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All in the Family: Equal Protection and the Illegitimate Child in Louisiana Succession Law

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anticipatory breach, the court should have specifically held that an anticipatory breach is an active breach which requires no putting in default and that a suit for specific performance may be instituted immediately.

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ALL IN THE FAMILY: EQUAL PROTECTION AND THE ILLEGITIMATE CHILD IN LOUISIANA SUCCESSION LAW

In *Trimble v. Gordon*[1] the United States Supreme Court held that an Illinois law prohibiting an illegitimate child from inheriting her father's intestate succession, even though paternity had been judicially determined prior to his death, violated the equal protection clause of the fourteenth amendment. In *Succession of Robins*[2] the Louisiana Supreme Court held that Civil Code article 1488 was in violation of article I, section 3 of the Louisiana Constitution[3] insofar as it denied the right of a father to dispose of his separate property by testament to his own adulterous, illegitimate children. An analysis of these two cases in light of Louisiana codal law and its history suggests the necessity for significant alteration of Louisiana's succession law.

Louisiana's Civil Code provides for different civil, social and political rights based on differences of conditions existing between persons.[4] Children are either legitimate, illegitimate, or legitimated[5] depending on whether they are born in or out of marriage.[6] Illegitimates are further classified as those conceived of parents who, at the time of conception, might have legally contracted marriage and those whose parents could not then have married[7] (adulterous[8] and incestuous[9] bastards). Adulterous

1. 97 S. Ct. 1459 (1977).
2. 349 So. 2d 276 (La. 1977).
3. "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, sex, culture, physical condition, or political ideas or affiliations . . . ." LA. CONST. art. I, § 3.
4. LA. CIV. CODE art. 24, as amended in 1921, now includes all differences between persons. The original article referred only to differences based on sex. LA. CIV. CODE art. 24 (1870) (as it appeared prior to the 1921 amendment).
5. LA. CIV. CODE art. 178.
6. *Id.* arts. 179, 180.
7. *Id.* art. 181.
8. *Id.* art. 182.
9. *Id.* art. 183.

children may be acknowledged by the subsequent marriage of the natural parents but incestuous children may never be acknowledged.[10] Illegitimate children who have been acknowledged by either parent are called natural children,[11] but acknowledgement does not give the illegitimate the same succession rights as legitimates.[12]

These classifications become important upon examining the succession law, for they determine priorities of inheritance.[13] In all cases, if the father or mother has legitimate children or descendants, an illegitimate has no inheritance rights except to amounts needed for nourishment, lodging, and support, called "alimony."[14] Where there are no surviving legitimate descendants the acknowledged natural child is ranked higher in the mother's succession, inheriting ahead of ascendants, collaterals[15] and the surviving spouse,[16] than in the father's succession where he is excluded by all lawful relations and the surviving spouse and inherits only ahead of the state.[17] In no case may a bastard (adulterous or incestuous) inherit more than mere alimony;[18] nor may a natural child inherit from the legitimate relations of the parents.[19]

Legitimacy distinctions are also important to donations mortis causa. If the parents leave legitimate offspring or descendants the law prohibits such legacies to any illegitimate child except to the extent necessary for sustenance or to procure an occupation or employment.[20] If the parents leave no legitimate descendants, the natural child may receive the

10. *Id.* art. 204. It is also reasonable to conclude that once the impediment to the marriage of the natural parents has been removed, the adulterous child could also be acknowledged by notarial act, for article 200 would allow legitimation in the same manner and the greater right (legitimation) should include the lesser (acknowledgement). See Goins v. Gates, 229 La. 740, 93 So. 2d 307 (La. App. 1st Cir. 1957).

11. LA. CIV. CODE art. 202. The jurisprudence has extended this definition to children acknowledged by the mother. Briggs v. McLaughlin, 134 La. 133, 63 So. 851 (1914); Allen v. Anderson, 55 So. 2d 596 (La. App. Orl. Cir. 1951).

12. LA. CIV. CODE art. 206.

13. *Id.* art. 917.

14. *Id.* arts. 230, 918-20.

15. *Id.* art. 918.

