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ANOTHER LOOK AT LOUISIANA SUCCESSION LAW: THE RAMIFICATIONS OF *Succession of Brown*

As a result of the recent Louisiana Supreme Court decision in *Succession of Brown*¹ which held article 919² of the Civil Code unconstitutional, the disparate treatment accorded persons deemed illegitimate under Louisiana succession law must be reformed in some significant manner.³ The inferior rights granted illegitimates include provisions governing the illegitimate's place in the estate of his parents, and in the estates of legitimate relations of the parents. Also of concern in this area are provisions relating to the rights of others in the estate of the illegitimate. The instant comment will discuss the probable or potential effect which *Brown* may have upon these areas of succession law,⁴ as well as its potential influence on other legitimate relations with regard to the rights of the illegitimate child. Changes are suggested which may be necessary to remove any constitutional deficiencies that exist in the successions scheme. Other desirable changes are noted—changes not constitutionally required, but nevertheless desirable if certain code mechanisms are to continue to operate properly in light of the *Brown* decision.⁵

Although the extent of reform is speculative, the constitutional overtones of *Brown* suffice to sound the alarm that, in many situations, the rights of the illegitimate in the law regulating successions must be no less than the rights of children of legitimate status.

Louisiana Framework

Legitimacy distinctions in the context of successions law may be traced to forces at work in the sources of the Louisiana Civil Code.

1. 388 So. 2d 1151 (La. 1980).

2. LA. CIV. CODE art. 919 provides: "Illegitimate children are called to the inheritance of their father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the state."

3. This comment treats primarily the subject of intestate successions, which was the focus of *Brown*. The *Brown* decision also affects certain provisions concerning testate successions; these effects are noted also.

4. *Brown* may have a broader effect than to revise succession law. For example, articles 216 through 244 of the Civil Code, dealing with paternal authority and the duties of parents toward their children (legitimate and illegitimate) and of the reciprocal duties owed the parents by their children, may have to be reconsidered. Article 256, dealing with tutorship of the illegitimate child, also should be reexamined.

5. See text at notes 114-19, *infra*.

Louisiana law is a pastiche of Spanish and French notions,⁶ which the redactors intertwined to create our present codal authority. Historically, the principal concept involved in the formulation of the legitimate/illegitimate dichotomy was the protection and encouragement of the family unit.⁷ Strong notions were visible in the law of Rome—the concept of *familia*, for example, of basic importance in Roman law, has evolved to become “predominant as [an element] of social order in the Louisiana Code”⁸ The illegitimate did not fit logically within the *familia* concept in Rome and was therefore excluded from the family unit. In the development of French and Spanish law, however, the moral aspects of illegitimacy began to militate against the illegitimate, and the preservation of “family values” became the primary focus of legitimacy distinctions.⁹ Domat articulated the reasoning: “Marriage being the only lawful way appointed for the propagation of mankind, it is but just to distinguish the condition of bastards from that of children lawfully begotten. And it is because of this distinction that the laws declare bastards incapable of succeeding to persons who die intestate”¹⁰ The civilian notion also prevailed that if the state were to force a family to share its patrimony with an illegitimate, the disintegration of the family as an efficient economic unit could result.¹¹ Thus legal, moral, and economic factors were all present in the history of legitimacy considerations.

Regarding the law of intestate successions as now provided in the Louisiana Civil Code, one should be concerned primarily with the inheritance rights granted illegitimate persons under these articles, as opposed to the rights accorded legitimates. The Civil Code

6. “It has been stated by eminent authority that Moreau Lislet and James Brown followed the first projet of the Code Napoleon in preparing the code of 1808.” Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280, 283 (1932).

“It has elsewhere been stated that the Code Commissioners . . . incorporated as well a part of the Spanish law that had become a rule of property in Louisiana.” *Id.* Although the Code Napoleon may have served as a model for the Code of 1808, “[s]uffice it to say here, that there are many differences between the Code Napoleon and the Louisiana Code of 1808 due to the incorporation of the Spanish law” *Id.*

7. This notion hails from Roman law, which weighed heavily on the formulation of both French and Spanish law. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 264, 266 (1970).

8. *Id.*

9. See Note, *All in the Family: Equal Protection and the Illegitimate Child in Louisiana Succession Law*, 38 LA. L. REV. 189 (1977).

10. 1 J. DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* 137 n.e. (Cushing ed. 1853).

11. Pascal, *Louisiana Succession and Related Laws and the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 46 TUL. L. REV. 167, 177 (1971). Professor Pascal notes that the scheme of discrimination, although not proper in our time and under our social conditions, may have been proper in 1808 and 1825. *Id.*

places fundamental importance upon the classification of offspring as "legitimate"¹² or "illegitimate."¹³ Although illegitimate children do not have the same legal rights as legitimate children, certain rights do exist in favor of the illegitimate.¹⁴ A survey of the salient Civil Code articles will serve to draw a clear distinction between the respective rights of the two classes.

Distinctions based on legitimacy or illegitimacy pervade the law of successions. Rudimentary provisions governing the rank of heirs in an intestate succession provide an example. Article 886 provides: "If there is no testament . . . the succession is then open in favor of the *legitimate* heirs . . ." This limitation excludes the illegitimate from the list of legal heirs in an intestate succession.¹⁵

Another area of discrimination concerns the concept of representation.¹⁶ Illegitimates have been denied this important right, though it does exist in favor of legitimate relations in two situations.¹⁷ Although this denial is not expressly included in the Code, Louisiana jurisprudence has unequivocally held that representation is not available in an irregular succession.¹⁸

12. LA. CIV. CODE art. 179 provides: "Legitimate children are those who are either born or conceived during marriage or who have been legitimated as provided hereafter."

13. LA. CIV. CODE art. 180 provides: "Illegitimate children are those who are conceived and born out of marriage."

14. Aside from the limited rights of inheritance granted illegitimates in articles 918, 919, and 923, articles 918 and 919 provide the payment of alimony to an illegitimate who is excluded from the estate. The exclusion is to be determined by articles 240 through 244.

15. The first class of heirs in an intestate succession is that of descendants. LA. CIV. CODE art. 902. In default of descendants, the deceased's siblings and parents share together in equal halves. If but one parent survives, only one-fourth is taken, and three-fourths goes to the siblings. LA. CIV. CODE arts. 903-04. If no parents survive, the siblings exclude all other relations. LA. CIV. CODE art. 912. Provision is made for a smaller share if a sibling be of the half blood. LA. CIV. CODE art. 913. In default of siblings and parents, the class of ascendants inherits, those of the closest relation excluding all others. LA. CIV. CODE arts. 905-07. In default of all classes mentioned previously, collateral relations inherit, those of the closest surviving generation excluding all others. LA. CIV. CODE art. 914. See text at notes 92-99, *infra*.

