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Richard L. Brown

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I. INTRODUCTION

The plight of orphans, from Oliver Twist[1] and Harry Potter[2] of literature to the far more real AIDS orphans of today,[3] has long engaged our social consciousness and conscience. By "orphans" we have meant children who have suffered the death of their parents.[4] This Article addresses the plight of a

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* Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. B.A., University of California Los Angeles, 1967; J.D., Indiana University, 1975; M.L.L., University of Washington, 1978. I would like to express my appreciation to Ann McGinley and Lynnda Brown for their useful comments on earlier drafts of this Article.

1. Oliver Twist, of course, was the title character in Charles Dickens's novel of the same name. *Oliver Twist* was first published serially in *Bentley's Miscellany*, beginning in 1837. Fred Kaplan, *Preface* to CHARLES DICKENS, OLIVER TWIST ix, x (Fred Kaplan ed., Norton Critical ed. 1993). Dickens's novels are replete with orphans and evocative accounts of their condition—Little Nell in *The Old Curiosity Shop*, David Copperfield in *David Copperfield*, Pip in *Great Expectations*, Esther Summerson in *Bleak House*. *See Generally* BARUCH HOCHMAN & ILJA WACHS, DICKENS: THE ORPHAN CONDITION (1999). Dickens was hardly alone among Victorian novelists in focusing on the plight of orphans, among them Heathcliff in Emily Bronte's *Wuthering Heights*, Jane Eyre in Charlotte Bronte's novel of the same name, and Eppie in George Eliot's *Silas Marner*. For a discussion of the role of the orphan in Victorian literature and society, see LAURA PETERS, ORPHAN TEXTS: VICTORIAN ORPHANS, CULTURE AND EMPIRE (2000).

2. As every late twentieth and early twenty-first century parent knows, Harry Potter, orphaned when his parents are killed by an evil wizard, is the protagonist in a series of wildly successful children's novels by the Scottish author J. K. Rowling. The series began with the publication of *Harry Potter and the Philosopher's Stone* (published in the United States under the title *Harry Potter and the Sorcerer's Stone*) in 1997.

3. *See* Deborah L. Shelton, *AIDS Orphans: The Forgotten Victims*, HUM. RTS., Fall 1995, at 18.

4. "Orphan" is defined in the *Oxford English Dictionary* as "[o]ne deprived by death of father or mother, or (more generally) of both parents; a fatherless or motherless child." 10 OXFORD ENGLISH DICTIONARY 944 (2nd ed. 1989). Interestingly, the secondary definition provided for the term orphan in the *OED*, "[o]ne bereft of protection, advantages, benefits, or happiness, previously enjoyed," *id.*, captures many aspects of the plight of the legal orphan with which this Article is concerned.

different kind of orphan—the "legal orphan"[5] who has lost her parents through a termination of parental rights proceeding but who has not been subsequently adopted by new parents. Every state has established a statutory procedure to terminate the parental rights of unfit parents. Recent federal legislation aimed at reducing the number of children mired in the foster care system is accelerating the rate at which parental rights are being terminated. Adoption of these children, however, is not keeping pace with the rate at which parental rights are being terminated. As a result, the number of legal orphans is growing.

This Article addresses the inheritance rights of these legal orphans. In some states, termination of parental rights (TPR) statutes expressly provide that the right of the child to inherit from the biological parent survives termination. In other states, termination statutes explicitly extinguish the inheritance rights of the child. In many states, however, termination statutes do not explicitly address inheritance rights at all, although these statutes often use broad language divesting both parent and child of all legal rights, obligations, and duties with respect to each other, suggesting that the right of the child to inherit from the terminated parent is extinguished. In a significant number of states, then, termination of parental rights will, or might, result in the loss of the child's right to inherit from his biological parents. Part II of the Article outlines the nature of state termination of parental rights statutes, notes the effect of recent federal legislation on those proceedings, and describes the effect of various types of termination of parental rights statutes on the inheritance rights of the child.

Part III(A) argues that barring a child's right to inherit from terminated parents contravenes the policies that underlie the child welfare system. The primary goal of the child welfare system in general, and the termination of parental rights process in particular, is to further the welfare of the child. Depriving children of the right to inherit from their parents, and from their parents' families, does not benefit children, but rather imposes an additional burden on children who are already disadvantaged not only by the inadequacies of their parents, but likely by poverty and minority status as well.

Part III(B) argues that the disinheritance of children of terminated parents is also inconsistent with the broader scheme of intestate succession. In the American legal system, inheritance rights are almost invariably based on the parent-child relationship—children inherit from their biological mothers and fathers. There are two notable exceptions to this general rule—adopted children and non-marital children—and the Article compares children of terminated parents with these other two categories of children who can lose the right to inherit from their biological parents. Neither of these exceptions sug-

5. The term "legal orphan," in the sense in which it is used in this Article, seems to have been originated by Professor Martin Guggenheim. *See* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995).

gests a rationale for extinguishing the right of children to inherit from their terminated biological parents.

Part IV considers the constitutionality of termination of parental rights statutes that disinherit children. The series of United States Supreme Court decisions that invalidated on equal protection grounds statutes that discriminated against non-marital children will be reviewed. These Supreme Court cases, and particularly those dealing directly with inheritance rights of non-marital children, suggest that similar bars on inheritance by children of terminated parents may be similarly subject to challenge on equal protection grounds. Finally, Part V will suggest how termination of parental rights statutes should be rewritten to explicitly protect the right of children to inherit from their terminated parents.

II. THE TERMINATION OF PARENTAL RIGHTS SCHEME

The right of parents to raise their children is fundamental.[6] However, the state also has a substantial interest in the welfare of children, reflected in the state's *parens patriae* power—the power of the state to protect those, such as children, who are unable to protect themselves.[7] That power can extend, in extreme cases, to the most draconian intervention—the termination of all of a parent's rights in the child.

Every state provides by statute a mechanism for the involuntary termination of parental rights.[8] These statutes vary considerably, but they generally include several common components.[9] Termination of parental rights statutes

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6. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

7. BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). For a history of the *parens patriae* doctrine, see Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975).

8. 1 JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 4.04(1)(a) (2004).

9. Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 104 (1999).

generally require a showing that the parent is unfit.[10] Parental unfitness must be established by clear and convincing evidence.[11] TPR statutes generally enumerate categories of unfitness, often including abuse, neglect, abandonment, nonsupport, mental illness, drug abuse, alcohol abuse, and long term imprisonment.[12] TPR statutes also frequently require that services aimed at alleviating the problem be offered to the parent and that the problem continue despite the offering of those services.[13] Finally, TPR statutes also generally require that termination be in the best interest of the child.[14]

A. The Impact of Federal Legislation

Although termination of parental rights is a creature of state statutes, the state statutory schemes have been substantially affected by federal legislation. In the 1970s, scholars and lawmakers became concerned with "foster care drift," which refers to the phenomenon of children spending many years in foster care, often under the care of a series of foster parents.[15] In response, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("AACWA").[16] AACWA began a movement "toward nationalizing the rules by which children enter state-supervised foster care, the obligations states owe to families with children in foster care, and the expected conditions and timelines under which children are to remain in foster care."[17] AACWA imposed several requirements on states receiving federal funding.[18] AACWA required that every child's case be reviewed every six months and that a judicial hearing be held once a child has spent eighteen months in the foster care system.[19] The Act also required that states' child welfare agencies make "reasonable efforts" to reunite children with their biological families,[20] although the scope of the required "reasonable efforts" remained undefined.[21]

AACWA, however, did not end concerns about the plight of children in the child welfare system. The Act was criticized as focusing too much on

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10. 1 HOLLINGER ET AL., *supra* note 8, § 4.04(1)(a); Freundlich, *supra* note 9, at 104.

11. *Santosky*, 455 U.S. at 769-70.

12. 1 HOLLINGER ET AL., *supra* note 8, § 4.04(1)(a)(i)–(vii).

13. Freundlich, *supra* note 9, at 104.

14. *Id.* at 104-05.

15. Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 2 (2001).

16. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

17. Guggenheim, *supra* note 5, at 122.

18. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 644 (1999).

19. Guggenheim, *supra* note 5, at 123.

20. *See* Gordon, *supra* note 18, at 644.

21. Adler, *supra* note 15, at 5.

family reunification, with the result that children remained in foster care for lengthy periods or were returned to unsafe families.[22] The Adoption and Safe Families Act of 1997 ("ASFA") was intended to address these concerns.[23] ASFA amended AACWA in several significant ways. First, ASFA clarified the "reasonable effort" required to reunify children with their biological families.[24] Most significantly, ASFA requires that in determining what reasonable efforts are required, and in making such efforts, the health and safety of the child shall be the primary goal.[25] ASFA also specifies certain circumstances in which reasonable efforts are not required prior to termination.[26] Those special circumstances include judicial determination that the parent has subjected the child to "aggravated circumstances" as defined by state law, which may include "abandonment, torture, chronic abuse, and sexual abuse."[27] Reasonable efforts are also not required if the parent has committed the crimes of murder or voluntary manslaughter upon another child of the parent, or attempted murder or felony assault resulting in "serious bodily injury [either] to the child or [to] another child of the parent,"[28] or if the parent's parental rights to a sibling of the child have been involuntarily terminated.[29]

ASFA also includes provisions intended to reduce "foster care drift" by expediting the process of determining the appropriate permanent placement for the child.[30] When reasonable efforts at family reunification are not required,[31] a permanency hearing must be held within thirty days[32] and "reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child."[33] Efforts to find an adoptive placement for the child may occur concurrently with the required reasonable efforts to reunify the family.[34] ASFA requires that a permanency hearing be held within twelve months after the child enters foster care and at least every twelve months thereafter as long as the child remains in foster care.[35] Most significantly, ASFA requires that if a child has been in foster care for 15 of the most recent 22 months, the state must file a petition to ter-

22. *See id.* at 3; Freundlich, *supra* note 9, at 99; Gordon, *supra* note 18, at 649.
23. Gordon, *supra* note 18, at 650.
24. *Id.*
25. 42 U.S.C. § 671(a)(15)(A) (2000).
26. *Id.* § 671(a)(15)(D)(i)-(iii).
27. *Id.* § 671(a)(15)(D)(i).
28. *Id.* § 671(a)(15)(D)(ii).
29. *Id.* § 671(a)(15)(D)(iii).
30. *See* Gordon, *supra* note 18, at 650-51.
31. *See supra* text accompanying notes 26-29.
32. 42 U.S.C. § 671(a)(15)(E)(i).
33. *Id.* § 671(a)(15)(E)(ii).
34. *Id.* § 671(a)(15)(F).
35. 42 U.S.C. § 675(5)(C) (2000).

minate parental rights,[36] subject to several exceptions.[37] ASFA also requires that, concurrently with the filing of the petition for termination of parental rights, the state also "identify, recruit, process, and approve a qualified family for an adoption."[38]

The primary thrust of the ASFA requirements is to de-emphasize the goal of family reunification and to expedite permanent placement, most often through termination of parental rights. Whether this shift toward expedited termination of parental rights is a good idea—and it has been subject to substantial criticism[39]—is beyond the scope of this Article. But, whether the effect of ASFA is beneficial or detrimental to children, it is having an impact that is very relevant to our topic. To the extent that ASFA is successful in achieving its goals, the pace of termination of parental rights proceedings is likely to increase. The number of terminations, however, may not be matched

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36. *Id.* § 675(5)(E). The requirement that the state file a petition to terminate parental rights also arises

> if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent.

Id. But see In the Interest of M.D.R., 124 S.W.3d 469 (Mo. 2004) (finding 15 of 22 months period merely triggers state's obligation to file for termination but is not an independent grounds for termination itself).

37. The state will not be required to file a petition to terminate parental rights if

> (i) at the option of the State, the child is being cared for by a relative; (ii) a State agency has documented in the case plan . . . a compelling reason for determining that filing such a petition would not be in the best interests of the child; or (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child.

Id. § 675(5)(E)(i)-(iii).

38. *Id.* § 675(5)(E).

39. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 113 (2002) ("ASFA threatens to permanently separate children from families, families that might have been preserved with the right incentives, adequate state resources, or creative custody arrangements."); Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 130 (2001) ("ASFA was the culmination of an assault on safe, effective programs to keep families together that began in the 1990's. The law has caused untold misery for thousands of children. While supposedly intended to solve the problems of the foster care system, it has, in fact, worsened those problems. In the name of promoting adoption, it is creating a generation of legal orphans. And worst of all, in the name of child safety, it has made children less safe.") (footnote omitted).

by the number of subsequent adoptions.[40] That, in turn, may lead to a growing number of "legal orphans," children caught for long periods in limbo, no longer the children of their biological parents, but not yet (and perhaps not ever) the children of adoptive parents.[41] In the words of Professor Appell, "every year the state creates hundreds, if not thousands, of legal orphans, children who have no legal or flesh and blood parents. The number of these legal orphans will increase with the application of ASFA's mandatory termination of parental rights provisions."[42] Professor Appell further notes that "[a]s of September 1999, states reported that 46,000 children are legal orphans and had been for an average of twenty-three months. On average, at any given time, 8,000 legal orphans have no current prospects for adoption."[43] It is the inheritance status of these children with which we are concerned and to which we now turn.

B. State Statutory Schemes

What does the text of state termination of parental rights statutes tell us about the effect the termination order has on the inheritance rights of these growing numbers of legal orphans—the children of terminated parents? In fact, different statutes provide quite different answers, and many statutes provide no answer at all.

Among those statutes that explicitly address the effect of the termination order on inheritance rights, the most common approach (which I will call the "Type 1" approach) is to provide that the order does not affect the right of the child to inherit from the parent. Type 1 statutes are not uniform, however. Some explicitly preserve the inheritance rights of the child, while saying nothing about the inheritance rights of the terminated parent. The Utah stat-

40. *See* Freundlich, *supra* note 9, at 108-09 ("If the ASFA, despite the potential barriers, achieves its goal of freeing more children for adoption through expediting termination of parental rights as projected, the increase in the number of children in foster care needing adoption planning and services will be dramatic. The growth in adoption demand, already being experienced across the country, raises critical questions about the 'supply' side of adoption for children in foster care—the recruitment of an adequate number of well-prepared adoptive families and the provision of ongoing support services following placement and adoption finalization to ensure stability and permanency. While attention has been given to further stimulating demand through expedited termination of parental rights, there has not been equivalent attention paid to enhancing supply through family recruitment, preparation, and post-adoption support.") (footnotes omitted).

41. *Id.* at 109-10. *See also* Guggenheim, *supra* note 5, at 121-22. (Professor Guggenheim's study was conducted after the adoption of the Adoption Assistance and Child Welfare Act of 1980 but before adoption of the Adoption and Safe Families Act of 1997).

42. Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood,* 34 U. MICH. J.L. REFORM 683, 777-78 (2001) (footnotes omitted).

43. *Id.* at 777 n.409 (citations omitted).

ute, which provides that "[a]n order for the termination of the parent-child legal relationship divests the child and the parents of all legal rights, powers, immunities, duties, and obligations with respect to each other, *except the right of the child to inherit from the parent*,"[44] is typical.