16. Brooks v. House, 168 La. 542, 122 So. 2d 844 (1929); *see* Oppenheim, *The Fundamentals of Louisiana Succession Law*, 23 TUL. L. REV. 305, 327 (1949).

17. LA. CIV. CODE art. 919.

18. *Id.* art. 920.

19. *Id.* art. 921.

20. *Id.* arts. 1483, 1488. This allowance for sustenance, however, is not an alimony and at least one case has allowed a sizeable legacy to an adulterous bastard because it was not shown that the amount involved was more than necessary for his sustenance. Succession of Haydel, 188 La. 646, 177 So. 695 (1937). For a discussion of this case, see Note, 1 LA. L. REV. 631 (1939).

mother's entire succession,[21] but he may receive only a portion of the father's,[22] the rest going to the father's legitimate relations.[23] In no case may a bastard (adulterous or incestuous) receive more than what is necessary for sustenance from either his father or mother.[24]

The rationale behind these distinctions in the law may be better understood by examining its historical framework. Louisiana succession law is a mixture of Roman, Spanish, and French elements.[25] From the Romans came the concept of the family as the central legal entity. Family ties were all important, for the law emphasized the "family unit" and not the individual.[26] Protection of the family unit was therefore necessary for *legal* reasons and not merely moral ones. Illegitimacy was important, not because it reflected an immoral deviation from family oriented values, but because it put the individual outside the family unit for jurisdictional purposes under the Roman legal system. However, as the Spanish and French codes were being formulated, protection of the family unit took on a religious or moral basis, for the Roman concept of the family unit was no longer applicable.[27] The Digest of 1808 reflected the view that distinctions such as those based on sex, legitimacy and minority were "natural distinctions" and were permissible bases for discrimination in the law.[28] The family unit concept, therefore, is deeply rooted in Louisiana's legitimacy classifications even though the concept fulfills an entirely different purpose than it did at Roman law in that it is aimed at the preservation of family values.[29]

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21. LA. CIV. CODE art. 1484.

22. *Id.* art. 1486.

23. *Id.* art. 1487.

24. *Id.* art. 1488. *See* Succession of Haydel, 188 La. 646, 177 So. 695 (1937).

25. Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280, 283 (1932).

26. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 264, 267 (1970).

27. Domat, when formulating a definition of legitimacy for his treatise, referred to *Deuteronomy*: "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 laws declare bastards incapable of succeeding to persons who die intestate . . . ." J. Domat, 1 CIVIL LAW IN ITS NATURAL ORDER 137 n.e (Cushing ed. Strauss trans. 1850). This was not, however, the basis for legitimacy distinctions in Justinian's law. Domat was ascribing canonical principles to justify its continued force. Tucker, *supra* note 26, at 270 n.29. Spanish law development was similar. *See* Pascal, *Louisiana Succession and Related Laws and the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 46 TUL. L. REV. 167, 174-76 (1972).

28. This was Domat's view and is the basis for Civil Code article 24. Tucker, *supra* note 26, at 282.

29. *See generally* Tucker, *supra* note 26.

Determining the basis for Louisiana's legitimacy classifications is important to consideration of the courts' application of equal protection language in the United States and Louisiana Constitutions. Although federal jurisprudence is far from clear in its interpretation of the fourteenth amendment's equal protection clause, courts have generally recognized that some disparate treatment of persons by the law is inevitable; therefore, they have often allowed states wide discretion in making *reasonable* classifications based on distinctions such as sex, birth, and age to serve necessary social and economic purposes.[30] However, any classification must have some rational basis; that is, it must bear a reasonable relation to the object of the statute (but not be the object of the statute itself),[31] must reflect a proper state purpose,[32] and must treat all persons within the class similarly.[33]

Louisiana did not have an equal protection clause in its constitution until the 1974 revision,[34] but the language of the new constitution goes further than that of the fourteenth amendment. Besides bestowing on all persons a guarantee of equal protection of the laws, article I, section 3 also states that no law shall arbitrarily, capriciously, or *unreasonably* discriminate on the basis of ***birth***, age or sex, among other characteristics.[35] Thus,

30. *E.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (statute limiting working hours for women held valid as in the public interest). One exception to this generalization has been where the classification is termed "suspect." In such cases the classification is put to "strict scrutiny" and the state must show a compelling state interest which can be served only by the formulation of that particular classification. To date only race and alienage have been classified as "suspect" classifications. Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

31. Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical, 348 U.S. 483 (1955); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

32. *See* cases cited in note 31, *supra*.