16. Representation is a fiction which allows a person to assume "the place, degree, and rights of the person represented." LA. CIV. CODE art. 894. This tool permits a person to assume a higher class of relation in the estate of the deceased—a rank higher than the party would possess without representation. Thus the party will share the estate with persons of rank equal to that of the represented party instead of being excluded by them. See text at notes 100-02, *infra*.

17. LA. CIV. CODE art. 895 states that "[r]epresentation takes place *ad infinitum* in the direct descending line." Representation also takes place "in favor of the children and descendants of the brothers and sisters of the deceased . . ." LA. CIV. CODE art. 897. Representation is available only in these two situations.

18. *Hawkins v. Williams*, 146 La. 529, 83 So. 796 (1920). The *Hawkins* court stated

The rules providing the rights of seizin¹⁹ in favor of the "legal heir" likewise do not operate in favor of the illegitimate. "Legal heir" refers to the succeeding heir in a legal succession. As already noted, legal successions are limited to the deceased's legitimate relations.²⁰

The concept of forced heirship²¹ also presents a situation in which the benefit favors legitimate persons but not illegitimate ones. Article 1493 speaks of a disposable portion which is dependent upon the number of "legitimate" children.²² A certain portion of the deceased's estate is required to go to the legitimate child or children. No such protection inures to the illegitimate child.

As to separate property of the parents, the acknowledged illegitimate,²³ under articles 918²⁴ and 919,²⁵ may succeed to the estate. In the case of the deceased mother, the acknowledged illegitimate succeeds only in default of legitimate descendants to the exclusion of all other legitimate relations. If the father is deceased, the ille-

that the reasons for denying representation to irregular successions are "very plain." These reasons consist of the fact that: 1) irregular heirs are not possessed of the right to seizin; and 2) the representation provisions are placed, physically, in the chapter "Of Legal Successions," and are not mentioned in the chapter "Of Irregular Successions."

19. LA. CIV. CODE arts. 940-46. See text at notes 103-07, *infra*.

20. See text at note 15, *supra*.

21. Forced heirship is a civil law concept which provides that a certain portion of all the property owned by a man during his lifetime is reserved for the descendants of the deceased, and in default of any descendants, for his parents, if they survive him. This portion, the legitime, cannot be impinged upon by the testament of the deceased, or by donations *inter vivos* that the deceased has made. See LA. CIV. CODE arts. 1493-94.

22. LA. CIV. CODE art. 1493 provides in pertinent part: "Donations *inter vivos* or *mortis causa* can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number."

23. The illegitimate, under articles 918 and 919, must be "duly acknowledged" in order to succeed to the parent's estate. Article 203 provides that the acknowledgment may be made by one of the two methods: 1) a notarial act declaring acknowledgment; or 2) by registering the birth or baptism of the child. These are the only methods stipulated by the Code. However, an informal acknowledgment was adopted jurisprudentially. Such acknowledgment "results from any act of the parent expressing or implying parentage of the child, and decisions have given it the same effect as formal acknowledgment for all purposes in favor of the child . . ." Pascal, *supra* note 11, at 169. See generally Allen v. Anderson, 55 So. 2d 596 (La. App. Orl. Cir. 1951).

24. LA. CIV. CODE art. 918 provides: "Illegitimate children are called to the legal succession of their mother, when they have been duly acknowledged by her, if she has left no lawful children or descendants, to the exclusion of her father and mother and other ascendants or collaterals of lawful kindred."

25. See note 2, *supra*.

gitimate succeeds only in default of all legitimate relations *and* a surviving spouse. The illegitimate excludes only the state.²⁶

With regard to community property of a deceased spouse, article 915 expressly limits the succession to legitimate descendants.²⁷ In default of this class, the surviving spouse succeeds either jointly with the parents of the deceased, or, if none survive, alone. Thus the relatively high rank given an illegitimate in the succession of his mother under article 918 is negated if community property is involved—the surviving spouse, and not the acknowledged illegitimate, takes the estate in default of legitimate descendants.²⁸

Article 923,²⁹ as interpreted by the courts,³⁰ gives the illegitimate a place in the estate of his illegitimate siblings. In this situation, the rules discriminate against the legitimate child for a change, since children born of lawful wedlock cannot succeed to the estate of their illegitimate siblings; of course, the illegitimate cannot inherit from his legitimate siblings.

Article 921³¹ is the most restrictive article of all those

26. The inheritance ladder established in articles 918 and 919 sets up a scheme which discriminates not only between legitimates and illegitimates, but within the class of illegitimates also. An illegitimate is given a relatively high rank in the inheritance of his mother, as opposed to a low rank as to the estate of his father. This distinction seems to be the result of a practical social consideration. The usual case of illegitimacy results in the child's being reared by the mother. See text at note 82, *infra*. It is reasonable for such a child to have a high standing in the inheritance of his mother. Conversely, the illegitimate child normally is separated from his father. Although some sort of support may be lent by the father, the illegitimate rarely becomes part of the father's family unit, and is thus given a lower echelon inheritance right as regards his father.

27. Prior to Act 607 of 1979 the article read: "When either husband or wife shall die, leaving neither a father nor mother, nor descendants . . ." The modern article, on the other hand, states: "When either husband or wife shall die, leaving neither a father nor mother nor *legitimate* descendants . . ." LA. CIV. CODE art. 915 (as it appeared prior to 1979 La. Acts, No. 607) (emphasis added). *Brooks v. House*, 168 La. 542, 122 So. 844 (1929), interpreted the pre-1979 article to allow an acknowledged illegitimate child to exclude the surviving spouse from the community property of the deceased. This case was negated by Act 607 of 1979.

28. Although article 918 grants the illegitimate second-tier ranking in the succession of the mother, this article is overridden as regards community property by article 915, which states that in the absence of legitimate descendants, the spouse inherits either jointly with the parents of the deceased or alone in their default.

29. LA. CIV. CODE art. 923 provides: "If the father and mother of the illegitimate child have died before him, or have not acknowledged him, the estate of such child shall pass to his brothers and sisters."

30. *Succession of Wesley*, 224 La. 182, 69 So. 2d 8 (1954), ruled that the "natural" brothers and sisters shall inherit the estate of a deceased illegitimate child.