While many Type 1 statutes specifically address the inheritance rights of the child (by preserving them) but say nothing about the inheritance rights of the parent, other Type 1 statutes expressly terminate the parent's right to inherit after termination, but also expressly retain the child's right to inherit. The Virginia statute, which reads in relevant part,

> [A]n order terminating residual parental rights . . . shall terminate the rights of the parent to take from or through the child in question but the order shall not otherwise affect the rights of the child, the child's kindred, or the parent's kindred to take from or through the parent or the right of the parent's kindred to take from or through the child,[45]

exemplifies this approach.[46] Yet another approach within the Type 1 category is taken in states with statutes which provide that the termination order di-

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44. UTAH CODE ANN. § 78-3a-413(1) (2002) (emphasis added). *See also* CONN. GEN. STAT. § 45a-707(8) (2004) ("'Termination of parental rights' means the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and the child's parent or parents so that the child is free for adoption *except it shall not affect the right of inheritance of the child* or the religious affiliation of the child.") (emphasis added); MONT. CODE ANN. § 41-3-611(1) (2003) ("An order for the termination of the parent-child legal relationship divests the child and the parents of all legal rights, powers, immunities, duties, and obligations with respect to each other . . . *except the right of the child to inherit from the parent.*") (emphasis added); WYO. STAT. ANN. § 14-2-317(a) (Michie 2003) ("An order terminating the parent-child legal relationship divests the parent of all legal rights and privileges and relieves the child of all duties to that parent except: . . . (ii) *The right of the child to inherit from the parent shall not be affected by the order.*") (emphasis added).

45. VA. CODE ANN. § 64.1-5.1(5) (Michie 2002).

46. *See also* KAN. STAT. ANN. § 38-1583(f) (2001) ("A termination of parental rights under the Kansas code for care of children *shall not terminate the right of the child to inherit from or through the parent.* Upon such termination, all the rights of birth parents to such child, *including their right to inherit from or through such child,* shall cease.") (emphasis added); OKLA. STAT. ANN. tit. 10, § 7006-1.3(A) (West 1998) ("The termination of parental rights terminates the parent-child relationship, including the parent's right to the custody of the child and the parent's right to visit the child, the parent's right to control the child's training and education, the necessity for the parent to consent to the adoption of the child, the parent's right to the earnings of the child, *and the parent's right to inherit from or through the child. Provided, that nothing herein shall in any way affect the right of the child to inherit from the parent.*") (emphasis added).

vests both parent and child of all legal rights and obligations, except that the rights of both the parent and the child to inherit shall not be terminated.[47]

Some Type 1 statutes make explicit that the right of the child to inherit from the terminated parent continues only until the child is adopted.[48] Even in

47. *See* ME. REV. STAT. ANN. tit. 22, § 4056(1) (West 2004) ("An order terminating parental rights divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, *except the inheritance rights between the child and his parent.*") (emphasis added); N.H. REV. STAT. ANN. § 170-C:12 (2002) ("An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations. . . . *The rights of inheritance of both the parent and the child shall not be divested until the adoption of said child.*") (emphasis added).

48. *See* ARIZ. REV. STAT. ANN. § 8-539 (West 1999) ("An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations with respect to each other *except the right of the child to inherit* and support from the parent. *This right of inheritance and support shall only be terminated by a final order of adoption.*") (emphasis added); COLO. REV. STAT. § 19-3-608(1) (1999) ("An order for the termination of the parent-child legal relationship divests the child and the parent of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other, *but it shall not modify the child's status as an heir at law which shall cease only upon a final decree of adoption.*") (emphasis added); D.C. CODE ANN. § 16-2361(a) (2001) ("An order terminating the parent and child relationship divests the parent and the child of all legal rights, powers, privileges, immunities, duties and obligations with respect to each other, *except the right of the child to inherit from his or her parent. The right of inheritance of the child shall be terminated only by a final order of adoption.*") (emphasis added); HAW. REV. STAT. ANN. § 571-63 (Michie 1999) ("*No judgment of termination of parental rights entered under sections 571-61 to 571-63 shall operate to terminate the mutual rights of inheritance of the child and the parent or parents involved . . . unless and until the child has been legally adopted.*") (emphasis added); KY. REV. STAT. ANN. § 625.104 (Michie 1999) ("Following the entry of an order involuntarily terminating parental rights in a child, *the child shall retain the right to inherit from his parent under the laws of descent and distribution until the child is adopted.*") (emphasis added); N.C. GEN. STAT. § 7B-1112 (2003) ("An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship, *except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued.*") (emphasis added); S.C. CODE ANN. § 20-7-1576(A) (Law. Co-op. 1985 & Supp. 2003) ("An order terminating the relationship between parent and child under this subarticle divests the parent and the child of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other, *except the right of the child to inherit from the parent. A right of inheritance is terminated only by a final order of adoption.*") (emphasis added); TENN. CODE ANN. § 36-1-113(*l*)(1) (2001 & Supp. 2004) ("An order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian . . . . (2) *Notwithstanding the provisions of subdivision (l)(1), a child who is the subject of the*

the absence of such explicit language, the right of children to inherit from their biological parents is terminated in almost every jurisdiction by adoption.[49]

Although it is clear under most Type 1 statutes that the child's right to inherit from the parent survives the termination order, at least until the child is adopted by new parents, Type 1 statutes leave at least one other issue unaddressed—does the child retain (at least until adoption) the right to inherit not just *from* the terminated parent, but *through* the parent as well? In other words, if the terminated parent has predeceased the child, can the child inherit from parents of the terminated parents or from siblings of the terminated parents to the same extent that she would if parental rights had not been terminated? A very few Type 1 statutes explicitly answer that question in the affirmative.[50] While the right of the child to inherit from other relatives through the terminated parent is not explicitly protected in most Type 1 statutes, it is hard to conceive of any rationale for not recognizing the continuation of that right after termination.

In a smaller number of states, termination of parental rights statutes take a dramatically different approach. These statutes, which I will call Type 2 statutes, divest both parent and child of their inheritance rights upon termination of parental rights.[51] Type 2 statutes are unique in expressly divesting the

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order for termination shall be entitled to inherit from a parent whose rights are terminated until the final order of adoption is entered.") (emphasis added).

49. *See* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 150-51.

50. *See* LA. CHILDREN'S CODE ANN. art. 1038 (West 2004) ("A final judgment terminating parental rights relieves the child and the parent against whom the judgment is rendered of all of their legal duties and divests them of all of their legal rights with regard to one another *except . . . (1) The right of the child to inherit from his biological parents and other relatives.*") (emphasis added); N.M. STAT. ANN. § 32A-4-29(P) (Michie 1999 & Supp. 2003) ("A judgment of the court terminating parental rights divests the parent of all legal rights and privileges . . . . *A judgment of the court terminating parental rights shall not affect the child's rights of inheritance from and through the child's biological parents.*") (emphasis added); TEX. FAM. CODE ANN. § 161.206(b) (Vernon 2002 & Supp. 2004-2005) ("[A]n order terminating the parent-child relationship divests the parent and the child of all legal rights and duties with respect to each other, *except that the child retains the right to inherit from and through the parent unless the court otherwise provides.*") (emphasis added).

51. *See* GA. CODE ANN. § 15-11-93 (2001) ("An order terminating the parental rights of a parent under this article is without limit as to duration and terminates all the parent's rights and obligations with respect to the child and all rights and obligations of the child to the parent arising from the parental relationship, *including rights of inheritance.*") (emphasis added). While it is not entirely clear from the text that the last clause relating to inheritance applies to both the child and the parent, a Georgia court has held that the language of an almost identical predecessor statute acts to terminate the inheritance rights of both parent and child from each other. Spence v. Levi, 211 S.E.2d 622, 624 (Ga. App. 1974). *See* IDAHO CODE § 16-2011 (Michie 2001) ("An order terminating the parent and child relationship shall divest the parent

child's right to inherit from parents whose parental rights have been terminated. One Type 2 statute, enacted in Delaware, explicitly extinguishes not only the child's right to inherit from the terminated parent, but the child's right to inherit from the terminated parent's lineal and collateral kin (i.e., the child's grandparents, aunts and uncles, etc.) as well.[52] The broad language referring to extinguishing inheritance rights in the other Type 2 statutes suggests that those statutes would also likely act to extinguish the right of the child to inherit from parental kin.

Among those TPR statutes that expressly mention inheritance rights, then, the majority are Type 1 statutes which explicitly preserve the child's right to inherit from the terminated parent, at least until adoption. Only Type 2 statutes, of which there are relatively few, explicitly divest the child of inheritance rights. But that does not necessarily mean that the inheritance rights of the child survive the termination of parental rights in most states. Unlike Type 1 and Type 2 statutes, many state TPR statutes make no specific reference to inheritance rights at all. I will call these statutes—which neither expressly preserve nor expressly extinguish the child's right to inherit—Type 3 statutes.

The effect of Type 1 and Type 2 statutes on the right of the child to inherit from the terminated parent is clear—Type 1 statutes explicitly preserve the child's right to inherit, while Type 2 statutes explicitly extinguish that right. In contrast, the effect of Type 3 statutes on inheritance rights of children is more difficult to discern, as the language of the statutes varies considerably and judicial interpretations are sparse. Some Type 3 statutes include broad language divesting both parent and child of all legal rights, obligations, and duties.[53] The language of the Minnesota statutes is typical: "Upon the

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and the child of all legal rights, privileges, duties, and obligations, *including rights of inheritance, with respect to each other.*") (emphasis added); NEV. REV. STAT. 128.015(1) (2003) (defines "parent and child relationship" within the termination of parental rights chapter as follows: "'Parent and child relationship' includes all rights, privileges and obligations existing between parent and child, *including rights of inheritance.*") (emphasis added).

52. DEL. CODE ANN. tit. 13, § 1113(b) (1999) ("Upon the issuance of an order terminating the existing parental rights and transferring such parental rights to another person or organization, *the child shall lose all rights of inheritance from the parents whose parental rights were terminated and from their collateral or lineal relatives and the parents whose parental rights were terminated and their collateral or lineal relatives shall lose all rights of inheritance from the child.*") (emphasis added).

53. *See* IND. CODE ANN. § 31-35-6-4(a)(1) (West 1999) ("[A]ll rights, powers, privileges, immunities, duties, and obligation, including any rights to custody, control, visitation, or support, pertaining to the relationship, are permanently terminated . . . ."); IOWA CODE ANN. § 232.2(56) (West 2000 & Supp. 2004) ("'Termination of the parent-child relationship' means the divestment by the court of the parent's and child's privileges, duties and powers with respect to each other."); N.D. CENT. CODE § 27-20-46(1) (1991 & Supp. 2003) ("An order terminating parental rights of a parent terminates all the parent's rights and obligations with respect to the child and of the child to

termination of parental rights all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent shall be severed and terminated."[54] Other Type 3 statutes, however, are less comprehensive in their descriptions of the effect of a termination order. The Alaska statute, for example, provides only that "the rights and responsibilities of the parent regarding the child may be terminated for the purposes of freeing a child for adoption or other permanent placement."[55] Yet others are even more constrained in their apparent scope, explicitly extinguishing only the parent's rights, but saying nothing about the effect of the termination order on the duties and obligations of the parent and on the rights of the child.[56]

Do Type 3 TPR statutes operate to terminate the inheritance rights of the child? The case law, while sparse, suggests that these statutes may do exactly that. The Minnesota Supreme Court faced that question directly, and concluded that the Minnesota statute did extinguish the child's right to inherit from parents whose parental rights had been terminated.[57] The court noted that the broad language in the statute severing "all rights, powers, privileges, immunities, duties and obligations . . . existing between child and the parent" is followed by two explicit exceptions—first, "that a support obligation may not be terminated under specific circumstances"[58] and, second, "that a termination of parental rights will not disentitle a child to any benefits the child may derive because of membership in a federally recognized Indian tribe."[59] The court concluded that "[b]y carving out an exception, the legislature exclude[d] other exceptions" and that, thus, there is no exception preserving the right of the child to inherit.[60] Given the broad language of the statute and the statutory enumeration of specific, limited exceptions, the court's interpretation of the Minnesota statute is unsurprising.

Other courts, while not addressing the issue directly, have assumed without discussion that Type 3 termination of parental rights statutes extinguish the child's right to inherit from the terminated parent. The Iowa Court

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or through the parent arising from the parental relationship."); VT. STAT. ANN. tit. 15A, § 3-505(a)(1) (2002) ("An order issued under this part granting the petition . . . (1) terminates the relationship of parent and child between the respondent and the minor . . . ."); WIS. STAT. ANN. § 48.43(2) (West 2003) ("An order terminating parental rights permanently severs all legal rights and duties between the parent and the child.").

54. MINN. STAT. ANN. § 260C.317 (West 2003).

55. ALASKA STAT. § 47.10.088(a) (Michie 2004).

56. *See* OR. REV. STAT. § 419B.524 (2003) ("[T]he order permanently terminates all rights of the parent or parents whose rights are terminated and the parent or parents have no standing to appear as such in any legal proceeding concerning the ward.").

57. *In re* Estate of Braa, 452 N.W.2d 686 (Minn. 1990).

58. *Id.* at 688.

59. *Id.*

60. *Id.*

of Appeals, for instance, reversed the decision of the juvenile court terminating the parental rights of a father because the termination was not in the best interests of the child, in part because the termination of parental rights would eliminate the child's "right to support or any prospective *inheritance*, windfall, or estate from [the father]."[61] No authority is cited for this proposition. Iowa statutes define the effect of a termination of parental rights quite broadly to mean "the divestment by the court of the parent's and child's privileges, duties and powers with respect to each other,"[62] although that statutory language was never mentioned by the court. Similarly, the Alaska Supreme Court, in remanding a termination of parental rights case, expressed doubt that the termination of a mother's parental rights would be in the child's best interest, again because "[i]f [the mother's] parental rights are terminated, [the child] would lose her rights of *inheritance* from [her mother] and her right to support from her biological mother."[63] Again, however, the court cites no authority for this conclusion and makes no mention of the statutory language describing the effect of a termination of parental rights. The Alaska statute uses somewhat more constrained language than the Iowa statute, describing the effect of the order as terminating "the rights and responsibilities of the parent regarding the child."[64] In yet another case, the Court of Civil Appeals of Alabama reversed the lower court decision terminating a father's parental rights.[65] The appellate court noted that termination of parental rights must be in the best interest of the child and that here "[t]he child's right to current and future support, including, possibly, payment of a college education, *and the child's right of inheritance from the father*, were apparently never considered, and the child's rights certainly were not protected."[66] While decisions such as

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61. *In re* G.A.Z., No. 01-1103, 2002 WL 575640, *5 (Iowa Ct. App. Feb. 20, 2002) (emphasis added).

