it would prefer the wrongful death statute to be totally void. We think the question answers itself. . . .

We therefore conclude that the constitutional difficulty is properly resolved by holding that, for the purpose of the wrongful death statute, illegitimate children shall be deemed to be children of their natural parents.¹⁰⁹

In Maryland there is some basis for concluding that the legislature, had it imagined that the treatment of illegitimates in the wrongful death statute would be found to be unconstitutional, would have included illegitimates within the class of primary claimants rather than to preclude all children from recovery. This is evidenced by the equal treatment that the legislature has afforded illegitimates in the area of workmen's compensation¹¹⁰ and support.¹¹¹ Therefore, it appears that the legislature would have wanted the Maryland judiciary to take the equitable course of including the illegitimates within the statute, rather than nullifying the statute altogether.

108. *Schmoll v. Creecy*, 54 N.J. 194, 254 A.2d 525 (1969).

109. *Id.* at 202-03, 254 A.2d at 529-31.

110. MD. ANN. CODE art. 101, § 36(8) (Supp. 1973); *Huber v. Baltimore & O.R.R.*, 241 F. Supp. 646 (D. Md. 1965).

111. MD. ANN. CODE art. 16, § 66A (1973).

CONCLUSION

Illegitimacy is a serious social problem, but the illegitimate child is not the cause. The recent Supreme Court decisions recognize that legislation which attempts to remedy this social evil by discriminating against illegitimates is misdirected. However, even though nearly six years have passed since the *Levy* decision, no action has been taken to correct the discriminatory effect of the Maryland statute, despite its unconstitutionality when applied to an illegitimate child's right to recover for the wrongful death of his father.^{1 1 2} If the legislature fails to bring Maryland's wrongful death statute within constitutional bounds, the Maryland courts will be forced to declare the statute invalid.^{1 1 3}

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112. One Maryland trial court has recently refused to hold the statute unconstitutional.

The Court . . . supports Plaintiffs' thinking that the Maryland Court of Appeals should re-examine *Holt vs. Try, Inc.* in light of evolving law and current reasoning in other jurisdictions. However, at this time and in this jurisdiction, the law seems to be clear and governed by [Holt]. . . ."

Williams v. Worsham, 1972 Doc. No. 132829 (Baltimore Super. Ct., Oct. 9, 1973) (citation omitted), *appeal dismissed on procedural grounds sub nom. Fowlkes v. Morrell*, No. 820 (Ct. Spec. App., Jan. 23, 1974).

113. H.B. 1067, Md. Gen. Assem., 1974 Sess., apparently has been introduced to correct the constitutional defect in the wrongful death statute. The bill states that its proposed purpose is "providing that an illegitimate child has a right to bring an action under the wrongful death statute for the death of his father as well as his mother. . . ." The bill would change the definition of child in § 3-901(b) to include an illegitimate child. This change would accomplish the desired result. However the bill proposes to add an additional subsection, § 3-904(G), which provides:

FOR PURPOSES OF THIS SECTION, A PERSON BORN TO PARENTS WHO HAVE NOT PARTICIPATED IN A MARRIAGE CEREMONY WITH EACH OTHER IS CONSIDERED TO BE THE CHILD OF HIS MOTHER. HE IS CONSIDERED TO BE THE CHILD OF HIS FATHER ONLY IF HIS FATHER (1) HAS BEEN JUDICIALLY DETERMINED TO BE THE FATHER IN A PROCEEDING BROUGHT UNDER SECTION 66E OF ARTICLE 16, OR (2) HAS ACKNOWLEDGED HIMSELF IN WRITING, TO BE THE FATHER, OR (3) HAS OPENLY AND NOTORIOUSLY RECOGNIZED THE PERSON TO BE HIS CHILD, OR (4) HAS SUBSEQUENTLY MARRIED THE MOTHER AND HAS ACKNOWLEDGED HIMSELF, ORALLY OR IN WRITING, TO BE THE FATHER.

Note that the proposed language is almost identical to that of MD. ANN. CODE art. 93, § 1-208 (1969). Although the amendment would allow some illegitimate children to be legitimated for purposes of the wrongful death statute, *see p. 255 supra*, many illegitimate children would continue to be excluded from recovery. Thus, if the bill were passed as is, Maryland's wrongful death statute would apparently still be unconstitutional.