31. LA. CIV. CODE art. 921 provides: "The law does not grant any right of inheritance of illegitimate children to the estate of the legitimate relations of their father or mother."

distinguishing illegitimate's rights. It denies the illegitimate any right of inheritance to the successions of legitimate relations of his parents. This provision relegates the illegitimate to the narrow status illustrated by articles 918, 919, and 923. Thus one can see how serious the discrimination created by the Civil Code is in this area. Although these laws have existed for a considerable time, courts have been in the process of mitigating the harshness of their effects through progressive steps in the interpretation of the equal protection clause of the United States Constitution,³² and, in Louisiana, under article one, section three of the 1974 Louisiana Constitution.³³

The Road To Brown

Discrimination against persons of illegitimate status has been eroded in the successions context, as well as other areas of the law,³⁴ through federal and state decisions interpreting the contours of equal protection under the law. The concept of equal protection is responsible for abating, to some degree, the discrimination aimed at illegitimates in successions law. Although certain legal distinctions based on legitimacy classifications are inevitable,³⁵ the distinctions in rights drawn on the basis of such classifications must, to be valid, bear a close relationship to a legitimate state interest. The equal protection clause, as interpreted, does not preclude all instances of discrimination, but only those that have no rational basis. "Statutory classifications, of course, are not *per se* unconstitutional; the matter depends upon the character of the discrimination and its relation to legitimate legislative aims."³⁶ The connexity between the statutory distinctions and the state interest is fundamental under an equal protection analysis. The court's determination of the strictness required of the connexity between the means and the end will in

32. U.S. CONST. amend. XIV, § 1 provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

33. LA. CONST. art. I, § 3 provides: "No person shall be denied the equal protection of the laws No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of *birth*, age" (Emphasis added.)

34. See, e.g., *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimacy distinctions determining availability of Social Security payments struck down); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973) (statute limiting welfare benefits to families with legitimate children struck down); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (provision denying equal relief to illegitimates for workmen's compensation recovery for death of father held unconstitutional); *Levy v. Louisiana*, 391 U.S. 68 (1968). See text at notes 40-44, *infra*.

35. See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978). Legitimate reasons for enacting statutes decreeing disparate rights for illegitimates do exist, as *Lalli* demonstrates. The equal protection clause prohibits unreasonable denials of right—those which have no rational relation to a permissible state interest.

36. *Mathews v. Lucas*, 427 U.S. 495, 503-04 (1976).

most cases foretell whether the discriminatory law will withstand constitutional scrutiny. The degree of scrutiny applied by the courts has varied; the evolution of the applicable constitutional standard for birth classifications will be sketched briefly to demonstrate the slowly moving trend from minimum scrutiny to a higher, more demanding level of analysis.

Because the enforcement of the spirit of the equal protection clause is dependent to a great extent on the standard that is prevalent at the time, identifying and articulating the elements of the applicable standard is extremely important. Only then can the mettle of existing laws be analyzed and any potential constitutional deficiencies be uncovered. The jurisprudence construing equal protection developed a two-tier system of analyzing challenged laws.³⁷ According to the courts' perceptions of priorities in discrimination, courts utilized either the upper level "strict scrutiny" or the lower level "minimum rationality" analysis. When courts employed the strict scrutiny standard, it was extremely difficult for a statute to withstand the analysis.³⁸ Conversely, the lower standard was almost cursory in nature, giving maximum deference to the legislature's will in enacting the law.³⁹ Mindful of this dichotomy, one must attempt to identify the standard which has been assigned to the distinctions in rights based on the classification of birth. The findings of the court in individual cases reflect the conscience of the court and show what priority it feels the birth classifications deserve.

Levy v. Louisiana,⁴⁰ though not a successions case, dealt with the validity of a distinction based on legitimacy or illegitimacy in

37. The "two-tier" system of equal protection was keyed by the subject of the statutory classifications. The upper tier "strict scrutiny" test was applied to classifications deemed "suspect". Examples of such distinctions are those based on race and nationality. Statutes discriminating on these bases are required to support a compelling state purpose. *See, e.g.,* *Graham v. Richardson*, 403 U.S. 365 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967).

The lower tier standard is one of minimal scrutiny. The statute is invalid only if it bears no rational relation to a legitimate state interest. *See, e.g.,* *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

38. The author could not find a case in which a discriminatory statute survived a strict scrutiny analysis.

39. "We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State." *Labine v. Vincent*, 401 U.S. 532, 539 (1971). *See* text at notes 45-49, *infra*.

"In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications." *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

40. 391 U.S. 68 (1968).

the area of wrongful death benefits. The illegitimate child could not bring a wrongful death action for the death of his mother, whereas the law established such a right in favor of the legitimate child.⁴¹ The United States Supreme Court, employing a minimum rationality test, found the Louisiana law unconstitutional. The interest the law allegedly promoted was that of protecting legitimate family relationships. The Court found that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."⁴² The challenged statute could not even meet the minimum rationality requirements. The *Levy* decision, already favorable in its view of illegitimates' rights, offered even more promise for the future. Although the analysis was labeled a minimum rationality test, the Court stated that "we have been extremely sensitive when it comes to basic civil rights . . ."⁴³ Basic or fundamental civil rights have received strict scrutiny in some cases;⁴⁴ thus the Court's language offered hope that in the future classifications based on birth could be susceptible to strict scrutiny—an eventuality which would go far in invalidating discriminatory laws in the area of illegitimate inheritance rights.

This "promise" took a step backward in *Labine v. Vincent*,⁴⁵ a Supreme Court case dealing with the validity of Louisiana Civil Code article 919.⁴⁶ Although ostensibly applying a minimum rationality test, seemingly the Court passed over even this lower level standard. The Court simply used a power analysis; once it determined that a state had the *power* to establish laws strengthening family ties and providing for the orderly disposition of property, the inquiry ended.⁴⁷ Birth classifications seemed to be placed in a very "non-

41. Article 2315 of the Civil Code had been interpreted to apply only to legitimate children, although the article's wording provides that the primary beneficiaries are "the surviving spouse and child or children of the deceased."

42. 391 U.S. at 72 (emphasis added).

43. *Id.* at 71.

44. For example, the right to vote and the right to travel interstate have been classified as "fundamental" rights. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Bd. of Electors*, 383 U.S. 663 (1966).

In *Levy*, the basic civil rights asserted "involve the intimate, familial relationship between a child and his own mother." 391 U.S. at 71.

45. 401 U.S. 532 (1971).

46. *See* note 2, *supra*.

47. The dissenters came to the defense of the minimum rationality concept. "[E]ven in cases of economic regulation," the dissent states, "this Court will inquire, under the Equal Protection Clause of the Fourteenth Amendment, whether there is some 'reasonable basis' for [a discriminatory state statute] . . . Such an inquiry does not question the State's *power* to regulate . . ." 401 U.S. at 547-48. (Brennan, Douglas, White, and Marshall, JJ., dissenting).

"Surely the Court cannot be saying that the Fourteenth Amendment's Equal Pro-

suspect" light. *Levy* was distinguished on the grounds that it sounded in tort⁴⁸ and that no insurmountable barrier existed;⁴⁹ the *Labine* Court found that article 919 erected no "insurmountable barrier" against the illegitimate. The father could, if he chose, bequeath property to the illegitimate child.