62. IOWA CODE ANN. § 232.2(56) (West 2000 & Supp. 2004).

63. A.B. v. Dep't of Health & Soc. Servs., 7 P.3d 946, 954-55 (Alaska 2000) (emphasis added).

64. ALASKA STAT. § 47.10.088 (Michie 2004).

65. State *ex rel* McDaniel v. Miller, 659 So. 2d 640 (Ala. Civ. App. 1995).

66. *Id.* at 642 (emphasis added). *See also In re* Elise K., 654 P.2d 253, 258 (Cal. 1982) (Bird, C.J., concurring) ("The termination of parental rights contemplated by section 232 is the ultimate sanction envisioned by the Legislature. It represents the total and irrevocable severance of the bond between parent and child. The child's emotional relationships with his or her natural parent and siblings are cut off. Any right to parental support or to an inheritance from biological family members is terminated.") (citations omitted). *But cf. In re* Estate of Pamanet, 175 N.W.2d 234 (Wis. 1970). The Wisconsin Supreme Court held that the terminated parent's right to inherit from the child had been extinguished by the termination order. *Id.* at 235-36. In reaching that conclusion, the court noted that the legislature had previously considered and rejected a bill that explicitly provided that "[a]n order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations, *including rights of inheritance, with respect to each other*." *Id.* at 236 n.1 (emphasis added). The rejected statute would, in the words of the court, "have

these suggest that courts may interpret TPR statutes to extinguish the inheritance rights of the child, they provide little guidance as to why that result should obtain.

The very few cases that have addressed, either directly or indirectly, the effect of a Type 3 TPR statute on the inheritance rights of the child, then, suggest that Type 3 statutes may extinguish the child's right to inherit from the terminated parent. But, given the paucity of useful judicial precedent on the issue and the variation in statutory language, it is hard to predict with any certainty whether all Type 3 statutes will be similarly interpreted. As Type 3 statutes do not explicitly address the effect of termination on the inheritance rights of the child, the result is likely to turn on interpretation of the more general language used in the statute to describe the effect of termination. If the language of the statute is broad and explicitly terminates the rights, obligations, and privileges of both the parent and the child, as was the case with the Minnesota statute interpreted by the *Braa*[67] court, it may be difficult for courts to interpret the statute in a way that preserves the child's right to inherit. It is likely that these broader statutes will have the effect of extinguishing the right of the child to inherit from a terminated parent.[68] The only rem-

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added a cutoff of all rights of the child to an existing cutoff of all parental rights in termination cases," strongly suggesting that the court interpreted the existing statute not to extinguish the child's right to inherit, although the court explicitly stated that it need not and did not decide on the rights of the child to inherit in that case. *Id.* at 236.

67. *In re* Estate of Braa, 452 N.W.2d 686 (Minn. 1990). *See supra* text accompanying notes 57-60.

68. A number of cases have addressed this question—the effect of termination of parental rights on the rights of the child—in the context of parental support obligations. These cases give us a sense of how courts are likely to answer the question that concerns us—in the absence of explicit statutory language preserving or extinguishing a specific right of the child or obligation of the parent, does a termination of parental rights affect only the *rights* of the parent (leaving the rights of the child unimpaired) or does it sever the parent-child relationship entirely, extinguishing not only the rights of the parent, but also parental obligations and children's rights. In a very recent case, the Oklahoma Supreme Court held that a termination of parental rights order also terminates the parent's duty to support the child. McCabe v. McCabe, 78 P.3d 956 (Okla. 2003). The McCabe court noted that in the majority of cases, the courts of other jurisdictions have held that "absent a statute directing otherwise, an order terminating parental rights severs the parent-child relationship to the degree that the parent no longer owes a duty to support the child," *id.* at 960, citing decisions from nineteen other states in support of the proposition that a termination of parental rights order terminates the parent's duty to support the child and only three that hold that the parent's obligation to support the child survives termination of parental rights, *id.* at 960 n.3. Many of the cases holding that termination of parental rights extinguishes the parent's obligation to support the child use language suggesting that they are giving very comprehensive effect to the termination order. *See* State *ex rel.* Sec'y of Soc. & Rehab. Servs. v. Clear, 804 P.2d 961, 967 (Kan. 1991) ("A person who has relinquished parental rights through adoption, a voluntary termination of parental rights, or an involuntary severance of parental rights is no longer a parent. These statutory pro-

edy in such states may be amendment of the statute to provide explicitly (as Type 1 statutes do) that the child's inheritance rights survive termination.

If, however, the statute provides for termination of parent *rights* only, and does not use language referring more broadly to parental obligations or children's rights or the extinguishing of the parent-child relationship, it will be easier for courts to construe TPR statutes narrowly, affecting only parental rights and leaving the child's rights unimpaired.[69] If the purpose of termina-

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cedures contemplate a complete severance of the child's ties and relationship with his or her natural parents. The parent whose rights have been severed is relieved of all duties and obligations to the child."); Commonwealth v. Fletcher, 562 S.E.2d 327, 329 (Va. Ct. App. 2002), *aff'd*, 581 S.E.2d 213 (Va. 2003) ("[T]ermination of parental rights is a complete severance of all ties between the child and parent so as to render them 'legal strangers' to include the termination of parental responsibilities as well as any correlative rights."). The careful reader may note that Oklahoma, Kansas, and Virginia all have Type 1 statutes and think it puzzling to include cases from Type 1 jurisdictions in a discussion focused on how courts might interpret Type 3 statutes. The point of the discussion, however, is not how these courts would interpret the effect of their Type 1 statutes on inheritance rights, but rather how courts are likely to interpret the effect of the broader language of TPR on rights of children that are not explicitly addressed in the statute, for that is the very issue that courts interpreting Type 3 statutes must answer when they determine the effect of the statute on inheritance rights. When courts in Type 1 (or Type 2 for that matter) jurisdictions consider the effect of their statutes on the right of the child to continued support from the terminated parent, they are addressing that very question—how should we apply the broad language of TPR statutes to the rights and obligations of the parent and the child.

69. Again, we may draw this inference from the manner in which courts have applied termination statutes to the child's right to receive support from the terminated parent. While many courts have held that termination of parental rights extinguishes the parent's support obligation, *see supra* note 68, a handful of recent court decisions have held, to the contrary, that the termination of parental rights order does not extinguish the parent's obligation to support the child. In doing so, these courts have given a much narrow interpretation to the effect of the termination order. In *State v. Fritz*, 801 A.2d 679 (R.I. 2002), for example, the Rhode Island Supreme Court held that the termination of the father's parental rights did not automatically extinguish his obligation to support his child, noting that the Rhode Island termination of parental rights statute (a Type 3 statute) authorizes the termination of "any and all legal rights of the parent to the child," *id.* at 683 (citing R.I. GEN. LAWS § 15-7-7(a) (2000)), in contrast to the state's adoption statute that provides for the "legal termination of parental rights and responsibilities of birth parents," *id.* at 684 (citing R.I. GEN. LAWS § 15-7.2-2 (2000)). Thus, because the "plain language of Rhode Island's termination of parental rights statute . . . addresses only the 'legal rights of the parent to the child' and not the reciprocal rights of the child with respect to the parent," the court explicitly declined to follow other courts that interpreted the term "parental rights" as "incorporating all the rights of the parental relationship, including not only those rights that flow to the parent, but also those, such as the right to financial support, that flow to the child." *Id.* at 685 (citations omitted). In another very recent case, the West Virginia Supreme Court held that the parent's obligation to pay child support was not automatically

tion is to further the best interests of the child, as it clearly is,[70] TPR statutes should be interpreted and applied in a manner that benefits, rather than disadvantages, the child. Courts that interpret statutes that authorize a termination of parental "rights" as having a substantially broader effect—as, for instance, requiring the complete severance of the parental bond or making the parent and child legal strangers—go too far and infect TPR statutes with an unnecessarily draconian character.

If Type 3 statutes are interpreted to bar the right of children to inherit from their terminated parents, they are likely to be interpreted also to bar inheritance by children *through* their terminated parents as well. Thus, a child of terminated parents would be barred from inheriting not only from the terminated parent, but also from the parents of the terminated parent or siblings of the terminated parent—i.e., the child's grandparents and aunts and uncles.[71]

III. EXTINGUISHING THE INHERITANCE RIGHTS OF THE CHILD AFTER TPR—IS IT GOOD POLICY?

It appears, then, that an increasing number of children are likely to become "legal orphans," in the sense that the parental rights of their natural parents have been terminated but the terminated natural parents have not been replaced by adoptive parents, leaving the children with no legal parent. It also appears that in all states with Type 2 statutes, and perhaps in many states with Type 3 statutes as well, termination of parental rights will extinguish the right of the child to inherit from the terminated parent and likely also from kin of the terminated parent. Is that a desirable result? In answering that question,

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extinguished by a termination of parental rights. *In re* Stephen Tyler R., 584 S.E.2d 581 (W. Va. 2003). The West Virginia termination statute (again a Type 3 statute) authorizes the court to "terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent." W. VA. CODE § 49-6-5(a)(6) (Supp. 2003). The court concluded that the plain language of the statute gave courts the option to terminate the parent's rights or responsibilities or both. *Stephen Tyler R.*, 584 S.E.2d at 596. In response to the terminated father's claim that it was "patently unfair" to continue a parent's obligation to pay support after the parent's right to visit or contact the child was terminated, the court explained that "'child support payments are exclusively for the benefit and economic best interest of the child,'" and that "'the duty to pay child support and the right to exercise visitation are not interdependent.'" *Id.* at 598 (quoting Carter v. Carter, 479 S.E.2d 681, 686-87 (W. Va. 1996)).

70. *See infra* text accompanying notes 72-73.

71. This conjecture flows from the treatment of inheritance rights when a child has been adopted. In most jurisdictions, adoption extinguishes the adopted child's right to inherit from her natural parents (except in the case of step-parent adoptions). *See infra* text accompanying notes 93-95. When the child's right to inherit from her natural parents has been extinguished by adoption, the child's right to inherit from the relatives of the natural parents is generally also extinguished. *See* Brashier, *supra* note 49, at 153.

we might first consider how this result comports with the purposes and goals of the child welfare system as reflected in termination of parental rights statutes.

A. The Policies of the Child Welfare System

Whatever questions may exist about the efficacy of TPR statutes, there is no question as to their primary goal—to protect the interest of children. That theme is clearly expressed in the language of the statutes,[72] as well as in court decisions implementing the statutory schemes.[73] While terminating the parental rights of abusive or neglectful parents may well further the interests of the child, it is hard to imagine how a concomitant extinguishing of any potential inheritance from the parent, or from the parent's kin, can in any way benefit the child. In fact, several courts have noted that the potential loss of inheritance rights is detrimental to children and suggested that, therefore, the potential loss of inheritance rights may be itself a factor in determining whether termination is warranted.[74] Thus, it is conceivable (and perhaps

72. *See, e.g.*, GA. CODE ANN. § 15-11-94(a) (2001 & Supp. 2004) ("If there is clear and convincing evidence of such parental misconduct or inability, the court shall then consider whether termination of parental rights is in the best interest of the child, after considering the physical, mental, emotional, and moral condition and needs of the child who is the subject of the proceeding, including the need for a secure and stable home."); IOWA CODE ANN. § 600A.1 (West 2001) ("The best interest of the child subject to the proceedings of this chapter shall be the paramount consideration in interpreting this chapter."); WIS. STAT. ANN. § 48.426(2) (West 2003) ("The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.").

73. *See, e.g.*, *In re* C.H., 79 P.3d 822, 825 (Mont. 2003) ("[A] court's paramount concern in a parental rights termination proceeding is the best interest of the children."); *In re* Christopher B., 823 A.2d 301, 307 (R.I. 2003) ("'[T]he primary step before any termination of parental rights is that there be a finding of parental unfitness. Once this fact is established, the best interests of the child outweigh all other considerations.'") (alteration in original) (quoting *In re* Kristen B., 558 A.2d 200, 203 (R.I. 1989)); *In re* M.S., 115 S.W.3d 534, 547 (Tex. 2003) ("[T]he Family Code's entire statutory scheme for protecting children's welfare focuses on the child's best interest.").

74. *See* A.B. v. Dep't of Health & Soc. Servs., 7 P.3d 946 (Alaska 2000); Hofmeister v. Bauer, 719 P.2d 1220, 1222 n.1 (Idaho 1986) (affirming the lower court's decree terminating parental rights) ("In constrast to the best interests of the parent, the best interests of the child must be considered when terminating the relationship under any provision of I.C. § 16-2005. This requirement is explicitly contained in category (e) and is implicitly embraced by the criteria of parental conduct or status in categories (a) through (d). It is conceivable, although unlikely, that grounds for termination could exist under categories (a) through (d) but that a court would refrain from terminating because the child's best interest would not be served. For example, the child might be deprived of a substantial future inheritance . . . ."); *In re* G.A.Z., No. 01-1103, 2002 WL 575640 (Iowa Ct. App. Feb. 20, 2002).

somewhat ironic) that the risk of loss of inheritance rights that would flow from a termination of parental rights might, in very close cases, result in courts declining to order termination in circumstances that would, otherwise, be in the child's best interest.

Rather than benefiting the child, then, barring the child from inheriting seems to simply inflict one more disadvantage on children whose lives are likely to have been blighted by the burden of incapable, neglectful, or abusive parents. This added disadvantage is likely to fall on children who are already disadvantaged not only because of the failings of their parents, but by minority status and poverty as well. Critics of the existing child welfare system have argued forcefully that the children in the system are disproportionately poor and disproportionately minority. Children who have become "legal orphans" as the result of termination of parental rights proceedings are the product of a child welfare system that is, in the unminced words of Professors Brooks and Roberts, "marked by striking class and race disparities."[75] Professors Brooks and Roberts marshal quite disturbing statistics in support of their expressed concern:

> Black children make up nearly half of the national foster care population, although they represent fewer than one fifth of the nation's children. Latino and Native American children are also in the system in disproportionate numbers. The system's racial imbalance is most apparent in big cities, where there are sizeable minority and foster care populations. In Chicago, for example, 95% of children in foster care are Black. Of 42,000 children in New York City's foster care system at the end of 1997, only 1,300 were White. Black children in New York were 10 times as likely as White children to be in state protective custody.[76]

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75. Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 453 (2002). Professors Brooks and Roberts go on to note that

> [c]hildren raised in poverty are many times more likely than other children to be reported to child protective services and to be placed in substitute care. Poverty—not the type or severity of maltreatment—is the single most important predictor of placement in foster care and the amount of time spent there. America's child welfare system is rooted in the philosophy of "child saving"—the idea that children should be rescued from the ills of poverty by taking them away from their parents. Thus, the public child welfare system often equates poverty with neglect. Most child maltreatment addressed by child protective services involves neglect related to poverty.

Id. (footnotes omitted).

76. *Id.* (footnotes omitted).

Professor Charlow, another critic of the current child welfare system, contends that "it appears that the system, true to its origins, is removing children simply because they are poor, and because minority children are more likely to be poor, an inordinate number of them are being separated from their families without sufficient reason."[77] Similarly, Professor Appell argues that the current child welfare system "largely targets poor and minority families and often confuses poverty with neglect."[78]

Extinguishing the right of the child to inherit from its terminated parent, then, seems not to further the primary goal of the termination statutes—protecting the interests of the child—but rather to add additional injury to children who already suffer from inadequate parenting and very likely the additional burdens of poverty and minority status as well. But might other valid interests important to our broader inheritance system be served by precluding inheritance by children from their terminated parents? To answer that question, we turn now to consideration of how extinguishing the child's right to inherit from his terminated biological parent compares to the other categories of children who might lose (or historically have lost) their right to inherit from their biological parents.

