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Constitutional Law - Wrongful Death - Illegitimate Children - Equal Protection

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tion such as allowing garnishment only of the community assets contributed by the husband cannot be justified in principle since there is no distinction within our community structure between assets contributed by the husband and those contributed by the wife.

Certainly, the considerations in the *Green* case illustrate the need for legislative reform of our community system. The wife's interest in community assets should be protected, but at the same time the creditor's rights should not be defeated. Within a framework similar to Louisiana's, the Spanish allow execution against the community assets if the husband has insufficient separate assets but only if such seizure will not interfere with the payment of obligations contracted since marriage.[20] There are of course other possibilities. For the present, however, it seems preferable to follow the traditional interpretation of the law and allow execution against the community assets. Then if the community is solvent upon dissolution, the wife can be reimbursed[21] and prejudice to both wife and creditor can be avoided.

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CONSTITUTIONAL LAW—WRONGFUL DEATH—ILLEGITIMATE CHILDREN—EQUAL PROTECTION

An action was brought in behalf of five illegitimate children for the wrongful death of their mother. The district court dismissed the suit holding that these children have no right of action since the word "child" in Louisiana Civil Code Article 2315[1] did not include illegitimate children. This decision was

20. CÓDIGO CIVIL ESPAÑOL arts. 1408, 1410.

21. If a separate obligation of one spouse has been paid with community funds, then the other spouse should be reimbursed one-half the amount of this payment at dissolution. This procedure is implicit in LA. CIV. CODE arts. 2403 and 2408 and is the method of accounting proposed in Davis v. Compton, 13 La. Ann. 396 (1858).

1. LA. CIV. CODE art. 2315 provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal instituted, or irregular heirs, subject to the community of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parents surviving. The survivors in whose favor this right of action survives may also recover the

affirmed by the court of appeal,[2] and writs were subsequently denied by the Louisiana Supreme Court.[3] On review the United States Supreme Court *held*, Article 2315 unconstitutional as construed since it denied these illegitimate children equal protection under the fourteenth amendment, Section 1, of the United States Constitution. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guar. & Liab Ins. Co.*, 388 U.S. 73 (1968).[4]

While the states have always been held to have a great deal of power to classify persons under the equal protection clause of the fourteenth amendment, they may not arbitrarily or invidiously discriminate against a particular class. In *Lindsley v. Nat'l Carbonic Gas Co.*[5] the Supreme Court stated the well-settled rule:

> "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing it does not vest on any reasonable basis, but is essentially arbitrary."[6]

Traditionally then, the question to be asked by the Supreme Court is merely whether there is any conceivable rational basis for the distinction in any particular legislative classification.

In *Levy* the majority restated the traditional rule and concluded that there is no conceivable rational basis for a state law denying illegitimate children a right of action for the wrongful death of a parent. Justice Douglas posed several questions in an

damages which they sustain through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father, and mother, by adoption respectively."

2. Levy v. State, 192 So.2d 193 (La. App. 4th Cir. 1966).

3. Levy v. State, 250 La. 25, 193 So.2d 530 (1967).

4. It was also held in a companion case that the mother of illegitimate children is not barred from bringing an action for the wrongful death of her illegitimate children. Glona v. American Guar. & Liab. Ins. Co., 388 U.S. 83 (1968).

5. 220 U.S. 61 (1910).

6. *Id.* at 78-79. *Accord*, Louisville & Nashville R.R. v. Melton, 218 U.S. 36 (1909); Ozan Lumber Co. v. Union County Bank, 207 U.S. 251, 256 (1907); Batchel v. Wilson, 204 U.S. 36, 41 (1906); Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 615 (1898).

apparent attempt to demonstrate the lack of a rational basis for the discrimination against illegitimates. He asked:

> "When the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock?"[7]

The majority also pointed out that the legitimacy or illegitimacy of the children has no connection with the wrong suffered by the mother and that it is invidious to discriminate against the children when no action on their part was relevant to the harm done the mother.[8]

