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## Constitutional Law - Equal Protection of Illegitimate Children - Levy V. Louisiana, 192 So.2d 193 (La. 1966)

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ones,<sup>25</sup> no matter how objectionable they might be to the district's customers,<sup>26</sup> unless there was a showing of a clear and present danger.<sup>27</sup>

Although the California Court has not changed any basic interpretations of the First Amendment's protected freedoms, it has extended them to another public medium of communication. While the minority felt that the district should not be compelled to subject itself and its customers to controversial and objectionable ideas,<sup>28</sup> the majority followed the prevailing view in the United States that a function of free speech is to invite dispute, create dissatisfaction, and stir people to anger.<sup>29</sup>

The courts have opened virtually all forms of public communications media to political and religious expression. By requiring an entirely commercial but public transit district to accept political advertising, the courts may be setting a trend requiring private communications media to be forums for the free expression of beliefs and ideas.

JOEL H. SHANE

**Constitutional Law—EQUAL PROTECTION OF ILLEGITIMATE CHILDREN.** In *Levy v. Louisiana*,<sup>1</sup> a suit was brought on behalf of five illegitimate children for the wrongful death of their mother.<sup>2</sup> The Louisiana District Court dismissed the suit,<sup>3</sup> finding that "child" un-

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Community Concerts Ass'n v. Bd. of Education, 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966); *Madole v. Barnes*, 20 N.Y.2d 169, 229 N.E.2d 20, 282 N.Y.S.2d 225 (1967).

25. *Thomas v. Collins*, 33 U.S. 516 (1945).

26. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

27. In *Kissinger v. N.Y.C. Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967), a case very similar to *Wirta*, defendant transit authority contended that Vietnam peace signs in subways would endanger the safety of its customers. The court held that this raised a question of fact as to the "clear and present danger" of such signs, and thus it was for a jury to decide. *Weaver v. Jordan*, 64 Cal.2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966).

28. *Wirta v. Alameda-Contra Costa Transit Dist.*, 64 Cal. Rptr. 430, 438, 434 P.2d 982, 990 (1967).

29. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). See also *Schneider v. New Jersey*, 308 U.S. 147 (1939).

1. 192 So.2d 193 (La. Ct. App. 4th Cir. 1966).

2. The children, who were raised by the mother, sued for: (1) damages to them for loss of their mother; and (2) damages based on the survival of a cause of action which the mother had at the time of her death for pain and suffering.

3. No. 430-566 (Civ. Dis. Ct. for the Parish of Orleans, 196-).

der the applicable statute<sup>4</sup> meant legitimate child and that no discrimination was involved. The Court of Appeals affirmed, and appeal was taken to the U.S. Supreme Court<sup>5</sup> upon refusal of the Louisiana Supreme Court to grant certiorari.<sup>6</sup>

In a six-to-three decision,<sup>7</sup> the Supreme Court found that there was no reasonable relationship between the purpose of the Louisiana wrongful death statute and the legitimacy or illegitimacy of the survivors. In reaching its decision the Court assumed that the purpose of the statute is to compensate close family relations for the loss of a family member. Consequently, a preclusion based on birth out of wedlock would be a denial of the guarantees of the Equal Protection Clause of the Fourteenth Amendment.<sup>8</sup>

States have long been given a broad power to create classifications in the exercise of their police power;<sup>9</sup> it is only when the state require-

4. The action was brought under LA. CIV. CODE art. 2315, *as amended*, Act 1960 No. 30, § 1 (1960), which reads:

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 rights 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 of the deceased, or either such spouse or such 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 parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained 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.

5. 88 S. Ct. 765 (1968).

6. 250 La. 25, 193 So.2d 530 (1967).

7. Justice Douglas wrote the majority opinion, and Justices Black and Stewart joined Justice Harlan in dissenting.

8. U. S. CONST. amend. XIV, states in pertinent part: "No State" shall "deny any person within its jurisdiction the equal protection of the laws." *Id.* at § 1.

9. *Linsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

ment amounts to "invidious discrimination" that it is considered to be offensive to the Constitution.<sup>10</sup> In interpreting the Equal Protection Clause, the Court is not shackled by the concept of equality of a prior era,<sup>11</sup> but must find instead a presently existing rational basis for a state's classification. This the Court failed to find in the *Levy* case.

Under the Jones Act<sup>12</sup> and the Death on the High Seas Act,<sup>13</sup> "parent, child or dependent relative" have been interpreted as including illegitimate children and their mothers in the class of persons who may recover.<sup>14</sup> Where a federal statute, such as the Copyright Act<sup>15</sup> and the Federal Employer's Liability Act,<sup>16</sup> fails to define "child" or "next of kin," the Supreme Court has consistently ruled that resort must be made to state law.<sup>17</sup>

The decisions under the state statutes have generally been determined by whether or not the particular state has changed the common law which excludes illegitimates from the class of persons who may inherit.<sup>18</sup> On this basis many states permit illegitimate children to recover under their wrongful death statutes for the loss of their mothers.<sup>19</sup> There is still a significant number of states, however, which do not permit recovery.<sup>20</sup>

10. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963); *Morey v. Doud*, 354 U.S. 457, 463 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

11. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966); *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954).