The decision of *Trimble v. Gordon*⁵⁰ was rendered six years later. At issue was an Illinois law similar to article 919.⁵¹ The law was held unconstitutional. The *Labine* case, though not overruled, was distinguished in part: "Despite these differences, it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls."⁵² This standard was not strict scrutiny, but something more stringent than the *Labine* test was applied. In the words of the Court, the scrutiny was not a "toothless one."⁵³ The standard seemed to be an intermediate one; it lay between strict scrutiny⁵⁴ and minimum rationality. The priority assigned to birth classifications was visibly higher after *Trimble*.

*Lalli v. Lalli*⁵⁵ reaffirmed and clarified the *Trimble* method of analysis while upholding a discriminatory statute.⁵⁶ The Court adopted the *Trimble* middle level test and articulated it this way: although not subject to strict scrutiny, classifications based on illegitimacy "are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."⁵⁷ This "substan-

tection Clause is inapplicable to subjects regulable by the States—that extraordinary proposition would reverse a century of constitutional adjudication under [the equal protection clause]." *Id.* at 548-49.

48. 401 U.S. at 535-36.

49. *Id.* at 537.

50. 430 U.S. 762 (1977).

51. ILL. REV. STAT. ch. 3, § 2-2 (1976). This statute permits the illegitimate to inherit from the mother but not the father. A legitimate child would inherit from the father.

52. 430 U.S. at 776 n.17.

53. *Id.* at 767.

54. The plaintiff made the argument that the classification should be held "suspect." The Court stated that although "illegitimacy is analogous in many respects to the personal characteristics that we have held to be suspect when used as the basis of statutory differentiations, . . . [w]e nevertheless [conclude] that the analogy [is] not sufficient to require 'our most exacting scrutiny.'" *Id.*

The "suspect" classification argument was forwarded and lost earlier in *Mathews v. Lucas*, 427 U.S. 495 (1976). It was in *Mathews* that the Court first noted that the middle-level scrutiny was not a "toothless one."

55. 439 U.S. 259 (1978).

56. The law at issue provided that the illegitimate, in order to inherit from his father in an intestate succession, must obtain a judicial order of filiation during the lifetime of the father.

57. 439 U.S. at 265.

tial relationship" label does not, in a practical sense, expose the strictness of the standard. It can properly be seen in terms of a means-end format. The "means"—in this case the discriminatory statute—used by the state to promote or protect the "end"—the permissible state interest—must bear a substantial relationship to such interest. A balancing test is used; the court weighs the gravity of the rights denied the disfavored class against the importance of the state interest.⁵⁸ Applying this test, the *Lalli* Court found that the state law stood in the face of this scrutiny.⁵⁹ The statute at issue provided that an illegitimate could inherit from his father *if* certain procedural guidelines concerning proof of filiation were followed.⁶⁰ The Court found constitutional this "means" of promoting the state's interest in insuring the orderly disposition of property at death. Important was the fact that rights on behalf of the illegitimate *could* be as great as those of legitimates, though contingent upon the illegitimate's following the filiation procedure. The *Lalli* decision seemingly would have been different had the law simply barred the rights of illegitimates when legitimates survived.⁶¹

In Louisiana equal protection exists in two forms, the fourteenth amendment to the United States Constitution and article one, section three of the Louisiana Constitution. Article one, section three has been interpreted as not unlike the equal protection clause of the fourteenth amendment. *Succession of Thompson*⁶² dealt with article 1483, which prohibited illegitimate children from receiving legacies from their mother if legitimate children survived. The article was held unconstitutional. The court held that the validity of discriminatory classifications of this type was contingent upon the existence of a reasonable relation between the law and a valid governmental interest.⁶³ The court found no relation between the prohibition of

58. *Lalli*, like *Trimble*, rejected the argument that by regulating the rights of illegitimates, discriminatory statutes promote the state's interest in legitimate family relationships. These statutes are not "defensible as an incentive to enter legitimate family relationships." *Id.*

59. The goal underlying the statute is to provide for "the just and orderly disposition of property at death. We long have recognized that this is an area with which the States have an interest of considerable magnitude." *Id.* at 268. The Court noted that this interest is "directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved." *Id.*

60. See note 56, *supra*.

61. The Court determined that the law in *Trimble* was invalid because "it effected a total statutory disinheritation of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes." 439 U.S. at 273.

62. 367 So. 2d 796 (La. 1979).

63. The court cited *Trimble* as authority for the test employed. *Id.* at 800. This evidences the court's intent to subject the statute to a middle-level analysis.

maternal donations and the orderly disposition of property at death.⁶⁴

With this background of significant federal and state jurisprudence established, the Louisiana Supreme Court had occasion to reevaluate the validity of article 919 in *Succession of Brown*.

The Brown Decision

Sidney Brown, Jr. died intestate on January 1, 1978. Brown fathered five children, all of whom were born illegitimate. Brown later adopted one of the children, thus giving her the status of a legitimate child. This legitimate child became the legal heir⁶⁵ of Brown, and the trial court granted a judgment of possession in her favor. The four remaining illegitimate children were excluded from their father's succession under pertinent Louisiana law. The illegitimates sought to overturn the trial court's judgment. The decision was reversed by the second circuit⁶⁶ and was affirmed by the supreme court. The crux of the two decisions was a finding that article 919⁶⁷ was unconstitutional insofar as it gave inferior rights to illegitimate children.

Of paramount importance is the standard of constitutional scrutiny adopted by the court in determining the validity of the article. This is critical because the remainder of Louisiana's succession provisions must be evaluated under the light shed by this level of scrutiny. The court expressly adopts the "middle-level" analysis,⁶⁸ rejecting the minimum rationality test of *Labine*. The *Trimble/Lalli* analysis serves as the unit of measurement in determining the constitutional validity of article 919.

Under this level of scrutiny, the court indicated that "the classification set forth in article 919 must be substantially related to

64. The *Thompson* court adhered to the analysis of *Succession of Robins*, 349 So. 2d 276 (La. 1977), in which article 1488 of the Code was held unconstitutional. Article 1488 provided that "natural fathers and mothers can, in no case, dispose of property in favor of their adulterine or incestuous children, unless to the mere amount of what is necessary to their sustenance . . ." The *Robins* court found no reasonable basis for the discriminatory statute. The concern for legitimate relationships was not promoted by this article. In this instance also, *Trimble* was cited as authority for the equal protection analysis applied.

65. The child's adoption erased the status of illegitimacy. LA. CIV. CODE art. 214: "The adopted person is considered for all purposes as the legitimate child . . . of the adoptive parents or parents . . ."

66. *Succession of Brown*, 379 So. 2d 1172 (La. App. 2d Cir. 1980).

67. See note 2, *supra*.

68. "[T]he two tier approach of *Dukes* has been refined to allow for a middle level of analysis for statutes based on such categories as sex, . . . and illegitimates . . ." 388 So. 2d at 1152.

permissible state interests."⁶⁹ The court made no distinction between the analysis used for the United States Constitution and that used for article one, section three of the Louisiana Constitution. Apparently, the Louisiana Supreme Court used the same analysis to satisfy the mandates of both provisions.