In the dissent to both the *Levy* case and *Glona v. American Guar. & Liab. Ins. Co.*, Justice Harlan attacked the failure of the majority to heed the traditional rule of constitutional law that the equal protection clause does not require that all persons be treated absolutely alike regardless of the circumstances.[9] He stated that the Louisiana statute for wrongful death follows the pattern of most state statutes and establishes classes of persons who may bring the action.[10] This is done to prevent the courts from having to hear offers of proof of loss of love and affection and economic plight from everyone who feels he can show some deprivation as a result of the victim's death. He also pointed out that what the majority says about loss of love and affection and dependency has no necessary relevance to the workings of Article 2315. The dissent stated:

> "[A] grown man may sue for the wrongful death of his parents he did not love, even if the death relieves him of a great economic burden or entitles him to a large inheritance. . . . A man may recover for the death of his wife, whether he loved her or not, but may not recover for the death of his paramour."[11]

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7. Levy v. Louisiana, 391 U.S. 68, 71 (1968). Justice Harlan points out in the dissent that Mrs. Levy left a legitimate parent, and thus it is erroneous to say the tortfeasors go free. *Id.* at 80-81.

8. *Id.* at 72.

9. 391 U.S. 68, 80-81 (1968). *See* F. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION § 279 (1922).

10. At common law there was no action for wrongful death since actions could not survive the death of the victim. W. BEALL, WRONGFUL DEATH AND SURVIVORSHIP § 1.1 (1958). It was hardly equitable that a tortious act that resulted in death should serve as a windfall to the wrongdoer. This inequity was removed in England by the Fatal Accident Act, often referred to as Lord Campbell's Act. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.7 (1966). Most American wrongful death statutes, including Louisiana's, are modeled after this act.

11. 391 U.S. 68, 79 (1968).

It is true, as the majority pointed out, that the illegitimates suffered a wrong when their mother died, just as if they had been legitimate, but this is academic since the right to sue is not based solely on a showing of suffering and loss.

The dissent answered the question of the majority, "Why should the illegitimate child be denied rights merely because of his birth out of wedlock?," and in doing so demonstrated that there is a rational basis for the distinction between legitimates and illegitimates as made by Article 2315. Justice Harlan reasoned that if the state can require the marriage relation be formalized, it can also require that rights dependent on family ties be formalized. In Louisiana the right to recover for wrongful death is thus based on one's legal status as husband or wife, son or daughter, or mother or father. It is certainly reasonable that the state insist on formalized proof of such status rather than force the court to inquire into the status of each person seeking recovery.

Judge Yarrut, speaking for the Louisiana Fourth Circuit Court of Appeal offered still another rational basis for this classification. He stated that to "deny illegitimate children the right to recover in such a case is actually based on morals and the general welfare because it discourages bringing children in the world out of wedlock."[12]

The *Levy* case follows some recent decisions[13] in which the court has forced its preferences upon society, as Justice Harlan says, by "brute force," with apparent disregard for the traditional rules of constitutional law. It has been traditionally accepted that a rational basis is all that is necessary to sustain a classification under the fourteenth amendment. Although the majority paid lip service to the traditional rule,[14] it is submitted that the court failed genuinely to search for a rational basis for the classification. This is quite apparent by the demonstration by Justice Harlan that the state's insistence on formalized proof of paternity is a very reasonable grounds for distinguishing between legitimates and illegitimates.

Considering the plight of illegitimates there might be some justification for the result reached by the majority in *Levy*. The illegitimate child is likely to be born under conditions much less favorable than the legitimate child and be handicapped

12. Levy v. State, 192 So.2d 193, 195 (La. App. 4th Cir. 1966).
13. *See* Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966).
14. 391 U.S. 68, 71 (1968).

from the beginning of its existence. Thus the denial of rights to money or property serves only to increase the burden on the state.[15]Assuming there is at least one rational basis for a particular classification in our system of tri-partite government it is the function of the legislature, not the courts, to change the law if it works inequitable results for a certain class of persons.[16] The majority would do well to heed the words of the late Justice Frankfurter in his dissent in *Morey v. Doud:*

> "In applying the Equal Protection Clause, we must be fastidiously careful to observe the admonitions of Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo that we do not sit as a super legislature."[17]