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77. Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 768-69 (2001). Professor Charlow further notes that

> [c]onsistent with its origins, the current child welfare system continues to remove more poor children from their families than their wealthier counterparts. Maltreatment rates for poor children are over twenty times greater than those of middle class or wealthy families. As a result, the impact of maltreatment laws is not felt equally by all races—the large number of poor charged with maltreatment results in a disparate impact on minorities. Despite the fact that child maltreatment occurs with the same frequency in all races, the percentage of African-American and Native-American children in the child welfare system is greater than the percentage of those groups in the general population. Given the over-representation of minorities living in poverty, it is not surprising that a disproportionate number of minorities are charged with child maltreatment.

Id. at 764-65 (footnotes omitted).

78. Appell, *supra* note 42, at 772. Professor Appell bolsters her point by noting that "of the approximately 560,000 children in state-supervised substitute care, forty-two percent (239,516) are identified as 'Black Non-Hispanic,' thirty-six percent (203,000) as 'White Non-Hispanic,' fifteen percent (84,924) as 'Hispanic,' two percent (8,910) as non-Hispanic Native American, and one percent (6,304) as Asian/Pacific Islander. Most of these children come from poor families." *Id.* (footnotes omitted).

B. The Policies of Inheritance Law

1. The Intestate Succession Scheme

Inheritance rights are created and defined by state intestacy statutes that exist in every state.[79] Although there is considerable variation among state intestacy statutes, the right to inherit almost inevitably flows from one of two relationships—husband and wife or parent and child.[80] Of these two relationships, the parent-child relationship is by far the most significant. Aside from the share of the surviving spouse, relationships based on marriage generally do not create inheritance rights under state intestacy statutes.[81] Marriage creates inheritance rights only in the spouse—in-laws do not inherit under most intestacy statutes.[82] Once the surviving spouse's share is determined,[83] the

79. WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 42 (2nd ed. 2001).

80. There are a very few exceptions to this general rule. Hawaii, by statute, allows persons who are at least eighteen years old and who are not married or parties to another reciprocal beneficiary relationship and who cannot legally marry one another to enter into a reciprocal beneficiary relationship. HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie 1999). Under the Hawaii intestate succession statute, a reciprocal beneficiary is entitled to the same share that a surviving spouse would be. HAW. REV. STAT. ANN. § 560:2-102 (Michie 1999). The Hawaii scheme is briefly discussed in Susan N. Gary, *The Parent-child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 674-77 (2002). The California Probate Code provides for inheritance by children from their foster parent or stepparent under very limited circumstances (there must be a "relationship of parent and child" that "began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent" and it must be "established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.") CAL. PROB. CODE § 6454 (West Supp. 2005). The California step child/foster child inheritance scheme is discussed in Gary, *supra*, at 671-74; Kim A. Feigenbaum, Note, *The Changing Family Structure: Challenging Stepchildren's Lack of Inheritance Rights*, 66 BROOK. L. REV. 167 (2000); Thomas M. Hanson, Note, *Intestate Succession for Stepchildren: California Leads the Way, But Has It Gone Far Enough?*, 47 HASTINGS L.J. 257 (1995).

81. MCGOVERN, JR. & KURTZ, *supra* note 79, at 46.

82. There are, however, a few exceptions to this general proposition. The California intestate succession scheme, for instance, extends inheritance rights, in some circumstances, to step children, CAL. PROB. CODE § 6402(e) (West 1991 & Supp. 2005), and to mothers- and fathers-in-law or their issue, *id.* § 6402(g). In Nevada, heirs of a decedent's predeceased spouse may inherit if the decedent died without heirs. NEV. REV. STAT. 134.210 (2003).

83. State intestate succession statutes vary considerably in their approach to determining the spousal share, with allocations of from one-third to one-half of the estate common. The spousal share may, or may not, depend on the number of children, or issue of children, who survive the decedent. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 75 (6th ed. 2000).

disposition of the remainder of the estate is governed almost entirely by relationships based on the parent-child relationship.[84] Generally, surviving children, if there are any, take the remainder of the estate, sharing it with any issue[85] of children who did not survive the decedent.[86] If there are no surviving children, or descendants of children, the estate generally passes to the decedent's parents or, if there are no surviving parents, to other ancestors or collateral relatives.[87] In all of these instances, the relationship between the decedent and the heir is based on one or more parent-child relationships. In other words, all eligible heirs (aside from spouses) are connected to the decedent by a chain, with each link in the chain being a single parent-child relationship.

Because inheritance rights (aside from the inheritance rights of the surviving spouse) are invariably based on the parent-child relationship, the determination of who qualifies as a parent or child is of obvious and crucial importance. At the most fundamental level, we think of a child as being the offspring of the child's biological, or natural, parents and, in most instances, the biological parent-child relationship determines inheritance rights.[88] There are, however, limited, but significant, exceptions to this common sense definition. To better understand when, and whether, a judicially ordered termination of parental rights also should constitute an exception to this biologically based general rule, it may be instructive to put termination of parental rights into context by briefly exploring the history and rationale of these other exceptions to the rule that inheritance rights are based on the biological link between parent and child.

2. Adopted Children

Adoption is a major exception to the general rule that biological relationships determine inheritance rights between parents and children.[89] Adop-

84. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 2 (2000).

85. "Issue" refers to direct descendants, including children, grandchildren, great-grandchildren, great-great-grandchildren, etc. MCGOVERN, JR. & KURTZ, *supra* note 79, at 6.

86. DUKEMINIER & JOHANSON, *supra* note 83, at 86.

87. *Id.* at 90-91.

88. That notion is reflected in § 2-114(a) of the Uniform Probate Code, which provides that "[e]xcept as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents." UNIF. PROBATE CODE § 2-114(a) (amended 1993).

89. For comprehensive discussions of the inheritance rights of adopted children, see Brashier, *supra* note 49, at 147-77 and Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711 (1984).

tion raises several related questions. When will adopted children inherit from, or through, their adoptive parents? When will adopted children inherit from, or through, their biological parents despite the adoption?

The answer to the first of these questions (when will adopted children inherit from, or through, their adoptive parents) is the most straightforward. In every American jurisdiction, adopted children inherit from their adoptive parents.[90] And in most jurisdictions, adopted children also inherit *through* their adoptive parents, which is to say that adopted children inherit not just from the adoptive parents, but also from the adoptive parents' kin, in the same manner as the natural children of the adoptive parents would.[91] In a very few states, however, adopted children are barred from inheriting from their adoptive parents' kin, who are viewed as "strangers to the adoption."[92]

The answer to the second question (will adoption extinguish the right of the adopted child to inherit from his biological parents), however, is considerably more unsettled and controversial. This second question is also more relevant to the basic question raised in this Article—should termination of parental rights extinguish the right of the child to inherit from his biological parents. In some jurisdictions, the right of the adopted child to inherit from his biological parents is unaffected by the adoption.[93] In most jurisdictions, however, the ability of the adopted child to inherit from his biological parents is terminated by the adoption, unless the adoption is by a step-parent, in which case the child may retain the right to inherit from the biological parent who is married to the adopting step-parent[94] or from both biological parents.[95]

Why do most intestate succession statutes terminate the right of adopted children to inherit from their biological parents? Several reasons are suggested. One is fairness. If adopted children retain the right to inherit from their biological parents as well as from their adopted parents, they will be unfairly advantaged over their siblings (the biological children of their adoptive parents) who can inherit only from their biological parents.[96] Allowing adopted children to retain the right to inherit from their biological families

90. *See* Brashier, *supra* note 49, at 149-50.

91. MCGOVERN, JR. & KURTZ, *supra* note 79, at 92.

92. *See* Brashier, *supra* note 49, at 154. For an articulation of the "stranger to the adoption rule," see *In re* Eddins' Estate, 279 N.W. 244 (S.D. 1938). *See* Rein, *supra* note 89, at 721-23 for criticism of the *Eddins* decision. The Vermont Supreme Court, in *MacCallum v. Seymour*, 686 A.2d 935 (Vt. 1996), held that the Vermont statute that precluded an adopted child from inheriting from the kin of her adopted parents violated the Vermont constitution. *But see* Lutz v. Fortune, 758 N.E.2d 77 (Ind. Ct. App. 2001).

93. Rein, *supra* note 89, at 723.

94. Brashier, *supra* note 49, at 155.

95. *Id.*

96. Rein, *supra* note 89, at 725.

also creates administrative complications. If adoption records are sealed, the identity of potential heirs may be difficult to ascertain.[97]

An additional, and probably more substantive, rationale relates to the goals and purposes of adoption. A frequently articulated goal of adoption is to promote the complete integration of the adopted child into the adoptive family, which, in turn, will be enhanced by severing ties with the biological family.[98] These rationales for severing inheritance rights of adopted children and their biological parents are much less persuasive, however, when the child is adopted by step-parents or other relatives.[99] Ties to the child's biological family are much more likely to be maintained, and the continuation of those ties is much less problematic, when the child has been adopted by a step-parent or other relative. And issues of administrative efficiency, such as determining the identity of potential heirs, are much less likely to arise. Consequently, many of the intestate succession statutes that cut off the inheritance right of adopted children to inherit from their biological parents create an exception for intra-family adoptions. Some such statutes allow the adopted child to continue to inherit from the biological parent who is the spouse of the adopting parent,[100] while others allow the adopted child to continue to adopt from both biological parents in the event of a step-parent adoption.[101]

In most jurisdictions, then, adopted children inherit from their adoptive parents and their adoptive parents' kin, but are barred from inheriting from their natural parents and their natural parents' kin, except in cases of step-parent adoptions. We do this for important policy reasons. We want adopted children to be fully integrated into their new families, a goal which is furthered by severing relationships with their biological families and by treating adopted children fairly in relation to their siblings in their new adoptive family. Exceptions (such as allowing the child to retain inheritance rights from

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97. *Id.* at 724.

98. *Id.* at 717. Perhaps the leading case expressing this approach is *In re Estates of Donnelly*, 502 P.2d 1163 (Wash. 1972). In *Donnelly*, the question before the Washington Supreme Court was whether an adopted child could inherit from her biological grandfather. *Id.* The court held that the child could not inherit, because allowing inheritance would conflict with the "broad legislative objective of giving the adopted child a 'fresh start' by treating him as the natural child of the adoptive parent, and severing all ties with the past." *Id.* at 1166. Some commentators, however, have argued that "open" adoptions, in which the child retains ties with the birth parent, may be preferable in some circumstances, particularly in the event of a step-parent adoption. *See* Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483 (1996); Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act § 4-113*, 51 FLA. L. REV. 89 (1999).

99. Rein, *supra* note 89, at 730.

100. *See* MD. CODE ANN., EST. & TRUSTS § 1-207(a) (2001).

101. *See* UNIF. PROBATE CODE § 2-114(b) (amended 1993).

their natural parents after step-parent adoptions) exist primarily when they are consistent with this policy.

Are the rationales for cutting off the adopted child's right to inherit from his or her biological parents transferable to termination of parental rights? The primary rationale for extinguishing the right of an adopted child to inherit from biological family members is that it furthers the goal of integrating the child into the new, adoptive family.[102] In fact, inheritance rights from biological parents are often retained in those instances in which separation from the biological family does not seem an appropriate goal—most notably, step-parent adoptions. That "integration into the adoptive family" rationale, however, is simply inapplicable to termination of parental right proceedings in which there is no replacement family into which the child can be integrated. The very nature of the children we are concerned with—legal orphans whose biological parents' rights have been terminated but who have not been subsequently adopted—negatives any suggestion that the "integration" rationale might be apt.

Similarly, extinguishing the right of adopted children to inherit from their biological families has been rationalized as an exercise in fairness, preventing the adopted child from having inheritance rights from three or four parents and their families, while the child's siblings in the new family (the natural children of the adopted parents) have inheritance rights only from two parents.[103] Again, however, that rationale is inapplicable to terminations of parental rights, where there are no disadvantaged siblings in the adoptive family because there is no adoptive family. Further, cutting off inheritance rights in conjunction with a termination of parental rights leaves the child with inheritance rights from only one parent (if the parental rights of only one parent are terminated) or from no parent at all (if the parental rights of both parents are terminated). Any notion of unfair advantage seems totally inapt in this context.

3. Non-marital Children

The second, and longest standing (although it remains standing only in vestigial form) exception to the general rule that the biological parent-child relationship determines inheritance rights is non-marital children. Historically, non-marital children (those often referred to with varying degrees of condescension and contempt as children born out of wedlock, illegitimates, or bastards[104]) could not inherit from either biological parent, nor could parents

102. *See supra* text accompanying note 98.

103. *See supra* text accompanying note 96.

104. The nomenclature has evolved quite dramatically. From the time of Blackstone, who noted that a bastard "can inherit nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*, somes *filius populi*," 1 WILLIAM BLACKSTONE, COMMENTARIES *447, well into the twentieth century, the term "bastard" was prevalent. *See* Chester G. Vernier & Edwin P. Churchill, *Inheritance by and*

inherit from their non-marital children.[105] Similarly, kin of the biological parents could not inherit from the child, nor could kin of the child inherit from the biological parents. For inheritance purposes, the non-marital child was considered to be "*filius nullius*," or the child of no one.[106]

What possible rationales exist, or existed, for a rule that is, to modern minds, so perverse? Several rationales have been suggested by scholars. Professors McGovern and Kurtz, in their treatise on wills, trusts, and estates, have suggested, and largely discounted, four possible rationales for the rule.[107] The first such rationale is feudalism.[108] Barring non-marital children from inheriting caused tenants to die without heirs, which in turn resulted in property escheating to the lord.[109] Thus, the theory goes, the barring of inheritance by non-marital children was supported by lords in order to increase the likelihood that land would escheat to them.[110] Professors McGovern and Kurtz, however, view this rationale as improbable because other legitimate heirs would likely exist, preventing the hoped-for escheat to the lord.[111] Even if the feudal rationale were not implausible, a policy aimed at increasing the rate at which property escheated would hardly be persuasive to modern minds.

The second possible rationale offered by Professors McGovern and Kurtz is the deterrence of sinful behavior.[112] Again, however, the proffered rationale fails as a legitimate contemporary justification. The notion that ex-

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from Bastards, 20 IOWA L. REV. 216 (1934-1935). Bastard was replaced by "illegitimate," but that term also came to be viewed as inappropriate and came to be replaced in turn by "children born out of wedlock" or, to use the common contemporary designation, "non-marital children." *See* Karen A. Hauser, Comment, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change*, 65 U. CIN. L. REV. 891, 891 n.1 (1997). Long lost are some wonderfully evocative terms for non-marital children, such as "merry-begot," 9 OXFORD ENGLISH DICTIONARY 641 (2d ed. 1989) (the usage being illustrated by this 1890 quotation from Sir Hall Caine's novel *Bondman:* "Maybe you think it nice to bring up your daughter with the merry-begot of any ragabash that comes prowling along.") and "by-blow," 2 *id.* at 731 (the usage being illustrated with this quotation from Henry Fielding's *Tom Jones*: "I thought he was a gentleman's son, thof he was a by-blow.").