12. 46 U.S.C. § 688 (1958).

13. *Id.* at §§ 761-767.

14. *Hassan v. A. M. Landry & Son, Inc.*, 321 F.2d 570, 572 (5th Cir. 1963), *cert. denied*, 375 U.S. 967 (1964); *Civil v. Waterman Steamship Corp.*, 217 F.2d 94, 98 (2d Cir. 1954). See generally Note, *The Rights of Illegitimates under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

15. 17 U.S.C. § 1, *et seq.* (1952), *as amended*, ch. 923, sec. 1(c), 66 Stat. 752 (1953).

16. 45 U.S.C. § 51 (1954), *amending* ch. 143, 36 Stat. 291 (1910).

17. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956); *accord*, *Glonn v. American Guarantee & Liability Ins. Co.*, 379 F.2d 545, 546 (5th Cir. 1967); *Bell v. Tug Shrike*, 332 F.2d 330, 331 (4th Cir. 1964); *Seaboard Air Line v. Kenney*, 240 U.S. 489, 493-494 (1916).

18. *Beeck v. Sabiné Towing Co.*, 300 U.S. 342, 344-345 (1937).

19. *Cogger v. Trudell*, 35 Wis. 2d 350, 151 N.W. 2d 146 (1967); *Sneed v. Henderson*, 211 Tenn. 572, 366 S.W.2d 758 (1963); *Piechota v. Rapp*, 148 Neb. 443, 27 N.W.2d 682 (1947); *Stoneburner v. Theodoratos*, 76 Cal. App. 886, 30 P.2d 1001, (1934) *rehearing granted*, 31 P.2d 1042; *Southern Ry. Co. v. Carlton*, 218 Ala. 265, 118 So. 458 (1928); *Goldmeyer v. Van Bibber*, 130 Wash. 8, 225 P. 821 (1924); *L. T. Dickason Coal Co. v. Liddil*, 49 Ind. App. 40, 94 N.E. 411 (1911); *Galveston, H. & S.A. Ry. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S.W. 705 (1907); *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S.W. 179 (1894).

20. *Panama R. Co. v. Castilla*, 272 F. 656 (C.C.A. 5th Cir. 1921); *Adams v.*

*Levy v. Louisiana*, in extending the Equal Protection Clause to illegitimate children in cases involving the wrongful death of their mothers, recognizes that the law cannot discriminate against an individual where he has performed no illegal act<sup>21</sup> and where his demeanor bears no relevant relationship to the wrong committed.

Whether or not the scope of the decision is limited only to the mother-child relationship in wrongful death actions is yet to be determined.<sup>22</sup> However, the broad language employed by the court indicates that any such distinction based on illegitimacy may well be violative of the Equal Protection Clause of the Fourteenth Amendment, at least where close family relations are involved.

ROBERT KAHN

**Criminal Procedure—DISCOVERY OF CO-DEFENDANTS IN FEDERAL COURTS.** In *United States v. Edwards*,<sup>1</sup> the defendant was charged with interstate transportation of stolen securities in violation of Federal Law.<sup>2</sup> Defendant moved, *inter alia*, for the discovery of “. . . all statements of his co-defendants . . . referring to him. . . .”<sup>3</sup> The court denied the motion, basing its decision on the defendant’s “. . . failure to show *materiality* and *reasonableness* (emphasis supplied) as required by Rule 16(b) of the Federal Rules of Criminal Procedure.<sup>4</sup> The court further pointed out that

The entire tenor of Rule 16 is contrary to the production of such statements. No exception need be made where the movant believes they may support a possible motion for severance under

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Powell, 67 Ga. App. 460, 21 S.E.2d 111 (1942); *Hiser v. Davis*, 234 N.Y. 300, 137 N.E. 596 (1922); *Molz v. Hansell*, 115 Pa. Super. 338, 175 A. 880 (1934); *Sesostris Youchican v. Texas & P. Ry. Co.*, 147 La. 1080, 86 So. 551 (1920); *Washington B. & A.R. Co. v. States*, 136 Md. 103, 111 A. 164 (1920); *Good v. Towns*, 56 Vt. 410, 48 Am. R. 799 (1883). *But see* *Frazier v. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (1962); *Battalico v. Knickerbocker Fireproofing Co.*, 294 N.Y.S. 481, 250 App. Div. 258 (1937); *Barron v. Zimmerman*, 117 Md. 296, 83 A. 258 (1912).

21. Justice Douglas stated:

We start from the premise that illegitimate children are not “nonpersons.” They are humans, live and have their being. They are clearly “persons” within the meaning of the Equal Protection Clause of the Fourteenth Amendment. 88 S.Ct. at —.

22. This question constituted the principal basis for the dissent.

1. 42 F.R.D. 605 (S.D.N.Y. 1967).

2. 18 U.S.C. § 2314 (1964).

3. *United States v. Edwards*, 42 F.R.D. 605, 606 (S.D.N.Y. 1967).

4. *Id.*