Since the decision in the *Levy* case was rendered there has been much speculation as to its possible effects. The initial question to be asked is whether the decision applies when there are legitimate as well as illegitimate children surviving the parent. This writer concludes that the Court intended the decision to raise the status of illegitimates to that of legitimates since, according to the majority, one must now show only biological proof of paternity and dependency on the deceased parent to qualify under the statute. Aside from this problem there is a vital concern about the possibility that this rationale might be extended to the law of successions.[18] If the reasoning were extended with retrospective application, great uncertainty of ownership would result, destroying the security of land titles. There is little doubt that the rationale of this decision could be extended to hold the Louisiana law of successions as it involves both intestacy and forced heirship to be a denial of equal protection.[19] Just as Article 2315 creates classes that are beneficiaries of the right to bring an action in wrongful death, the Code provides

15. *See* Comment, 28 LA. L. REV. 110, 124 (1967).

16. This situation is somewhat analogous to that which brought the wrongful death statutes into existence. The law as it existed before Lord Campbell's Act worked inequities and then the legislature enacted statutes to remedy this situation.

17. Morey v. Doud, 354 U.S. 457, 475 (1957).

18. In a recent North Dakota Supreme Court case concerning this issue of extending the *Levy* rationale to the successions area, the court stated that the question was whether the classification (between legitimate and illegitimate children) was reasonable and necessary to effect the purpose of the law. Citing *Levy v. Louisiana*, the court held not, saying that such statutes constituted invidious discrimination against illegitimate children and thus were in violation of the equal protection clause of the 14th amendment. *See* U.S.L.W. 2303-2304 (December 3, 1968), citing Michaelsen v. Undhjem, 162 N.W.2d 861 (N.D. 1968).

19. Justice Harlan warns of this possibility in his dissent: "That suits for wrongful death, actions to determine the heirs of intestates, and the like must as a constitutional matter deal with every claim of biological paternity or maternity on its merits is an exceedingly odd proposition." 391 U.S. 68, 80-81 (1968).

similar classifications which discriminate against illegitimates in the law of successions.[20] This notion that the distribution of successions is clearly within the power of the legislature is asserted in *Minor v. Young:*

> "There is no inherent right in anyone to succeed to the estate of a person deceased, and the rules of transmission or devolution of property in such cases are left to the wisdom of the state."[21]

It is beyond the scope of this Note to predict what the Supreme Court will do if confronted with the question of constitutionality of Louisiana's successions law. There are, however, several policy considerations and factual distinctions that weigh against the application of *Levy* in the area of inheritance law. The problems presented in the transfer of property after the death of a parent of an illegitimate would be awesome. Under an extension of the *Levy* rationale the illegitimate would become the owner of property just as any other forced heir. The Louisiana Supreme Court has held that ". . . the owner may ignore a sale of his property by one who had no authority to sell it and may bring a petitory action to recover it."[22] The legitimate heir or heir named in a will could sell property of the succession without any knowledge that there were illegitimate heirs. The vendee would thus have no method of protection since no system exists to provide notice that a person, either single or married, has illegitimate children lurking in the shadows of the family tree. A subsidiary problem involves the question of proof of paternity to establish one's right to inherit. The Code provides a method for proving paternal descent,[23] but it was not designed to handle the litigation that would arise as a result of allowing illegitimates to inherit. The fact the Louisiana courts have not allowed blood tests in the determination of paternity would further cloud this problem.[24]

An important factual difference between the wrongful death action and succession law is that the wrongful death action is a relatively new addition to the law, for the action did not lie at common law and was unknown until the 19th century.[25] Thus the action for wrongful death does not have tradition for

20. LA. CIV. CODE art. 902.
21. 149 La. 583, 588, 89 So. 757, 759 (1920).
22. Long v. Chalain, 187 La. 507, 516, 175 So. 42, 46 (1937).
23. LA. CIV. CODE arts. 208-210.
24. Williams v. Williams, 230 La. 1, 87 So.2d 707 (1956).
25. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.7 (1966).