105. For a comprehensive discussion of the inheritance rights of non-marital children, see Brashier, *supra* note 49. *See also* MCGOVERN, JR. & KURTZ, *supra* note 79, at 82-91.

106. Non-marital children were frequently disadvantaged not simply for inheritance, but in a variety of other contexts as well, including support, use of the father's name, and state and federal welfare statutes. *See* Harry D. Krause, *Equal Protection for the Illegitimate,* 65 MICH. L. REV. 477 (1967).

107. MCGOVERN, JR. & KURTZ, *supra* note 79, at 82-84.

108. *Id.* at 82-83.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 83.

tra-marital sexual activity is seriously sinful has largely gone out of fashion.[113] And, to the extent that deterring such activity is appropriate public policy, it can hardly be argued that punishing the child who results from the illicit activity, rather than the adults who engaged in that activity, is anything but grossly unfair.[114] Further, it strains credibility to suppose that the specter of inheritance disabilities imposed on offspring resulting from extra-marital sex would in fact act to deter the participants.[115] As we will discuss in Part IV, statutes that impose disabilities on children because of the misconduct of their parents are constitutionally suspect as well.

Neither of these rationales for disinheriting non-marital children suggests any viable justification for the analogous disinheritance of children of terminated parents. We surely cannot justify disinheriting children of terminated parents on feudal grounds. Similarly, disinheriting children of terminated parents on the assumption that we would thereby be deterring bad parenting seems implausible, as well as potentially unconstitutional.

The third possible rationale suggested by Professors McGovern and Kurtz is based upon parental intent.[116] The notion here is that the average decedent would not have intended or desired non-marital offspring to inherit.[117] It is axiomatic that a primary goal of intestate succession statutes is to replicate the presumed intention of the decedent.[118] Professors McGovern and Kurtz deem the presumed parental intent rational improbable, noting that there is no reason to suppose that parents in the past did not love even their illegitimate children.[119] Similarly, Professor Krause has suggested that legal disabilities attaching to "illegitimacy" may result from an honoring of the father's choice.[120] Professor Krause, like Professors McGovern and Kurtz, finds this rationale unsatisfactory, arguing that, as the father voluntarily inflicted this status on the helpless child, the decision to withhold the benefits of legitimacy cannot properly belong to the father.[121] The Supreme Court, in fact, has criticized the use of the presumed parental intent as a rationale for

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113. *Id.*

114. *Id.*; *see also* Krause, *supra* note 106, at 492; *see also infra* text accompanying notes 238-48, for a discussion of the United States Supreme Court's expressed concern in this particular form of unfairness.

115. MCGOVERN, JR. & KURTZ, *supra* note 79, at 83; Krause, *supra* note 106, at 492.

116. MCGOVERN, JR. & KURTZ, *supra* note 79, at 83.

117. *Id.*

118. *See* DUKEMINIER & JOHANSON, *supra* note 83, at 74; Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J., 321, 323-24.

119. MCGOVERN, JR. & KURTZ, *supra* note 79, at 83.

120. Krause, *supra* note 106, at 495-98. Professor Krause's article focuses not just on inheritance rights, but on the broad range of legal disabilities inflicted upon non-marital children.

121. *Id.* at 497.

discrimination against illegitimates. In *Trimble v. Gordon,*[122] which is discussed at greater length in Part IV of this Article, the Court confronted the argument that a statute which barred illegitimate children from inheriting from their fathers reflected the presumed intent of parents. The Court responded by noting that:

> [e]ven if one assumed that a majority of the citizens of the State preferred to discriminate against their illegitimate children, the sentiment hardly would be unanimous. . . . The issue therefore becomes where the burden of inertia in writing a will is to fall. At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of "presumed intent."[123]

Just as the "presumed intent" rationale seems an inadequate justification for disinheriting non-marital children, it seems an inadequate justification for disinheriting children of terminated parents. We have no reason to presume that terminated parents would, in fact, intend to disinherit their children. Even terminated parents are likely to love their children. Furthermore, many parents whose parental rights are terminated are not "bad" parents at all, but rather parents who are unable to provide adequate parenting because of mental illness, drug or alcohol dependency, or incarceration.[124] In the face of uncertainty as to parental intent, it seems perverse to impose presumptions that harm the innocent child. Additionally, the effect of TPR statutes that disinherit children is to bar inheritance not just from the terminated parent, but from the terminated parent's family as well.[125] It seems far-fetched to presume that the grandparents of a child would intend to disinherit the child simply because the child's parent's rights had been terminated.

The fourth suggested rationale—the problem of proving paternity[126]—is, or, at least was, the most plausible explanation for the disinheritance of illegitimate children. Although the basic laws of human reproduction make proof of maternity relatively easy, proof of paternity has been, by the nature of human reproduction, subject to much greater uncertainty.[127] This fourth

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122. 430 U.S. 762 (1977).

123. *Id.* at 775 n.16.

124. *See* 1 HOLLINGER, *supra* note 8, § 4.04[1][a][v]—[vii].

125. *See supra* text accompanying note 71.

126. MCGOVERN, JR. & KURTZ, *supra* note 79, at 83-84.

127. Recent scientific advances in paternity testing, however, have dramatically reduced that uncertainty. *Id.* at 84. *See also* Allan Z. Litovsky & Kirsten Schultz, *Scientific Evidence of Paternity: A Survey of State Statutes*, 39 JURIMETRICS J. 79 (1998); Laura W. Morgan, *An Introduction to Attacking Blood Tests in Paternity Cases*, 12 AM. J. FAM. L. 204 (1998); Jill T. Phillips, Comment, *Who Is My Daddy?*

rationale retains some life in current law, albeit in much attenuated form, in statutory requirements that condition inheritance from non-marital fathers on appropriate and timely proof of paternity.[128] Statutory requirements prescribing how paternity may be established and when it must be established vary considerably from state to state.[129] As a result, the ability of a non-marital child to inherit from the father and the extent to which states may impose requirements on non-marital children to establish paternity as a condition of inheriting remain issues of some complexity.

The need to establish whether a father-child relationship in fact exists provides a plausible rationale for imposing additional burdens (requirements that non-marital children establish paternity by appropriate means and within appropriate time periods) on illegitimate children. That proof of paternity rationale, however, cannot support extinguishing the child's inheritance rights in a termination of parental rights proceeding, which is a proceeding that by its very nature presupposes the existence of an identified parent. One could argue, however, that extinguishing the inheritance rights of these children simplifies and expedites the process of estate administration in another way. If parental rights have been terminated, the argument would go, it is likely that contact between the child and the parent will be severed. Therefore, when the parent dies, the child may be unlocatable by, or even unknown to, the administrator of the estate, particularly if the parent dies many years after the termination proceeding.

The argument that extinguishing the inheritance rights of all children of terminated parents is justified by a need to simplify and expedite the estate administration process is unpersuasive. Certainly, some children of terminated parents may be less easily identified and located after the death of the parent (especially a death that occurs many years after the termination) than most children of parents whose legal relationship with their children was not severed. It is far from certain, however, that all (or even most) children of terminated parents will be unknown to the estate administrator. Estates are likely to be administered by relatives of the decedent, who are also relatives of the terminated child and thus likely to be aware at least of the child's existence. To the extent that the child is unlocatable, which is more likely, statutory provisions for notice by publication and statutes of limitations applicable to probate proceedings generally can protect the estate administration process against this limited category of unlocatable heirs in a satisfactory and much less draconian manner.[130]

Using DNA to Help Resolve Post-death Paternity Cases, 8 ALB. L.J. SCI. & TECH. 151 (1997).

128. *See* Brashier, *supra* note 49, at 113-42.

129. *Id.*

130. *See, e.g.*, Little v. Smith, 943 S.W.2d 414 (Tex. 1997).

IV. EXTINGUISHING THE INHERITANCE RIGHTS OF THE CHILD AFTER TPR—IS IT CONSTITUTIONAL?

Because of the weakness of most of the rationales underlying the common law rule that treated non-marital children as "filius nullius," the rule has been of diminishing vigor for many years. By the early twentieth century, in fact, non-marital children inherited from their mothers in nearly all U.S. jurisdictions.[131] Non-marital children can now inherit from their fathers, as well, although in many states their right to inherit from their fathers is conditioned on the child establishing paternity.[132] Much of the change in the right of non-marital children to inherit from their biological fathers has been driven by a series of United States Supreme Court decisions in which legal disabilities imposed on the children of non-marital fathers were challenged on equal protection grounds. As we will see, this series of illegitimacy cases established that classifications based on illegitimacy are subject to intermediate scrutiny when challenged on equal protection grounds. In the most significant of these cases for our purposes, *Trimble v. Gordon*,[133] the Court struck down a statute that precluded inheritance from their fathers by illegitimate children.[134] This Part will provide an overview of the illegitimacy cases and then suggest that TPR statutes that extinguish the right of children to inherit from their terminated parents may similarly violate the Equal Protection Clause.

A. The Illegitimacy Cases—The History of Constitutional Challenges to Discrimination Against Non-marital Children

The Court began to critically scrutinize classifications based on illegitimacy[135] in *Levy v. Louisiana*[136] in 1968 and *Weber v. Aetna Casualty & Surety Co.*[137] in 1972. In *Levy*, the Court struck down provisions of a Louisi-

131. MCGOVERN, JR. & KURTZ, *supra* note 79, at 85. *See also* Vernier & Churchill, *supra* note 104, at 216-17.

132. MCGOVERN, JR. & KURTZ, *supra* note 79, at 85-86.

133. 430 U.S. 762 (1977).

134. *Id.*

135. I use the term "illegitimate" rather than the currently preferred "non-marital children" in this segment of the discussion because that is the term used in the cases being discussed. *See supra* note 104 for a brief discussion of the evolution of the terminology used to denominate children who are born of unwed parents.

136. 391 U.S. 68 (1968).

137. 406 U.S. 164 (1972). Between *Levy* in 1968 and *Weber* in 1972, the Court decided another illegitimacy case, *Labine v. Vincent*, 401 U.S. 532 (1971), in which the Court upheld a Louisiana statute which allowed inheritance by an illegitimate child, even though acknowledged by the father, only when there were no other surviving descendants, ancestors, or collateral relations. *Labine*, however, appears to have been relegated to the status of an aberration in the development of law in the illegitimacy cases. The Court in *Trimble v. Gordon*, 430 U.S. 762 (1977), said of *Labine* that

ana wrongful death statute that denied recovery by unacknowledged illegitimate children for the death of a parent.[138] In *Weber*, the Court invalidated, again on equal protection grounds, a provision of the Louisiana workmen's compensation laws that denied unacknowledged illegitimate children the same recovery rights afforded to legitimate children.[139]

Several themes that run through the later illegitimacy cases first appear in *Levy* and *Weber*. Although the Court did not explicitly adopt a heightened level of scrutiny for classifications based on illegitimacy, it did engage in a more critical assessment of the fit between the classification and legitimate state interests than would seem warranted under the low level rational basis test.[140] These early illegitimacy cases also evince a suspicion of classifications that act to punish children for the wrongful acts of their parents, a suspicion that has subsisted throughout the Court's illegitimacy cases and that seems to underlie the enhanced scrutiny applied by the Court. The Court, in *Levy*, found that the statutory discrimination against illegitimate children violated the Equal Protection Clause in large part because "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother" and that "it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the

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it "is difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent." *Id.* at 767 n.12. Commentators, as well, have discounted the significance of *Labine*. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 812-13 (6th ed. 2000) ("[T]he opinion is almost indecipherable. It applies the equal protection analysis only in a footnote and spends the entire text on a discussion of why these laws should be beyond the reach of the equal protection guarantee, a position with no support in any case prior to or following this one.") (footnote omitted).

138. *Levy*, 391 U.S. 68.

139. *Weber*, 406 U.S. 164.

> For the purposes of recovery under workmen's compensation, Louisiana law defines children to include "only legitimate children, stepchildren, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204, and 205." Thus, legitimate children and acknowledged illegitimates may recover on an equal basis. Unacknowledged illegitimate children, however, are relegated to the lesser statute of "other dependents" under § 1232(8) of the workmen's compensation statute and may recover only if there are not enough surviving dependents in the preceding classifications to exhaust the maximum allowable benefits.

Id. at 167-68 (footnotes omitted). The decedent's four legitimate children received the maximum allowable compensation, leaving nothing for the decedent's two illegitimate children. *Id.* at 167.

140. *See* NOWAK & ROTUNDA, *supra* note 137, at 810 ("In a series of decisions since 1968 [referring to *Levy*] the Court has employed a standard of review that must be implied from its rulings.").

harm that was done the mother."[141] That concern was evidenced in *Weber* as well, when the Court criticized the illogic and injustice of imposing on illegitimate children the societal disapproval of the illicit liaisons of their parents.[142]

Another theme that recurs throughout later illegitimacy cases first appears in *Weber*—the Court's impatience with statutes that provide no mechanism for the child to avoid the burdens imposed by her status as illegitimate.[143] That theme became apparent in the flurry of Supreme Court decisions addressing illegitimacy that followed close on the heels of *Weber*. In *Gomez v. Perez*,[144] decided the year after *Weber*, the Court struck down on equal protection grounds Texas laws that imposed a duty on fathers to support their legitimate children but denied to illegitimate children a judicially enforceable right to paternal support.[145] The Court acknowledged the existence of proof of paternity problems, but concluded that those problems cannot "be made into an *impenetrable barrier* that works to shield otherwise invidious discrimination."[146] In *New Jersey Welfare Rights Organization v. Cahill*,[147] also decided in 1973, the Court held that provisions of the New Jersey Assistance to Families of the Working Poor program that "operate[d] *almost invariably* to deny benefits to illegitimate children while granting benefits to those children who are legitimate"[148] violated the Equal Protection Clause.[149]

The Court then decided two cases in which provisions of the Social Security Act that discriminated against illegitimate children were challenged. These cases, as well, evince the Court's continuing concern with statutes that

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141. *Levy*, 391 U.S. at 72 (footnotes omitted).

142. *Weber*, 406 U.S. at 175.

143. The Louisiana workmen's compensation law advantaged legitimate children and acknowledged illegitimates over unacknowledged illegitimates. *Id.* at 167-68. As the Court noted, the Louisiana law provided no mechanism that would have allowed the affected children to change their status from unacknowledged to acknowledge. *Id.* at 171. "Under Louisiana law [the father] could not have acknowledged his illegitimate children even had he desired to do so. The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them." *Id.* (footnotes omitted).

144. 409 U.S. 535 (1973) (per curiam).

145. *Id.*

> The Court of Civil Appeals has held in this case that nowhere in this elaborate statutory scheme does the State recognize any enforceable duty on the part of the biological father to support his illegitimate children and that, absent a statutory duty to support, the controlling law is the Texas common-law rule that illegitimate children, unlike legitimate children, have no legal right to support from their fathers.