33. *See* cases cited in note 31, *supra*. A law is "over-inclusive" if it burdens or benefits not only all those similarly situated but other persons as well. A law is "under-inclusive" on the other hand, if it burdens or benefits only a portion of those within the class. Petrillo, *Labine v. Vincent: Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377, 395 (1971); Tussman & ten-Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305 (1966); United States v. Brown, 381 U.S. 437, 456 (1965).

34. LA. CONST. art. I, § 3. See note 3, *supra*, for the text of this section.

35. Drafters at the Constitutional Convention intended the term "birth" to apply to disabilities connected with legitimacy of birth in the law, although successions law is not mentioned specifically. STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS, Aug. 29, 1973, at 62-63 [hereinafter cited as VERBATIM TRANSCRIPTS]. The specific listing of types of discrimination was

the article follows the federal courts' interpretation of equal protection requirements in permitting reasonable discrimination based on natural distinctions.[36]

In *Levy v. Louisiana*[37] and *Glona v. American Guarantee and Liability Insurance Company*[38] the United States Supreme Court was presented with the claim that Louisiana law, which had been interpreted to forbid illegitimate children to recover for the wrongful death of their natural mother, or the natural mother to recover for the wrongful death of her illegitimate child,[39] violated the fourteenth amendment. The Supreme Court agreed that allowing only legitimates to recover for wrongful death bore no rational relationship to the law's purpose, which was to provide a remedy for persons injured by the wrongful death of a parent or child.

Levy and *Glona* were the opening wedge for a line of decisions by the Supreme Court considering similar laws.[40] A Louisiana case, *Labine*

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in response to the failure of the courts to apply the fourteenth amendment to these particular classes. *Id.* at 58. *See also* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 6 (1974).

36. *See* Hargrave, *supra* note 35, at 8. This has been the interpretation given in the post-1974 decisions. *E.g.*, Williams v. Williams, 331 So. 2d 438 (La. 1976); State v. Barton, 315 So. 2d 289 (La. 1975). The burden of proving "reasonableness" rests with the state, and discriminatory laws are deprived of a presumption of constitutionality. *See* Hargrave, *supra* note 35, at 8.

37. 391 U.S. 68 (1968).

38. 391 U.S. 73 (1968).

39. LA. CIV. CODE art. 2315. *See* Thompson v. Vestal Lumber & Mfg. Co., 208 La. 83, 22 So. 2d 842 (1945); Sesostris Youchican v. Texas & P. Ry., 147 La. 1080, 86 So. 551 (1920).

40. Using similar reasoning, every Supreme Court decision prior to *Trimble v. Gordon*, with two exceptions, invalidated legitimacy classifications in various state and federal laws. Jimenez v. Weinberger, 417 U.S. 628 (1974); Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974) (federal social security law barred unacknowledged, illegitimate children born after a parent became disabled from receiving benefits); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (New Jersey law denied indigent health care to illegitimate children of otherwise qualified families); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972) (federal social security laws denied benefits to certain classes of illegitimates); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (Louisiana workmen's compensation laws gave higher priority in death benefit claims to the legitimate and acknowledged children of the decedent than to his unacknowledged, adulterous children living within the same household). One important exception to this line of cases, and the only case concerned with classifications in successions law, was *Labine v. Vincent*, 401 U.S. 532 (1971). The other exception was *Matthews v. Lucas*, 427 U.S. 495 (1976), where the Court held that a Social Security law which denied payments to illegitimate children unless they could prove dependency on the parent, while not requiring such proof of legitimate