In seeking to determine whether a substantial relationship exists between the "means" offered in article 919 and a permissible state interest, the court recognized three potential "ends" to be considered: 1) the promotion of legitimate family relationships; 2) the orderly disposition of property at death; and 3) the possibilities the father could have exercised to insure the illegitimates a part of the succession. No "insurmountable barrier" existed against the illegitimate child.⁷⁰

The court quickly disposed of the first interest because of the means utilized to accomplish it. The interest in legitimate family relations cannot serve as the desired "end" of a statute discriminating against illegitimate children in the estates of their parents. The state cannot "attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."⁷¹ In other words, the state cannot punish children for the transgressions of their parents.⁷²

The "insurmountable barrier" notion, although listed as a state interest by the court, is simply a consideration that allegedly should help cure a constitutional deficiency to the extent that the parent could, of his own volition, bequeath property to the illegitimate which the law, perhaps unconstitutionally, would not leave him. The court disregarded this consideration. The court focused on the fact that the father *did not* provide for the children, and thus "the acknowledged illegitimates' rights should not hinge on mere hypotheses of what the father might have done."⁷³ It appears that the court has abandoned this interest for all constitutional purposes as being an "analytical anomaly,"⁷⁴ as indicated earlier in *Trimble*.

The valid remaining interest is that of the orderly disposition of property at death. However, the state interest of stable land titles and orderly disposition of property will serve as a justification only

69. *Id.* at 1153.

70. *Id.*

71. *Id.*

72. The key element is that the means of article 919 is not a proper or acceptable way of promoting the interest of legitimate family relationships. This does not preclude the possibility that a statute could exist punishing the parents of the illegitimate in an effort to promote the family. See text at notes 95-99, *infra*.

73. 388 So. 2d at 1153.

74. 430 U.S. at 773.

for a reasonable statute seeking to perpetuate the legitimate state goal or "end." A substantial relationship must exist between the two. The permissible goal of protecting land titles and of seeing to the orderly disposition of property at death is not achieved by article 919, "which flatly denies [the illegitimate's] succession rights if other relatives exist."⁷⁵ A valid example of discrimination based on birth classification can be seen in *Lalli*.⁷⁶ The illegitimate had to meet formal requirements in proving his filiation to his father; if the procedure was not followed, the claim to the estate of the father was denied. The court found that the means used was substantially related to the permissible "end" of seeking orderly disposition of property and thus was valid. A method existed through which the illegitimate could ascend to a position equal to that of the legitimates. This was vital to the success of the statute in *Lalli*. Article 919, conversely, provided no way for the illegitimate to achieve equal protection in the succession of his father if other relatives exist.⁷⁷

The Louisiana Supreme Court, limited in the scope of its ruling by the facts of *Brown*, held only article 919 unconstitutional and noted that, subject to laws related substantially to the state's interest in orderly disposition of property at death,⁷⁸ illegitimate children must share equally with their legitimate siblings in intestate successions. This holding is a rather narrow one, but the forces at work in reaching the decision make the admittedly narrow holding a harbinger of change as regards the rights of illegitimates and the rights of other relations vis-à-vis illegitimates under the Louisiana succession scheme. *Brown* warrants extensive changes in succession law in order to buttress the code provisions to a position from which they can withstand constitutional attack similar to that in *Brown*.

The Legislature has several options available in reshaping Louisiana's succession laws. Already, a *Lalli*-like provision had been adopted by the Legislature. Civil Code article 209⁷⁹ provides that a child may prove paternity by "any means which establish, by a preponderance of the evidence, . . . that he is the child of that man."⁸⁰ This must be done by a civil proceeding "brought within six months

75. 388 So. 2d at 1154.

76. See note 56, *supra*.

77. "[B]oth the United States and Louisiana Constitutions prohibit the total denial of inheritance rights of acknowledged illegitimates in the succession of the father who is survived by other relations." 388 So. 2d at 1154.

78. "Absent any legislative authority to remedy their loss of succession rights, . . . we find the statute . . . denies them the equal protection of the law." *Id.* This is an obvious reference to the validity of a *Lalli*-like statute. See text at notes 79-85, *infra*.

79. Article 209 was established by Act 549 of 1980.

80. LA. CIV. CODE art. 209.

after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first."⁸¹ This law, like that in *Lalli*, is an attempt to promote the state's interest in stable land titles and in orderly disposition of property at death. This interest is threatened in the case of an illegitimate succeeding his father because of the difficult proof problem inherent in demonstrating paternity. Maternity seldom presents such problems. "The birth of a child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her."⁸² In the case of the father, however, illegitimate children not even known may exist. Thus, if the illegitimate is given rights equal to those of the legitimate child, a judgment of possession in favor of legitimate children may be challenged later by a "secret illegitimate lurking in the buried past of a parent . . ."⁸³ Since title to real property transfers under the judgment, it is imperative that any illegitimate having a claim under the succession prove his filiation within a certain specified time to insure the stability of land titles. Also, the possibility of spurious claims by alleged illegitimates could cause litigation in the estate of the deceased, thus creating disorder in the succession and harassing heirs with a rightful claim to the succession.⁸⁴ Without a law regulating the filiation procedure of an illegitimate, orderly disposition of property at death could be impossible to achieve.

The validity of article 209 seems reasonably certain in view of the *Lalli* decision. The decision and rationale in *Lalli* are closely analogous to any inquiry made regarding the constitutionality of article 209. The "means" used bears a substantial relationship to the state's desired "end" of providing for orderly disposition of property at death. The state provides a method, though somewhat limited, by which the illegitimate can prove filiation. The limitations appear reasonable, however, in light of the state's interest, which is "of considerable magnitude."⁸⁵ Thus article 209 is an example of reasonable

81. LA. CIV. CODE art. 209.

82. 439 U.S. at 268, quoting *In re Ortiz*, 60 Misc. 2d 756, 761, 303 N.Y.S.2d 806, 812 (1969).

83. *Id.* at 270, quoting *In re Flemm*, 85 Misc. 2d 855, 859, 381 N.Y.S.2d 573, 573-76 (Surr. Ct. 1975).

84. 439 U.S. at 270.

85. *Id.* at 267. Louisiana law varies in its treatment of the interest in stability of land titles. Article 209 demonstrates a positive step in promoting this interest. Conversely, articles 1517 and 1518 of the Code create a situation in which land titles are anything but stable. These articles provide for an action in revendication in favor of the forced heirs. When the donee who is subject to an action in reduction (because the legitimate was impinged upon by donations inter vivos) has alienated the immovable property, the disadvantage heir may bring an action to recover the property from the

discrimination against the class of illegitimates. If the Legislature takes no further action and allows the courts to continue their analysis of the code, overruling articles considered unconstitutional, the law of successions could be thrown into uncertainty indefinitely. This approach is *not* recommended.