Id. at 536-37.

146. *Id.* at 538 (emphasis added).

147. 411 U.S. 619 (1973) (per curiam).

148. *Id.* at 619-20 (emphasis added).

149. *Id.* at 621.

absolutely or conclusively deny benefits to illegitimate children. In *Jimenez v. Weinberger*,[150] the Court held that provisions of the Social Security scheme that denied benefits to some illegitimate children of disabled parents, but provided benefits to legitimate children and other categories of illegitimate children[151] violated equal protection guarantees of the Due Process Clause of the Fifth Amendment. The Court was clearly troubled by the fact that those illegitimate children who were denied benefits were denied "any opportunity . . . to establish their 'claim' to support and, hence, their right to eligibility."[152] While acknowledging the government's interest in preventing spurious claims, the Court concluded that it could not accept

> that the *blanket and conclusive* exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to *conclusively* deny them an opportunity to establish their dependency and their right to insurance benefits.[153]

In contrast, in *Mathews v. Lucas*,[154] decided two years later, the Court upheld provisions of the Social Security Act "that condition[ed] the eligibility of certain illegitimate children for a surviving child's insurance benefits upon a showing that the deceased wage earner was the claimant child's parent and, at the time of his death, was living with the child or was contributing to his support" while affording a presumption of dependency to legitimate children and to some categories of illegitimate children.[155] The Court distinguished

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150. 417 U.S. 628 (1974).

151. *Id.* at 635-36 ("[A]fterborn illegitimate children are divided into two subclassifications under this statute. One subclass is made up of those (a) who can inherit under state intestacy laws, or (b) who are legitimated under state law, or (c) who are illegitimate only because of some formal defect in their parents' ceremonial marriage. These children are deemed entitled to receive benefits under the Act without any showing that they are in fact dependent upon their disabled parent. The second subclassification of afterborn illegitimate children includes those who are conclusively denied benefits because they do not fall within one of the foregoing categories and are not entitled to receive insurance benefits under any other provision of the Act.").

152. *Id.* at 635.

153. *Id.* at 636 (emphasis added).

154. 427 U.S. 495 (1976).

155. *Id.* at 497.

> A child is considered dependent for this purpose if the insured father was living with or contributing to the child's support at the time of death. Certain children, however, are relieved of the burden of such individualized proof of dependency. Unless the child has been adopted by some other individual, a child who is legitimate, or a child who would be entitled to inherit personal property from the insured parent's estate under the applicable state intestacy law, is considered to have been dependent at the time of

Jimenez and earlier illegitimacy cases because "this *conclusiveness* in denying benefits to some classes of afterborn illegitimate children . . . is absent here, for, as we have noted, any otherwise eligible child may qualify for survivorship benefits by showing contribution to support, or cohabitation, at the time of death."[156]

The two most significant cases for our purpose (because they deal expressly with inheritance rights) were *Trimble v. Gordon*[157] and *Lalli v. Lalli*,[158] decided in 1977 and 1978 respectively. In *Trimble*, the illegitimate daughter of an intestate father challenged the constitutionality of a provision of the Illinois Probate Act which allowed illegitimate children to inherit only from their mothers, while legitimate children were able to inherit from both parents.[159] Illegitimate children could inherit from their fathers, however, if the father and mother married and the father acknowledged the child, thereby legitimizing the child.[160] The Court struck down the Illinois statute as violating the Equal Protection Clause.[161]

The level of scrutiny applied by the *Trimble* Court was not made explicit in the opinion. The Court declined to declare classifications based on illegitimacy "suspect," which would trigger strict scrutiny, but rather required that the "'statutory classification bear some rational relationship to a legitimate state purpose.'"[162] That language, taken alone, would seem to suggest that the Court was poised to apply rational basis scrutiny, but that was not the case.

> the parent's death. Even lacking this relationship under state law, a child, unless adopted by some other individual, is entitled to a presumption of dependency if the decedent, before death, (a) had gone through a marriage ceremony with the other parent, resulting in a purported marriage between them which, but for a nonobvious legal defect, would have been valid, or (b) in writing had acknowledged the child to be his, or (c) had been decreed by a court to be the child's father, or (d) had been ordered by a court to support the child because the child was his.

Id. at 498-99.

156. *Id.* at 512 (emphasis added).

157. 430 U.S. 762 (1977).

158. 439 U.S. 259 (1978).

159. *Trimble*, 430 U.S. at 763-64. The Illinois statute provided that

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

Id. at 764-65 (quoting ILL. REV. STAT. C.3, § 12 (1973) (current version at 755 ILL. COMP. STAT. ANN. 5/2-2 (West 1992 & Supp. 2004)).

160. *Id.* at 765 (citing ILL. REV. STAT. C.3, § 12).

161. *Id.* at 776.

162. *Id.* at 766-67 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972)).

The Court immediately went on to note that "[i]n this context, the standard just stated is a minimum; the Court sometimes requires more."[163] While recognizing that classifications on the basis of illegitimacy do "fall in a 'realm of less than strictest scrutiny,'"[164] the Court made clear that the appropriate level of scrutiny was "'not a toothless one.'"[165] The *Trimble* court did not use the term "intermediate scrutiny" to describe the level of review it applied, but later Court decisions have made clear that classifications based on illegitimacy, like those based on gender, do warrant an intermediate level of scrutiny between the strict scrutiny required of classifications based on race or national origin or those affecting fundamental rights and the lowest level of scrutiny, a rational relationship to a legitimate governmental purpose, applicable to all other statutory classifications.[166]

The Illinois Supreme Court, in upholding the statute, had held that the act was supported by two important state interests: "'promotion of [legitimate] family relationships'"[167] and "'establish[ing] a method of property disposition.'"[168] The United States Supreme Court, however, concluded that neither interest sustained the statute. The Court made short shrift of the first interest. While the Court acknowledged the "appropriateness of Illinois' concern with the family unit,"[169] it concluded that "the difference in the rights of illegitimate children in the estates of their mothers and their fathers appears to be unrelated to the purpose of promoting family relationships."[170] The Court's impatience with statutes that punish innocent children for the wrongdoing of their parents, expressed earlier in *Levy*[171] and *Weber*,[172] is again evident throughout this portion of the opinion. The Court noted that it previously had "expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on

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163. *Id.* at 767.

164. *Id.* (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

165. *Id.* (quoting *Mathews*, 427 U.S. at 510)).

166. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

> This standard of intermediate scrutiny, which falls between the rational relationship test and the strict scrutiny test in terms of the strictness of the judicial review of classification, was not formally adopted for illegitimacy classifications until 1988. Nevertheless, the Supreme Court's pre-1988 decisions are consistent with this form of intermediate standard of review.

NOWAK & ROTUNDA, *supra* note 137, at 807 (footnote omitted).

167. *Trimble*, 430 U.S. at 768 (quoting *In re* Estate of Karas, 329 N.E.2d 234, 238 (Ill. 1975)) (alteration in original).

168. *Id.* at 770 (quoting *In re Estate of Karas*, 329 N.E.2d at 238) (alteration in original).

169. *Id.* at 769.

170. *Id.* at 768 n.13.

171. *See supra* text accompanying note 141.

172. *See supra* text accompanying note 142.

the children born of their illegitimate relationships"[173] and that "parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status."[174] In making this point, the Court quoted at some length language from *Weber* highlighting the illogic and injustice of imposing disabilities on illegitimate children because of the misconduct of their parents.[175]

The Court agreed that the second interest articulated by the Illinois Supreme Court, establishing a method of property disposition, was substantial and acknowledged that the "serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."[176] The Court also acknowledged that "judicial deference is appropriate when the challenged statute involves the 'substantial state interest in providing for "the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents."'"[177] However, the Court qualified that deference, stating that "there is a point beyond which such deference cannot justify discrimination" and that "statutes involving the disposition of property at death are not immunized from equal protection scrutiny."[178] Despite the acknowledged importance of the state interest in the disposition of property at death, the Court required that the statute be "'carefully tuned to alternative considerations,'"[179] a requirement unlikely to be applied by a court utilizing rational basis scrutiny. The Court concluded that the state's rationale failed to support the statute because "[d]ifficulties of proving paternity in some situations do not justify the *total statutory disinheritance* of illegitimate children whose fathers die intestate."[180] The Illinois court was criticized for failing to recognize "the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity."[181] The inheritance rights of "at least some significant categories of illegitimate children of intestate men"[182] can be protected "without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[183] Thus, the Illinois statute

173. *Trimble*, 430 U.S. at 769.

174. *Id.* at 770.

175. *Id.* at 770-71.

176. *Id.* at 770.

177. *Id.* at 767 n.12 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972) (quoting Labine v. Vincent (Succession of Vincent), 229 So. 2d 449, 452 (La. Ct. App. 1969), *aff'd*, 401 U.S. 532 (1971))).

178. *Id.*

179. *Id.* at 772 (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976)).

180. *Id.* (emphasis added).

181. *Id.* at 770-71.

182. *Id.* at 771.

183. *Id.*

failed constitutional muster "[b]ecause it excludes those categories of illegitimate children unnecessarily."[184] Although the Court did not use the term "overinclusive," it was clearly focusing on the overinclusiveness of the Illinois statute's disinheritance of illegitimate children.

The *Trimble* decision seemed to suggest that while a complete or near complete prohibition on paternal inheritance by illegitimate children was unconstitutional, more tailored restrictions on the ability of illegitimate children to inherit from their fathers might survive even the heightened scrutiny applied in *Trimble.* That supposition was borne out the following year by *Lalli v. Lalli*,[185] which challenged on equal protection grounds the constitutionality of a New York statute that provided that illegitimate children inherited from their mothers but inherited from their fathers only if a court determination of paternity had been made during the lifetime of the father.[186] The Illinois statute struck down in *Trimble* and the New York statute challenged in *Lalli* were indeed quite different in scope. The Illinois statute had made both "legitimation of the child through the intermarriage of the parents" and "the father's acknowledgment of paternity" absolute conditions if the child was to qualify as an heir of the natural father[187] and thus "effected a *total statutory disinheritance* of children born out of wedlock who were not legitimated by the subsequent marriage of their parents."[188] In contrast, the New York statute treated the subsequent marital status of the parents as immaterial and imposed only an "evidentiary" requirement that the paternity of the father

184. *Id.*

185. 439 U.S. 259 (1978).

186. The New York statutes provided that:

> (a) For the purposes of this article: (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred. (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child. (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2). (4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order. (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Id. at 261 n.2 (quoting N.Y. EST. POWERS & TRUSTS § 4-1.2 (McKinney 1967)).

187. *Id.* at 266.

188. *Id.* at 273 (emphasis added).

be judicially determined before the father's death.[189] The Court concluded that this requirement did "bear an evident and substantial relation"[190] to the state interest in providing "for the just and orderly disposition of property at death."[191] As the Court noted, proof of paternity, when the non-marital father might well not be a part of the child's family, is subject to more uncertainties than is proof of maternity[192] and the state's interest in an orderly and accurate procedure for distributing the assets of decedents is furthered by the requirement that paternity be determined during the father's lifetime, when the father is available to provide evidence and challenge untrue allegations of paternity.[193] The New York statute, then, did not violate the Equal Protection Clause because "the requirement imposed by [the New York statute] on illegitimate children who would inherit from their fathers is substantially related to the important state interests the statute is intended to promote"[194] in contrast to the Illinois statute, which "was far in excess of its justifiable purposes."[195] The constitutionally significant distinction between the Illinois statute that was struck down in *Trimble* and the New York statute that was upheld in *Lalli* quite clearly seems to be that the Illinois statute imposed an absolute, blanket bar on inheritance by illegitimate children while the New York statute was more narrowly tailored.

Both *Trimble* and *Lalli*, then, confirm that statutes that limit inheritance rights on the basis of classifications based on illegitimacy must be "substantially related to the important state interests the statute is intended to promote"[196] and that the "just and orderly disposition of property at death"[197] is an important state interest. While the *Lalli* decision does not clearly establish the extent to which proof of paternity requirements may be imposed on illegitimate children without overstepping the restraints of the Equal Protection Clause, it is consistent with the clear message of *Trimble* that statutes that impose blanket disinheritance on illegitimates (i.e., statutes that provide no mechanism to allow illegitimates to establish their claim of inheritance rights) are constitutionally infirm.

Trimble and *Lalli* were the last Supreme Court decisions to deal directly with the inheritance rights of non-marital children.[198] They were followed,

189. *Id.* at 267.
190. *Id.* at 268.
191. *Id.*
192. *Id.* at 268-69.
193. *Id.* at 271-72.
194. *Id.* at 275-76.
195. *Id.* at 273.
196. *Id.* at 275-76.
197. *Id.* at 268.
198. With one exception—the Court held in 1986, in *Reed v. Campbell*, 476 U.S. 852 (1986), that *Trimble* applied retroactively and, therefore, a Texas statute that "prohibited an illegitimate child from inheriting from [the child's] father unless [the child's] parents had subsequently married," *id.* at 853, was invalidly applied to the

however, by a series of three cases that addressed the constitutionality of state statutes that imposed time limitations on the ability of illegitimate children to bring paternity actions as a prerequisite to seeking support from their fathers. In *Mills v. Habluetzel*,[199] the Court struck down a Texas statute that required that suits by illegitimate children to establish paternity be brought before the child reached one year of age. The Court recognized the state's interest in avoiding stale or fraudulent claims, but concluded that allowing only one year in which to bring paternity claims did not provide illegitimate children "an adequate opportunity to obtain support."[200] Shortly thereafter, in *Pickett v. Brown*,[201] the Court stuck down a Tennessee statute that imposed a two-year statute of limitations on paternity claims brought by some illegitimate children. Again, the Court concluded that the allowable time period did not "provide illegitimate children with 'an adequate opportunity to obtain support,'"[202] but rather "amounts to a restriction effectively extinguishing the support rights of illegitimate children that cannot be justified by the problems of proof surrounding paternity actions."[203] Finally, in *Clark v. Jeter*,[204] the Court struck down a Pennsylvania statute that required that illegitimate children bring paternity suits within six years of the child's birth. While again questioning whether the allowable time period was sufficient to provide a reasonable opportunity for the child to assert a claim, the Court rested its decision on the absence of a substantial relationship between the six year period and the state's interest in avoiding stale or fraudulent claims.[205] The number of circumstances in the Pennsylvania scheme that did allow paternity to be litigated more than six years after the birth of an illegitimate child[206] belied the state's claim that the six year period was substantially related to the prevention of fraudulent or stale claims.[207] In *Clark*, the Court for the first time explicitly acknowledged that classifications based on illegitimacy are

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inheritance rights of a child whose father had died before *Trimble* was decided, *id.* at 856.

199. 456 U.S. 91 (1982).

200. *Id.* at 99-100.

201. 462 U.S. 1 (1983).

202. *Id.* at 13 (quoting *Mills*, 456 U.S. at 100).

203. *Id.*

204. 486 U.S. 456 (1988).

205. *Id.* at 463-64.