discrimination as is found in the successions law with its discrimination against illegitimates. For centuries, under both common and civil law, illegitimates and legitimates have received different treatment with regard to inheritance.[26] The Court in recent years, however, has felt less bound by tradition, as Justice Douglas wrote in *Levy:*

> "We have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side."[27]

Yet it is not a novel or radical idea that illegitimates should be beneficiaries in a wrongful death action. Quite a few states had allowed the action to be brought by illegitimates prior to the *Levy* decision.[28] However, the vast majority of these states discriminate in favor of legitimates in their inheritance law.[29] Wrongful death statutes were enacted to compensate for loss of support, love, companionship, and for grief, and mental anguish.[30] The purpose of successions law, however, is to distribute the property of the deceased.[31]

It is arguable that there is a rational basis for distinguishing between legitimate and illegitimate children concerning their right to bring an action in wrongful death. The dissent in *Levy* adequately demonstrated that it is reasonable for illegitimates not to be allowed to sue for wrongful death, and this is the proper test of constitutionality. The Court should not consider the wisdom of the classification nor the hardship that it might work in certain circumstances. It is hoped the reasoning of *Levy* will not be compounded by the extension of this same reasoning to successions law. Aside from the argument that the distinctions between legitimate and illegitimate children are reasonable when used in determining inheritance rights and thus meet the constitutional requirements of the equal protection clause, the policy considerations and differences in factual situations should overwhelmingly dictate that the rationale of *Levy* not be applied to inheritance law. In short, the Constitution does not com-

26. W. Rollison, Law of Wills § 35 (1939).
27. 391 U.S. 68, 71 (1968).
28. S. Speiser, Recovery for Wrongful Death and Survivorship § 10.4 (1966).
29. W. Rollison, Law of Wills § 35 (1939).
30. Comment, 6 Tul. L. Rev. 201, 223 (1932).
31. W. Rollison, Law of Wills § 1 (1939).

mand an extension of the *Levy* rationale to successions, and this writer hopes that the Supreme Court will recognize that such an extension would be very undesirable.

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FEDERAL JURISDICTION — TAXPAYER'S STANDING TO SUE

Plaintiffs sought to enjoin defendants from the allegedly unconstitutional expenditure of federal funds to finance certain instruction in religious schools, and to purchase textbooks and other instructional materials for use in these schools. Such expenditures, authorized by the Elementary and Secondary Education Act of 1965,[1] were alleged to be in contravention of the Establishment And Free Exercise Clause of the First Amendment.[2] Plaintiffs rested their standing to challenge the statute on the fact that each pays income taxes to the United States. Defendant's motion to dismiss for lack of standing to sue was sustained by a three-judge district court for the Western District of New York, one judge dissenting. On appeal to the United States Supreme Court, *held,* reversed, one justice dissenting. Federal taxpayers have standing to challenge an exercise of the congressional spending power alleged to be in violation of the establishment clause of the Constitution. *Flast v. Cohen,* 88 S. Ct. 1942 (1968).

It is a basic maxim of federal jurisdiction that "the constitutionality of an act of government can only be decided when raised as a justiciable issue."[3] Since "standing" is an aspect of justiciability,[4] a litigant may attack an act of Congress as unconstitutional only if he has standing to make the challenge.[5] Although the origins of this concept are unclear, it has been suggested that it is a policy of judicial self-limitation that can be traced back to a general reluctance of courts to interfere in the affairs of the king.[6] It has also been suggested that standing

1. 79 Stat. 27 (1965), 20 U.S.C. 821 (Supp. II, 1967).
2. U.S. CONST. amend. I.
3. Comment, 45 YALE L.J. 649, 650 (1936). *See also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 13 (1963).
4. Flast v. Cohen, 88 S.Ct. 1942 (1968).
5. *E.g.,* Frothingham v. Mellon, 262 U.S. 447 (1923); Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433 (1962).
6. Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1923). Here the author argues that standing is part of a general tendency of courts of non-interference with what they consider "political" questions. He traces this back to the Talmud. This view was challenged in Weston, *Political Questions,* 38 HARV. L. REV. 296 (1925).