Alternatively, the Legislature could revise those code provisions which seem deficient constitutionally in light of the *Brown* rationale. Articles dictating disparate treatment for successions purposes in the case of a legitimate or an illegitimate must be reevaluated. Re-examination does not require that in all cases the benefit granted to legitimates be extended to illegitimates. The Constitution does not require that the benefit exist, but it does mandate that any benefit created be created equally, unless a legitimate state interest exists to justify discriminatory treatment. However, the Legislature could decide to abrogate the benefit altogether. This would equalize treatment of the two classes with as much efficacy as if the benefit were extended to the class of illegitimates. In some cases, withdrawal of the right may be a more desirable remedy. This analysis will proceed under the assumption that the Legislature will extend existing benefits to the class of illegitimates, as this was the remedy chosen by the court in *Brown*.

The third consideration which the Legislature faces concerns those articles of the code which, although not unconstitutional in light of *Brown*, must receive different application since *Brown* has changed other related laws. These articles may no longer achieve the effect originally contemplated by the Legislature; and, it may be desirable to amend these articles as well.

Necessary Changes

Fundamental changes of extensive scope are required under Louisiana's successions law. The thrust of *Brown*, read in light of the legislative intent of article 209, requires that *proven* biological children of a parent must stand in the same position as proven legitimate children.⁸⁶ This basic concept calls for drastic amendment of

third party. R.S. 9:5682 provides a similar action. Any heir or legatee who was not recognized by the court in a judgment of possession may sue to recover property transferred to a third party by an heir or legatee who received the property from the succession of the deceased. Obviously, in such situations the Legislature has determined that the stability of land titles is not paramount and does not outweigh the interest in insuring that an heir receives his share of a succession.

86. The problem presented in proving filiation of illegitimates does not arise if the child is acknowledged. Once acknowledged, the child has no need of a filiation procedure; the filiation has been established by the parent's own action.

virtually all of the articles creating inheritance benefits for legitimate persons, because in all those cases, illegitimate relations are treated less favorably.

Since article 919 was held unconstitutional in *Brown*, the articles which accompany it, dealing with the rank of illegitimates in irregular successions, are rendered vulnerable. The invalidity of article 918⁸⁷ seems clear, since the reasoning of *Brown* applies almost directly to this article. Although the illegitimate's place in the estate of his mother is higher than that granted in article 919, the inferior status accorded him in relation to legitimate children renders the article constitutionally infirm. As was stated in *Brown*, "it is apparent that the respondents are being discriminated against because of their birth status, for had they been born legitimate,"⁸⁸ they would succeed their mother in the first rank. Article 918 provides no method whereby the illegitimate could remedy the loss of succession rights *vis-à-vis* the legitimate child of the mother. The means employed in the legislative scheme—the granting of an absolutely superior right to a legitimate child of the mother—does not bear substantial relation to a permissible legislative "end." Because the proof problems which exist in the case of paternity do not exist in the case of maternity, a law discriminating against illegitimates in the succession of their mother does not promote the state's interest in orderly disposition of property. Also, as previously mentioned, the family harmony interest cannot be promoted by punishing the product of illicit relations.⁸⁹

Article 921⁹⁰ also seems deficient. It denies the illegitimate any inheritance rights in the successions of legitimate relations of his parents. Of course, the child would have such rights if he were born legitimate. Punishing children in this manner can be perpetrated only in an effort to protect land titles and to insure the orderly disposition of property at death. Courts will not view favorably statutes which effectively punish children for the sins of their parents in an attempt to deter illicit family relations. It is submitted that article 921 will not withstand constitutional scrutiny in light of *Brown*. Surely such a broad denial of rights to illegitimates is too extreme a method of promoting the legitimate interest of orderly disposition of property. A requirement that filiation be demonstrated within a certain time, as provided in article 209, would be a reasonable manner of promoting such an interest.⁹¹

87. See note 24, *supra*.

88. 388 So. 2d at 1154.

89. See note 72, *supra*.

90. See note 31, *supra*.

91. See text at notes 79-85, *supra*.

The focus shifts to perhaps the most rudimentary rules in succession law, the rank of heirs in a legal intestate succession which is established in articles 902-914 of the Code. As noted earlier, the entire successions scheme is fraught with the notion that devolution of property accrues only in favor of legitimate relations. With article 921 no longer vital, illegitimates should take their place in the successions of legitimate relations of their parents, as well as the estates of their parents themselves.

Any distinction in right assigned to illegitimate children which is more demanding than a reasonable requirement governing the proof of filiation (article 209) would seem to be unreasonable following *Brown*.⁹² As regards a child inheriting from his parents or grandparents, the articles granting paramount ranking to descendants now must include legitimate and illegitimate descendants, subject to a reasonable filiation procedure.⁹³ The goal of orderly disposition of property is not attained reasonably by a law granting illegitimate descendants a position lower in the scheme of intestate successions. Such a rule violates equal protection.

Article 914 places collateral relations other than siblings in a low position in the law of intestate successions. If an illegitimate collateral has proven sufficiently his filiation within the family, it is difficult to contemplate a reasonable cause for excluding him from the class of collaterals. He cannot be excluded in an effort to foster legitimate family relations since *Trimble* and *Brown* have demonstrated that this interest will not support discrimination against the product of illicit relations. *Lalli* demonstrated that a filiation procedure is related substantially to the interest of orderly disposition of property; presumably article 209 achieves a similar purpose in Louisiana. However, any rule denying completely the illegitimate's position as a "collateral" seems unconstitutional. This analysis pertains to both siblings and to more distant collateral relations.⁹⁴

A more difficult question arises in the context of parents inheriting from their illegitimate children.⁹⁵ If the law excluded them

92. *Brown* emphasizes the unreasonableness of laws which "flatly deny" inheritance rights to a class, as opposed to laws which grant the illegitimate an equal right if certain procedural requirements are met. 388 So. 2d at 1154. Absent such "legislative authority" to remedy loss of succession rights, equal protection is violated.

93. See text at notes 55-61 & 79-85, *supra*.

94. This would include amendment of articles 911 through 913, dealing with the inheritance rights of brothers and sisters, and article 914, regulating the inheritance of more distant collaterals.

95. LA. CIV. CODE art. 922 states: "The estate of an illegitimate child deceased without posterity, belongs to the father or mother who has acknowledged him, or in

from the estate of their illegitimate children, a different analysis would be used in testing the constitutional validity of the law. *Trimble* and *Brown* do not proscribe discrimination against the *parents* of illegitimates in an effort to foster the state's interest in legitimate family relationships. As was noted in *Trimble*, "no one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society."⁹⁶ The Court simply found that no reasonable relation existed between the state's interest in family harmony and a statute discriminating against illegitimate children.