206. *Id.* at 464 ("In a number of circumstances, Pennsylvania permits the issue of paternity to be litigated more than six years after the birth of an illegitimate child. The statute itself permits a suit to be brought more than six years after the child's birth if it is brought within two years of a support payment made by the father. And in other types of suits, Pennsylvania places no limits on when the issue of paternity may be litigated. For example, the intestacy statute permits a child born out of wedlock to establish paternity as long as 'there is clear and convincing evidence that the man was the father of the child.' Likewise, no statute of limitations applies to a father's action to establish paternity.") (citation omitted).

207. *Id.*

subject to intermediate scrutiny, requiring that the statutory classification "be substantially related to an important governmental objective."[208]

Three themes emerge from the illegitimacy cases. First, it is now clear that classifications based on illegitimacy subjected to equal protection challenges will be given intermediate scrutiny.[209] It is clear as well that this intermediate scrutiny is indeed "'not . . . toothless,"[210] as equal protection challenges to illegitimacy-based classifications have succeeded in the Supreme Court in the great majority of cases.[211] Second, the Court's suspicion of classifications based on illegitimacy and its decision to apply heightened scrutiny to them is rooted to a substantial degree in the notion, clearly articulated in *Weber* and frequently repeated thereafter, that it is both unfair and illogical to impose burdens on children because of the misconduct of their parents. And third, statutes that impose blanket disadvantages on illegitimate children, without providing some reasonable mechanism to avoid those disadvantages, almost certainly do not bear the substantial relationship to an important governmental interest test required under intermediate scrutiny.

B. The Constitutionality of Disinheriting Children in Termination of Parental Rights Proceedings

Are Type 2 termination of parental rights statutes (and Type 3 statutes that are interpreted to bar inheritance by children of terminated parents) subject to equal protection challenges in the same way as statutes (like the statute struck down in *Trimble*) that excessively restrict the inheritance rights of children from their non-marital fathers? We must ask first whether these statutes discriminate in the sense that they disadvantage one group of children (children whose parents have been terminated but who have not been subsequently adopted) over other children (children whose parents have not been terminated or children who have been adopted). It would appear so. Children whose parents have not been terminated may inherit from and through their parents, subject only to reasonable limitations that may be imposed on their right to inherit from non-marital fathers.[212] Adopted children can inherit from their adoptive parents, and usually they can inherit from their adoptive parents kin as well.[213] In some instances, adopted children may also be able to inherit from their natural parents and their kin.[214] In contrast, in jurisdictions with Type 2 statutes, or with Type 3 statutes that are interpreted to cut off all

208. *Id.* at 461.

209. *See id.*; *see also* NOWAK & ROTUNDA, *supra* note 137, at 807.

210. Trimble v. Gordon, 430 U.S. 762, 767 (1977) (quoting Mathews v. Lucas, 427 U.S. 495, 510 1976)).

211. *See* cases discussed *supra* this Section.

212. *See supra* text accompanying note 132.

213. *See supra* text accompanying notes 90-91.

214. *See supra* text accompanying note 93.

rights (including inheritance) of both parent and child, children cannot inherit from their terminated parent or parents and likely cannot inherit from their natural parents' kin either. Like the Illinois statute struck down in *Trimble*, these TPR statutes impose a "total statutory disinheritance" on the affected children. These statutes, then, discriminate against children of terminated parents in a very significant way.

But most statutes, of course, discriminate in the sense that they classify people and treat them differently because of that classification. Whether a classification violates the Equal Protection Clause depends in large part on the level of judicial scrutiny to which it is subjected.[215] What level of scrutiny, then, should be applied to TPR statutes that disinherit children? As the classification created by the TPR statues is not based on race and does not impact fundamental rights, it would not be subjected to strict scrutiny. Intermediate scrutiny, which requires that "a statutory classification must be substantially related to an important governmental objective," [216] has been applied primarily to classifications based on gender[217] or, as we have seen, on illegitimacy.[218] Should TPR statutes that disinherit children be subjected to the intermediate scrutiny applied in the illegitimacy cases, such as *Trimble?* To answer those questions, we must consider the rationale for applying in-

215. As Professors Nowak and Rotunda put it in their treatise on constitutional law: "the ultimate conclusion as to whether a classification meets the equal protection guarantee in large measure depends upon the degree of independent review exercised by the judiciary over the legislative line-drawing in the establishment of the classification." NOWAK & ROTUNDA, *supra* note 137, at 638. As Justice Scalia somewhat more pointedly characterized the matter in his dissenting opinion in *United States v. Virginia*,

> our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: 'rational basis' scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.

518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

216. Clark v. Jeter, 486 U.S. 456, 461 (1988). Again, Justice Scalia describes the intermediate scrutiny test somewhat more caustically in his *United States v. Virginia* dissent: "We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice." *Virginia*, 518 U.S. at 568 (Scalia, J., dissenting).

217. Some commentators have suggested that the Court has in fact applied an enhanced intermediate scrutiny standard of review to gender discrimination cases, noting the requirement expressed in Justice Ginsburg's opinion in *United States v. Virginia*, that the state demonstrate an "exceedingly persuasive justification" for its gender discrmination at the Virginia Military Institute. *Virginia*, 518 U.S. at 534. *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002).

218. *See Clark*, 486 U.S. 456.

termediate scrutiny in illegitimacy cases and determine whether those rationales apply to termination of parental rights cases.

Why does illegitimacy warrant intermediate scrutiny? The Court has not provided a satisfying answer to that question. After twenty years of deciding equal protection challenges to classifications based on illegitimacy, the Court for the first time explicitly acknowledged that intermediate scrutiny applied to statutes that discriminate on the basis of illegitimacy in 1988 in *Clark*.[219] The *Clark* decision did not explain why intermediate scrutiny was the appropriate standard of review, but rather simply cited *Mills* and *Mathews* as examples of prior cases in which intermediate scrutiny had been applied to illegitimacy[220] (although, as noted above, the term "intermediate scrutiny" was not used in either case). Neither *Mathews* nor *Mills*, however, provides much additional insight into the rationale for applying intermediate scrutiny to illegitimacy.

In *Mathews*, the Court explicitly discussed the appropriate level of scrutiny to be applied to illegitimacy classifications.[221] That discussion, however, consisted primarily of an explanation of what level of scrutiny the Court was not applying—strict scrutiny—rather than a clear articulation of what level of scrutiny it was applying. The Court disagreed with the district court's conclusion that classifications based on illegitimacy required "the judicial scrutiny traditionally devoted to cases involving discrimination along lines of race or national origin."[222] The Court acknowledged that "the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."[223] However, while illegitimacy has historically imposed burdens on illegitimate children, discrimination against illegitimate children "has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."[224] The Court suggested that the distinction between race-based discrimination and discrimination based on

219. *Id.* at 461 ("In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.") (citations omitted). Some commentators have argued that, in fact, the Court applies more than the traditionally enumerated three standards of review. *See* Kelso, *supra* note 217.

220. *Clark*, 486 U.S. at 461.

221. Mathews v. Lucas, 427 U.S. 495, 504-06 (1976).

222. *Id.* at 504 (footnotes omitted).

223. *Id.* at 505.

224. *Id.* at 506.

illegitimacy may, in part, rest on the fact that "illegitimacy does not carry an obvious badge, as race or sex do."[225]

The *Clark* Court's citation of *Mathews* in support of its announcement that intermediate scrutiny was applicable to classifications based on illegitimacy seems a bit puzzling. The *Clark* opinion explicitly noted that intermediate scrutiny "applied to discriminatory classifications based on sex or illegitimacy,"[226] a conclusion which was followed by citations to both illegitimacy cases and gender discrimination cases,[227] suggesting the equivalence of these classifications. In the *Mathews* decision itself, however, the Court had drawn significant distinctions between classifications based on illegitimacy and those based on sex, emphasizing that illegitimates do not carry an obvious badge and that historic discrimination against illegitimates has not been of the same magnitude as discrimination against women.[228]

The *Mills* decision provides even less guidance. Again, the Court never explicitly identifies the level of scrutiny it is applying, noting only that "[s]uch restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest," citing *Lalli*, *Trimble*, and *Mathews*.[229]

While the Court, then, has made clear that classifications based on illegitimacy warrant intermediate scrutiny, it has not made clear *why* intermediate scrutiny is appropriate. In the absence of more explicit guidance from the Court, what rationales can we infer from the illegitimacy cases to explain the application of intermediate scrutiny to classifications based on illegitimacy? In other contexts, such as race and gender, the Court has focused on the immutability of the characteristic as a rationale for heightened scrutiny. [230] The Court suggests something like that in *Mathews*, when it notes that "the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual."[231] As the Court also noted in *Mathews*, however, illegitimate children do not bear an obvious badge reflecting their status, as racial minorities,

225. *Id.*

226. Clark v. Jeter, 486 U.S. 456, 461 (1988).

227. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that the state's policy of excluding males from a state supported school of nursing was unconstitutional); Mills v. Habluetzel, 456 U.S. 91 (1982) (invalidating a Texas statute that required that suits by illegitimate children to establish paternity be brought before the child reached one year of age); Craig v. Boren, 429 U.S. 190 (1976) (invalidating an Oklahoma statute that differentiated on the base of gender the age at which 3.2 percent beer could be legally purchased); *Mathews*, 427 U.S. 495 (upholding provisions of the Social Security Act that restricted eligibility of certain illegitimate children for surviving child's insurance benefits).

228. *Mathews*, 427 U.S. at 506.

229. *Mills*, 456 U.S. at 99.

230. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

231. *Mathews*, 427 U.S. at 505.

or, for that matter, women, do.[232] Unlike race or gender, illegitimacy is not a physical characteristic, but a purely legal one.

A history of discrimination has also supported heightened scrutiny in other contexts, again most notably gender.[233] The existence of a history of discrimination has also received sporadic note by the Court as a basis for its special concern with illegitimate children.[234] As the Court noted in *Mathews*, however, the historical discrimination against illegitimates, while very real, has been limited in scope (primarily related to inheritance rights,[235] governmental benefits,[236] and the right to parental support[237]), in contrast to the pervasive, systemic discrimination faced by women (or, for that matter, by racial minorities).

Immutability and historical discrimination, then, seem at most to be secondary rationales for the application of intermediate scrutiny to classifications based on illegitimacy. Something more fundamental must underlie the Courts designation of illegitimacy as a classification that warrants intermediate scrutiny. What is it? The single most prevalent theme that recurs throughout the illegitimacy cases is the Court's suspicion of classifications that impose disadvantages on illegitimate children because of the misconduct of their parents. That concern, as we have seen, was clearly expressed early on in *Weber*. The language used by the *Weber* Court bears quoting at length, as it clearly and forcefully articulates the Court's concern with classifications that punish children for the actions of their parents:

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

232. *Id.* at 506.

233. *See* United States v. Virginia, 518 U.S. 515, 531 (1996); *Frontiero*, 411 U.S. at 684.

234. *See* Pickett v. Brown, 462 U.S. 1, 8 (1983) ("In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny.").

235. *See* Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977).

236. *See Mathews*, 427 U.S. 495; Jimenez v. Weinberger, 417 U.S. 628 (1974); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

237. *See* Clark v. Jeter, 486 U.S. 456 (1988); *Pickett*, 462 U.S. 1; Mills v. Habluetzel, 456 U.S. 91 (1982); Gomez v. Perez, 409 U.S. 535 (1973).

> the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.[238]

This passage has been quoted repeatedly in subsequent illegitimacy cases. The passage, in whole or in part, is found in *New Jersey Welfare Rights Organization*,[239] *Jimenez*,[240] *Mathews*,[241] *Trimble*,[242] *Mills*,[243] *Pickett*,[244] *Reed*,[245] and *Clark*.[246] The Court acknowledged the central role of this concern with punishment of children for the wrongs of their parents in *Reed*, noting the "rather clear distinction that has emerged from our cases considering the constitutionality of statutory provisions that impose special burdens on illegitimate children. In these cases, we have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct."[247] This concern, first articulated in *Weber* and relied upon in later illegitimacy cases, more than any other possible factor (such as a history of discrimination or immutability) seems to capture the essence of the Court's special concern for illegitimate children.[248]

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238. *Weber*, 406 U.S. at 175-76 (footnotes omitted).
239. 411 U.S. at 620.
240. 417 U.S. at 632.
241. 427 U.S. at 505.
242. 430 U.S. 762, 769-70 (1977).
243. 456 U.S. 91, 101 n.8 (1982).
244. 462 U.S. 1, 7-8 (1983).
245. 476 U.S. 852, 855 n.5 (1986).
246. 486 U.S. 456, 461 (1988).
247. *Reed*, 476 U.S. at 854.
248. The Court's special concern for children who suffer governmentally imposed burdens because of the misdeeds of their parents is not limited to illegitimate children. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court struck down as violating the Equal Protection Clause a Texas law that denied free public education to undocumented children. The Court noted that:

> Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but

The question, then, is whether TPR statutes that bar inheritance by children from their biological parents should be subject to the same scrutiny as statutes, such as the Illinois statute struck down in *Trimble*, that bar inheritance by illegitimate children from their biological fathers. The plight of children who have lost the right to inherit from their parents or their parents' relatives solely as a result of their status as children of parents whose parental rights have been terminated seems strikingly similar to the status of illegitimate children prior to *Trimble* and seems therefore to warrant the same "special concern" of the Court and the heightened scrutiny that comes with that concern. Like illegitimate children, children of terminated parents are burdened by a classification caused by the wrongdoing or inadequacy of their parents, for which they have no responsibility. Like illegitimate children, children of terminated parents are in fact victims of their parents' behavior. Just as it is "illogical and unjust" (to use the words of *Weber*) to inflict governmental disabilities on illegitimate children who have already been disadvantaged by their parent's behavior, so it seems equally inappropriate for the state to add to the burdens of children of terminated parents—children who bear no responsibility for their status but are clearly disadvantaged, if not by the status itself, then by the circumstances that led to the status—in the absence of a substantial governmental interest.

If statutes that extinguish the inheritance rights of children of terminated parents were subjected to intermediate scrutiny, in the same way as statutes that discriminate against illegitimate children are, how would they fare? Governmental classifications that burden illegitimate children will survive equal protection challenges only if the statutory classification is "substantially related to an important governmental objective."[249] The Court clearly acknowledged in both *Trimble* and *Lalli* that the states have a significant interest in "safeguarding the accurate and orderly disposition of property at death."[250] The Illinois statute that barred illegitimate children from inheriting from their fathers was struck down by the *Trimble* Court because it was not substantially related to an important governmental objective. As the *Lalli* decision demonstrates, however, more narrowly tailored statutes that disinherit illegitimate

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> the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status."

Id. at 219-20 (emphasis added) (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)). The Court also noted that the challenged Texas law "is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control," *id.* at 220, and that the law "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status," *id.* at 223. Although the Court did not explicitly announce the level of scrutiny it was applying, commentators have concluded that the Court in fact applied intermediate scrutiny. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 747 (2d ed. 2002).