Analogous instances of discrimination against parents exist in the Code. Article 214, for example, provides that the blood parents of an adopted child are "relieved of all of their legal duties and divested of all of their legal rights . . . including the *right of inheritance* from the adopted person . . ."⁹⁷ Also illustrative is article 118,⁹⁸ which denies the civil effects of marriage to a bad faith putative spouse. The civil effects in such a case are produced only in favor of the good faith spouse and the children of the marriage. Being denied the civil effects of the marriage, the bad faith spouse has no rights of inheritance as regards the children of the putative marriage.⁹⁹ However, this analysis may not be valid if *all* ascendants are excluded. It would not be reasonable to punish the child's grandparents since they are not the "wrongdoers." This would probably

equal portions to the father and mother, when he has been acknowledged by both of them."

96. 430 U.S. at 769.

97. LA. CIV. CODE art. 214 (emphasis added).

98. LA. CIV. CODE art. 118: "If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage."

99. *Eisenstadt v. Baird*, 405 U.S. 438 (1978), is a case in which the state was found to have gone too far in sanctioning the participants of illicit relationships in an effort to protect legitimate family relations. The Massachusetts statute permitted married persons to obtain contraceptives but refused the same to single persons. The state asserted its interest in controlling premarital sex (an important variation of preserving legitimate relationships) as the basis for the law. The Court held the law unconstitutional, finding that the state interests involved warranted neither an infringement on the privacy of an individual, nor a denial of equal protection (unmarried vs. married persons).

The Massachusetts statute is more extreme than a law simply denying parents the right to inherit from their illegitimate offspring. The Court does not deny the right to engage in illicit sexual relationships without fear of conception; only the rights normally accruing from the relationship are curtailed. The illicit relations are being deterred after the fact, rather than before the fact. It is submitted that the interest in preserving legitimate family relationships would be related substantially to a law excluding the parent from the estate of his illegitimate child.

be violative of equal protection. The article should be restricted to exclude only the parents of the illegitimate.

In light of the foregoing analysis, the illegitimate should be included in Chapter Two—“*Of Legal Successions*.” Thus, the important benefit of representation necessarily follows for illegitimate descendants of the deceased and for illegitimate descendants of the siblings of the deceased. No rational basis exists for distinguishing illegitimate children in this area. These are the only two situations in which the right of representation arises.¹⁰⁰ Presently, only legitimate children are favored by the fiction of representation.¹⁰¹ If the right is extended to illegitimates, the illegitimate will share in the succession of his grandfather by representing his predeceased father in the same manner as his legitimate siblings. Without the benefit of representation, the illegitimate would be excluded either by uncles and aunts or by his legitimate siblings who rose to the same rank as those uncles and aunts through representation.¹⁰²

The benefit of seizin also must be reconsidered. Conceptually, seizin gives the legal heir constructive possession of the deceased's estate from the moment of death.¹⁰³ Thus, the heir continues uninterrupted possession of the deceased's property. Also, theoretically the heir can sue on the rights of the deceased.¹⁰⁴ The heir also is considered to transmit the succession to *his* heirs in the event of his death.¹⁰⁵

Louisiana law has weakened the heir's right of seizin. Code of Civil Procedure article 3211 provides that the “succession representative shall be deemed to have possession of all the property of the succession”¹⁰⁶ With the vesting of seizin rights in the administrator of the succession, the heirs' rights of seizin are negated effec-

100. See note 17, *supra*.

101. See *Hawkins v. Williams*, 146 La. 529, 83 So. 796 (1920).

102. If the representing party were forced to claim a part of the estate in his own right, he would be excluded by the brothers and sisters of his deceased parent and by legitimate grandchildren representing their deceased parent.

103. LA. CIV. CODE art. 942 provides: “The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession.”

104. LA. CIV. CODE art. 945 provides: “The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute”

105. LA. CIV. CODE art. 944 states: “The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs”

106. LA. CODE CIV. P. art. 3211.

tively.¹⁰⁷ Still, in those successions which are *not* administered, the right of seizin exists in favor of the legal heir, which now should include illegitimate heirs, as well as those of legitimate status. On the basis of the rights which seizin grants, no reason appears to exist to distinguish legitimate from illegitimate heirs.

One of the greatest benefits available to the illegitimate is the concept of forced heirship. Presently, among descendants, only those of legitimate birth receive the advantage of a forced portion from which they cannot be disinherited freely. The logic of *Brown* almost certainly renders the limitation of forced heirship to legitimates unconstitutional. Faced with the realization that illegitimate children will have the benefit of a forced portion of their parent's estate, the Legislature may seek to abandon the concept of forced heirship altogether—a move which has been suggested in the past.¹⁰⁸ Such a change would require an amendment to the Louisiana Constitution, which preserves forced heirship.¹⁰⁹ If forced heirship is abandoned, the law will treat all children equally under the intestate scheme, and all will inherit equal shares. This will allow a parent to write a will excluding the illegitimate if such is the parent's choosing. No rule exists which would prohibit such a denial.

A less drastic remedy would be to include the illegitimate as a forced heir but to reduce the forced portion, thus reducing all of the children's shares.¹¹⁰ This would leave a larger disposable portion which the parent could then use to favor legitimate children. The parent could testamentarily grant the disposable portion to a legitimate child, expressly bequeathing it in excess of the child's legitime.¹¹¹ The expression of an extra portion will be necessary since with forced heirship come the appurtenant rights and obligations of collation and reduction.¹¹²

107. Official comment (a) to article 3211 provides in pertinent part: "The utility of the concept of seizin in Louisiana law is doubtful, since as a practical matter the succession representative has full seizin of all the property of the deceased."

108. For an excellent article exploring the possibilities of succession law in the absence of forced heirship, see Le Van, *Alternatives to Forced Heirship*, 52 TUL. L. REV. 29 (1977).

109. LA. CONST. ART. XII, § 5 states: "No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinheritance shall be provided by law."

110. See note 109, *supra*.

111. LA. CIV. CODE art. 1501 states: "The disposable *quantum* may be given in whole or in part, by an act *inter vivos* or *mortis causa*, to one or more of the disposer's children or successible descendants, to the prejudice of his other children or successible descendants . . . provided it be expressly declared by the donor that this disposition is intended to be over and above the legitimate portion."