249. Clark v. Jeter, 486 U.S. 456, 461 (1988).

250. Lalli v. Lalli, 439 U.S. 259, 274 n.11 (1978).

children can meet that test if they are substantially related to the government's interest in the orderly disposition of a decedent's property. The New York statute challenged in *Lalli* survived intermediate scrutiny because its requirement that paternity be established during the lifetime of the father enhanced the accuracy of the property disposition process "by placing paternity disputes in a judicial forum during the lifetime of the father,"[251] where his "'availability . . . should be a substantial factor contributing to the reliability of the fact-finding process.'"[252]

Statutes that bar inheritance by children of terminated parents, however, are not "substantially related" to the state's interest in accurate, just, and orderly distribution of property in the same manner as the paternity proof requirements upheld in *Lalli*. The restrictions upheld in *Lalli* went to the need to determine paternity in a fair, timely, and accurate manner. While we may disagree about the strictness of any particular proof of paternity requirement, the underlying rationale for the existence of such requirements is clear and reasonable. Inheritance rights of a child are based on the parent-child relationship.[253] In the absence of certainty concerning the existence of a father-child relationship, it is difficult to make property dispositions that are based on that relationship in an accurate, fair, and timely manner.

Termination of parental rights statutes that extinguish the right of the child to inherit, however, are quite different from the proof of paternity requirements upheld in *Lalli*. The paternity requirements upheld in *Lalli* were designed to address the uncertainty of parental identity that frequently accompanies non-marital children. In contrast, there usually is no uncertainty as to the identity of the natural parents in TPR cases. In most termination cases, we know who the parents are, and we know that (at least at the commencement of the TPR proceeding) a parent-child relationship exists. The requirements upheld in the illegitimacy cases, then, are aimed at establishing certainty in the face of actual or presumed uncertainty about paternity—certainty that is necessary for the accurate and fair disposition of assets in an inheritance regime which bases inheritance rights primarily the existence of a parent-child relationship. The TPR statutes do not fulfill a similar function, as they disqualify children when there is no uncertainty as to their parentage.

But, as discussed above,[254] the state might argue that extinguishing the child's right to inherit from a terminated parent serves the state's broader interest in an accurate, just, and orderly distribution of decedents' property in another way—by eliminating as possible heirs children who, because their ties to the parent were severed, are more likely to be unknown to, or unlocatable by, the estate administrator. But would an assertion of that interest be

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251. *Id.* at 271.

252. *Id.* (quoting *In re* Estate of Lalli, 340 N.E.2d 721, 724 (N.Y. 1975), *vacated by* 431 U.S. 911 (1977)).

253. *See supra* text accompanying notes 80-87.

254. *See supra* text accompanying note 130.

sufficient to sustain a classification subject to intermediate scrutiny? The Court in *Trimble* acknowledged the importance of the state interest in the disposition of property at death and recognized that difficulties "of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."[255] Termination of parental rights statutes that disinherit the child, however, seem possessed of the very characteristic that proved fatal to the Illinois statute in *Trimble*—they impose a blanket prohibition on inheritance. The Illinois statute failed because "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children" inflicted by the statute.[256] Termination of parental rights statutes effect an automatic disinheritance of all children of terminated parents very much akin to the "total statutory disinheritance"[257] that the Court found constitutionally objectionable in *Trimble.* Termination statutes that disinherit the child do so in a blanket manner. Unlike the paternity proof requirement upheld in *Lalli,* the termination statutes provide no mechanism by which the child can establish a right to inherit from the terminated parent. As we have seen, statutes that imposed absolute or blanket disabilities on illegitimate children (i.e., statutes that provide no reasonable opportunity for the child to avoid the burdens imposed by her status as illegitimate) have consistently been stuck down.[258] If the Court similarly applies intermediate scrutiny to termination of parental rights statutes that impose blanket disinheritance on children, those statutes may be struck down as well.

If TPR statutes are subject to intermediate scrutiny, then, provisions that disinherit the children of terminated parents may well be vulnerable to equal protection challenges. Given the uncertainties inherent in equal protection jurisprudence, however, it is very hard to predict whether children of terminated parents will be recognized as a class warranting intermediate level scrutiny. The Court has been notably sparing in its selection of classifications subject to intermediate scrutiny—explicitly designating only gender and illegitimacy—and the Court has not demonstrated any eagerness to enlarge the list of quasi-suspect classes.[259] If the status of children whose parents' rights have been terminated is not sufficiently analogous to illegitimacy to trigger intermediate scrutiny, statutes that disinherit these children would be subject to the lowest level of scrutiny, "rational basis." How would termination of

255. Trimble v. Gordon, 430 U.S.762, 770 (1977).

256. *Id.* at 772.

257. *Id.*

258. *See* Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982); Trimble v. Gordon, 430 U.S. 762 (1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

259. *See* CHEMERINSKY, *supra* note 248, at 645-46.

parental rights statutes that disinherit children fare under this lower level of scrutiny?

If TPR statutes are subject to traditional rational basis scrutiny, requiring only a rational relationship to a legitimate state interest, they are likely to survive constitutional challenge. It is notoriously difficult to mount a successful challenge to a statutory classification that is subject to traditional rational basis scrutiny.[260] The standard is extraordinarily forgiving.[261] The existence of any plausible relationship between the classification and any conceivable justification, however hypothetical, will suffice.[262] In a challenge to TPR statutes, the disinheritance of children who may be more likely than other children to be unknown to or unlocatable by estate administrators would seem to be rationally related to the state's interest in the efficient administration of decedents' estates. That the classification is over-inclusive (because many children of terminated parents are known to and can be located by the estate administrator) or under-inclusive (because other categories of heirs may be unknown or difficult to locate) is unlikely to invalidate the governmental action. In traditional rational basis review, it does not matter that the challenged classification is far broader or narrower than necessary to achieve the government's purpose. Over-inclusiveness or under-inclusiveness is not fatal in the world of traditional rational basis review.[263]

However, rational basis scrutiny has sometimes appeared in a more rigorous variant. Perhaps the most prominent recent example in which a statutory classification subject to rational basis scrutiny was struck down is *City of Cleburne v. Cleburne Living Center*.[264] While the Court said it was applying

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260. *Id.*

261. *See* Heller v. Doe, 509 U.S. 312, 324 (1993) ("A statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'") (citations omitted). *See also* CHEMERINSKY, *supra* note 248, at 652.

262. *See* CHEMERINSKY, *supra* note 248, at 657; Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 359 (1999).

263. *See* CHEMERINSKY, *supra* note 248, at 659-60.

264. 473 U.S. 432 (1985). In *Cleburne*, a land use case, the City of Cleburne zoning ordinance required special use permits to locate "hospitals for the insane or feeble-minded" in the city's R-3 (Apartment House) district. *Id.* at 436 & n.3. The city denied a special use permit for a group home for the mentally retarded, which the city classified as a hospital for the feebleminded. *Id.* at 436-37. The Court of Appeals for the Fifth Circuit had subjected the ordinance to intermediate scrutiny because it viewed mental retardation as a quasi-suspect classification and had struck the ordinance down as violating the Equal Protection Clause. *Id.* at 438. The United States Supreme Court disagreed with the Fifth Circuit's characterization of mental retardation as a quasi-suspect classification. *Id.* at 442. The Court, therefore, required only that the challenged classification be "rationally related to a legitimate governmental purpose." *Id.* at 446. But, while nominally applying this low level rational basis test, the Court struck down the zoning ordinance requirement that homes for the mentally

rational basis scrutiny, it in fact scrutinized the government's justifications with a degree of rigor that is quite atypical of rational basis cases, seemingly discounting the strong presumption of constitutionality typically afforded legislative actions subject to rational basis scrutiny and requiring a better articulated justification than typically required.[265] Commentators have noted other cases in which the Court similarly appeared to apply rational basis scrutiny with atypical rigor.[266]

As the Court has not explicitly acknowledged the existence of heightened rational basis scrutiny, it is difficult to articulate the test with precision. When applying heightened rational basis scrutiny, the Court appears to inquire more seriously into the governmental purpose and to require "some real correlation between classification and purpose."[267] The Court is more inclined to require evidence on the record of the governmental purpose and is less likely to be satisfied with hypothetical rationales.[268] As is evidenced by *Cleburne*, the Court is likely to be troubled by significant over-inclusiveness or under-inclusiveness when applying heightened rational basis scrutiny, in clear contrast to its traditional rational basis approach.[269]

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retarded obtain a special use permit because it found no rational basis for believing that the proposed group home for the mentally retarded would harm the city's legitimate interests differently from any of the uses, such as "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders." *Id.* at 447-50. Justice Marshall, in his separate opinion, opined that "I cannot accept the Court's disclaimer that no 'more exacting standard' than ordinary rational-basis review is being applied," and noted that the city's "ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation," and that the Court had in fact subjected the ordinance to "heightened scrutiny." *Id.* at 456 (Marshall, J., concurring in part & dissenting in part). Subsequent commentators have generally agreed that the *Cleburne* Court applied something more rigorous than traditional rational basis review. Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 615 (1999-2000).

265. Saphire, *supra* note 264, at 612-13.

266. Farrell, *supra* note 262 (listing as cases applying rational basis scrutiny in equal protection cases in a manner that seemed to reflect heightened scrutiny, in addition to *Cleburne*: *Romer v. Evans*, 517 U.S. 620 (1996); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)).

267. Farrell, *supra* note 262, at 360.

268. *Id.*

269. The government had denied the plaintiff's special use permit for a group home for the mentally retarded in part because the home would be located in a flood plain. *Cleburne*, 473 U.S. at 449. The Court discounted the city's concern about flood

Would TPR statutes that disinherit children survive heightened rational basis scrutiny? The efficient administration of decedents' estates is quite clearly a justifiable—indeed even substantial—governmental goal.[270] It would be more difficult, however, for the government to establish that there is a real correlation between the disinheritance of all children of terminated parents and the governmental interest in efficient estate administration. While there is surely some relationship—heirs are likely to be more readily identified and located within intact families—the automatic disinheritance of *all* children of terminated parents is seriously over-inclusive. While some children of terminated parents may be difficult to locate, or even be unknown by estate administrators, many such children would be easily identified and located. Termination of parental rights effectively severs the legal relationship between the terminated parent and the child, but it can hardly be imagined that it extinguishes the emotional bond between the terminated parent (and the terminated parent's family) and the child. Families are unlikely to forget the existence of a grandchild or sibling simply because the parental rights of the child's parent were judicially terminated. It is from these families that the administrators of the decedent parent's estate are likely to be drawn. Statutes that disinherit children of terminated parents are not only over-inclusive, they are also under-inclusive. While some children of terminated parents may be difficult to locate during estate administration, so may other estranged relatives who are not subject to automatic disinheritance. If this *Cleburne* variant of rational basis scrutiny were applied to statutes that impose a blanket disinheritance of children of terminated parents, then, it would be difficult for the state to affirmatively establish the necessary relationship to an appropriate governmental purpose.

But would the Court apply heightened rational basis scrutiny to statutes that disinherit children of terminated parents? Again because the Court has not explicitly acknowledged that heightened rational basis scrutiny even exists, it has not made clear when such scrutiny might apply. Some have suggested that there simply is no pattern to be discerned. As one commentator has put it: "[The] search for an underlying principle that would explain the results in the heightened rationality cases appears to be unsuccessful. Rather, it appears that the Court, without explanation, decided in a particular case to

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safety because other similar facilities, such as nursing homes, sanitariums, and homes for the aged could be located in the flood plain without a special use permit. *Id.* Similarly, the Court discounted the city's reliance on concerns about the number of persons allowed to inhabit the group home by noting that, under the city's zoning ordinance, the same densities would be allowable for similar facilities, such as boarding houses, nursing homes, and fraternity houses. *Id.* at 449-50. These are the kinds of under-inclusiveness that would not typically raise concern under traditional rational basis scrutiny.

270. *See* Lalli v Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977).

use heightened rationality and thus the claim succeeded."[271] One aspect of the TPR statutes suggest that they might attract the Court's special attention. As discussed above, in the illegitimacy cases (and others) the Court has seemed to evince a particular sympathy for children who are subjected to disadvantage because of the misconduct of their parents.[272] That sympathy appeared to underlie the Court's designation of illegitimate children as a class worthy of intermediate scrutiny. Even if the Court declines to extend intermediate scrutiny to children of terminated parents, that same concern might at least instigate the application of heightened rational basis scrutiny.

V. CONCLUSION

In a number of states, termination of parental rights statutes (Type 2 statutes) explicitly provide that a termination order extinguishes the inheritance rights of the child. In an even greater number of states, the termination of parental rights statutes (Type 3 statutes), while not explicitly addressing inheritance rights, employ language that might well be interpreted to terminate not just the rights of the parent, but the rights of the child arising from the parent-child relationship as well. In some of these jurisdictions, the courts have directly held (or indirectly suggested) that such statutes also extinguish the inheritance rights of the child. In many states, then, children who have been rendered legal orphans because of the termination of parental rights of their parents risk losing not only their relationship with their biological parents, but their right to inherit from them as well.

Extinguishing the inheritance rights of children of terminated parents is unwarranted. While extinguishing the inheritance rights of the child may, to a very modest extent, enhance the efficiency of estate administration by foreclosing the possibility that children, as heirs, may be unknown or unlocatable when the estate of the parent is administered, it seems a substantial overreaction to mandate a blanket disinheritance of all children of terminated parents. Other, far less draconian mechanisms are available to address the problem of unknown or unlocatable heirs. Termination of parental rights statutes, the very purpose of which is to protect children, seem to operate quite perversely when they disinherit the very objects of their protection. Termination of parental rights statutes that disinherit children may be not only misconceived, they may be unconstitutional as well.

States with Type 2 statutes should amend their termination of parental rights statutes to explicitly provide that the right of the child to inherit from the parent survives termination, as Type 1 statutes do. The ideal termination of parental rights statute would make clear not only that the child's right to inherit *from* her biological parents continues until adoption, but that the child's right to inherit *through* the biological parents from the biological par-

271. Farrell, *supra* note 262, at 415.

272. *See supra* text accompanying notes 238-48.

ents' relatives is also preserved. A provision reading as follows would suffice: "A termination of parental rights shall not terminate the right of the child to inherit from or through the parent. The right of inheritance of the child shall be terminated only by a final order of adoption"[273]

States with Type 3 statutes should similarly amend their termination statutes. In the absence of legislative action, courts should interpret the effect of a termination order as narrowly as the statutory language allows in order to preserve the child's inheritance rights. Courts can follow the leads of the Rhode Island Supreme Court in *State v. Fritz*[274] and the West Virginia Supreme Court in *In re Stephen Tyler R.*[275] that have read termination statutes narrowly so as to preserve the child's right to support from the terminated parent. The termination of parental rights process is intended, above all, to protect children. That underlying goal should inform courts' interpretation of the effect of a termination order.

273. The language in my suggested statute is borrowed in part from Kansas Statute Annotated Section 38-1583(f) (2001) and District of Columbia Code Annotated Section 16-2361(a) (2001).

274. 801 A.2d 679 (R.I. 2002). *See supra* note 69.

275. 584 S.E.2d 581 (W. Va. 2003). *See supra* note 69.