112. LA. CIV. CODE art. 1227 defines collation as: "the supposed or real return to the mass of the succession which an heir makes of property which he received in

With regard to forced heirship and an intestate succession, an alternative legislative solution has been postulated. The argument has been advanced that the illegitimate be made a forced heir, but within certain guidelines: In partitioning the decedent's estate, the legitimate children should receive their fractional interest in the estate, while the illegitimate should take a credit against the estate. This credit could result in the illegitimate's being satisfied in cash rather than in any specific movable or immovable assets. This alternative meshes nicely with the notion that the illegitimate's place in the succession may cause disintegration of the economic family unit. Real property and family enterprises (*e.g.*, business associations) would be kept within the family unit. It is more likely that the legitimate children will continue the business, which is a desirable economic goal. Though a slight distinction in the treatment of legitimates and illegitimates would exist, such distinction in rights bears substantial relation to the state's permissible interests. Such a scheme possibly represents a reasonably discriminatory policy.¹¹³

Desirable Changes

Once the long-range effect of *Brown* is appreciated fully, articles of the Code not affected directly (*i.e.*, not unconstitutional) but nevertheless different in their application because of *Brown* may no longer implement the policy which led to their enactment.

Chief among these laws is article 916, which provides for a usufruct in favor of the surviving spouse over community property left by the deceased. Presently, article 916 entitles the surviving spouse to a usufruct over the property if the naked ownership of such property is inherited by issue of the marriage.¹¹⁴ The usufruct does not attach if the naked owner is a child of a *previous* marriage. After *Brown*, the usufruct will be defeated also by the decedent's illegitimate child, who would exclude the spouse under article 915.¹¹⁵

advance of his share . . . , in order that such property may be divided together with the other effects of the succession."

Reduction takes place when the donations *inter vivos* and *mortis causa* made by the deceased exceed the disposable portion. The forced heirs are able to sue to have this impingement reduced to the quantum of the disposable portion. LA. CIV. CODE arts. 1502-18.

113. See Pascal, *supra* note 11, at 181-82.

114. "In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed [of the property] by last will and testament . . . , the survivor shall hold in usufruct . . . so much of the share of the deceased in such community property as may be inherited by such issue." LA. CIV. CODE art. 916.

115. See text at notes 27-28, *supra*.

Surely this result is not within the contemplation of article 916, since the illegitimate had no such right of inheritance when the article was redacted.

An amendment to article 916 may be desirable to insure that the spouse's usufruct will attach if the naked owner is other than issue of the marriage. In principle, article 916 would remain unchanged; however, if this amendment is made, a possible equal protection argument would still exist—the illegitimate could argue that the article, by allowing the issue of a previous marriage to inherit free of the usufruct, discriminates against the illegitimate in violation of the Constitution. A safer solution would be to grant the usufruct regardless of whether the naked owner is issue of the marriage, issue of a previous marriage, or an illegitimate issue. Article 916 would be slightly different in application since the issue of a previous marriage has his inheritance impinged upon, but, most importantly, the spouse's usufruct, which is the primary concern, would obtain in spite of the illegitimate's new status.¹¹⁶ Such a law would be impervious to an equal protection challenge. As written, article 916.1 presently gives the spouse a usufruct over the family home, no matter who the naked owner is;¹¹⁷ article 916 would be extended similarly.

With the invalidation of Article 921, the illegitimate can expect to be treated the same as legitimates as regards the estates of their parents' legitimate relations. This result may cause a rethinking of the present intestate rank of heirs. For instance, one can foresee a situation in which an illegitimate third cousin would exclude the surviving spouse as to separate property under articles 914 and 924. These articles grant a legitimate cousin such a right. This type of inheritance could serve to catalyze the granting to the surviving spouse of greater rights to the estate of the deceased spouse. This would constitute a further step in making the spouse a legal heir in the succession of a deceased spouse.¹¹⁸ Perhaps the spouse could be

116. The presently included right to extend the usufruct over the separate property of the deceased and/or to grant it for life (instead of until remarriage, which is article 916's statutory norm) will exist also against the naked ownership of the illegitimate and the non-issue legitimate child. This extension of 916 is not an impingement on the heirs' legitime.

117. "In all cases, when the predeceased husband or wife shall not have disposed by last will and testament of his or her share in the family home, the survivor shall hold in usufruct . . . the deceased's share of the family home . . ." LA. CIV. CODE art. 916.1.

118. For some time there has been a slowly-moving trend in Louisiana which favors the granting of more inheritance rights to a surviving spouse. "Under the Civil Codes of 1808 and 1825, the surviving spouse had a low rank of inheritance in the succession of the deceased spouse . . ." Oppenheim, *Recent Developments in the Succes-*

made a legal heir to the deceased's separate property by moving the class higher into the hierarchy of beneficiaries,¹¹⁹ either after ascendants and siblings, excluding collaterals, or after collaterals of a certain degree, excluding those more distant.

Conclusion

Expedient consideration of the aforementioned articles of the Civil Code by the Legislature hopefully will occur. The aura of uncertainty generated by *Brown* surrounds Louisiana's law of successions, and legislative action provides the surest and quickest method of rectifying the situation. One certainty exists: those persons deemed illegitimate in Louisiana anxiously await the outcome of the house-cleaning instigated by *Brown*.¹²⁰

Wm H. Parker, III

sion Law of Louisiana, 24 TUL. L. REV. 419 (1950). However, the Code of 1870 contained article 915, which gave the spouse greater rights to the deceased's community property. The spouse retained a usufruct over the deceased's community property not testamentarily disposed of if no ascendants or descendants survived. The spouse's rights under article 915 were enhanced in 1910 to the point that the spouse took the property in full ownership in default of ascendants or descendants. In 1916 the spouse was raised to a level equal to the parents under 915 and was excluded only by descendants. Other changes have been made, resulting in the present code article. Little has been done as yet in terms of granting the spouse rights to the deceased's separate property. See note 119, *infra*.

119. Presently, article 924 of the Code provides that the surviving husband inherits the separate property of his wife only to the exclusion of unacknowledged illegitimate children and the state. The wife, under this provision, inherits from her husband to the exclusion of the state and all illegitimates. This article appears to be unconstitutional in discriminating against illegitimate children. Apparently after *Brown*, a surviving spouse will exclude only the state in a separate property inheritance.

Perhaps the Louisiana Legislature could learn a lesson from the Quebec Civil Code; under its system, the spouse is given rights equal to, and sometimes greater than, those accorded descendants. If one descendant survives, half the estate is taken by the spouse and half by the descendant. However, if the number of descendants is more than one, the spouse's share remains one-half while the descendants must share one-half. The spouse also has the right to forego his one-half share and take instead a usufruct over the whole of the property. If no descendants survive under the Code, the spouse takes to the exclusion of all other relations. QUEBEC CIV. CODE, Book Three, arts. 40-41 (Draft 1977).

120. For an excellent treatment of the complex and extremely important issue of the retroactivity of the *Brown* decision, see Note, *The Problematic Application of Succession of Brown*, 41 LA. L. REV. 1314 (1981). The rights of illegitimates who claim a place in the estates of persons deceased before the *Brown* decision was rendered hinge on the ultimate determination of the retroactivity of *Brown*.