v. Vincent,[41] was an equal protection challenge to Civil Code article 919 by the acknowledged illegitimate son of the intestate deceased.[42] The father had legitimate collateral relations and the Supreme Court upheld the validity of the article granting them a preference. *Levy* was mentioned but was considered limited to tort law. The Court applied an extremely deferential analysis and merely held that the states had broad powers to protect family life and to regulate dispositions of property within their borders, and declined, in the absence of a clear constitutional guarantee, to nullify any method chosen by elected representatives merely because it disagreed with the state's reasoning or felt it could devise a better method.[43] A strong dissent subjected the Louisiana statute to a more exacting equal protection scrutiny to determine if its discriminatory effect served valid state ends.[44] It came to the conclusion that the rationale behind article 919 was merely a "moral prejudice of bygone centuries."[45] According to the dissent, the one factor which made the law constitutionally suspect was that it punished innocent children for the misdeeds of their parents, which the dissent characterized as, in the very least, "unusual."[46]

State court decisions in the area are few, due probably to the established nature of succession law and the fact that Louisiana had no equal protection provision in its constitution until 1974. *Labine v. Vincent* was an affirmation of *Succession of Vincent*,[47] the first consideration of the

children, did not violate the fourteenth amendment. The Court found a valid state purpose to be served in that legitimate children were more likely to be dependent upon the parent than illegitimate children and the purpose of the law was to provide aid to dependent children. The statute, instead of disqualifying all illegitimates (which would make it over-inclusive), provided for the illegitimate child who could prove dependency, thereby lessening its impact on the class of illegitimates as a whole.

41. 401 U.S. 532 (1971).

42. For an in-depth discussion of the equal protection ramifications of *Labine*, see Petrillo, *supra* note 33. *See also* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

43. 401 U.S. at 538-39. But the Court did mention that the Louisiana law had a rational basis in the promotion of family life and the orderly disposition of property. *Id.* at 536 n.6.

44. Petrillo, *supra* note 33, at 399-405. The dissent considered and rejected the following possible policies behind the Louisiana law: biological differences, precise and orderly disposition of property by the state upon death, the presumed intent of the decedent (i.e., how the average citizen would desire to dispose of his property should he execute a will), and encouragement of marriage and discouragement of illegitimacy. 401 U.S. at 551-56.

45. 401 U.S. at 541.

46. *Id.* at 557.

47. 229 So. 2d 449 (La. App. 3d Cir. 1969), *writ denied*, 255 La. 480, 231 So. 2d 395 (1970).

matter of the constitutionality of legitimacy classifications by a Louisiana court.[48] In *Succession of Captain*[49] the deceased father (who had no legitimate descendants) willed all of his property to his natural children. The decedent's mother and collateral relations attacked the testament under Civil Code article 1486 and the court reduced the children's legacy to one-fourth of the decedent's property. Equal protection arguments were rejected because the court maintained that the new constitution forbade only *unreasonable* discrimination and that the statute had a reasonable basis.[50] The court applied the *Labine* philosophy that the nuances of succession law promote unique state interests and thus should not be tampered with by the courts.

Trimble v. Gordon was the first United States Supreme Court consideration of legitimacy classifications in succession law since *Labine*. The Court held unconstitutional an Illinois law which allowed an illegitimate child to inherit by intestate succession only from the natural mother.[51] The child involved had been determined to be the daughter of the deceased in a state court paternity action, and had been supported by her father until his death. The probate court determined Gordon's heirs to be only his parents, brothers, and sisters and the Illinois Supreme Court affirmed.[52] The United States Supreme Court discarded the *Labine* approach and instead undertook a thorough analysis to determine whether the Illinois legitimacy classifications were rationally related to the statute's underlying purposes.[53] After recognizing that the Illinois law did much to

48. The court here also discounted the relevancy of *Levy* and *Glona* and held that legitimacy classifications have a reasonable basis in that the state validly desired to encourage marriage, discourage illegitimacy, and ensure the stability of land titles and the prompt determination of ownership of property upon death.

49. 341 So. 2d 1291 (La. App. 3d Cir. 1977).

50. The court was referring to stability of land titles, encouraging marriage, and discouraging illegitimacy. 341 So. 2d at 1295.

51. ILL. REV. STAT. ch. 3, § 12 (1961). Section 12 has since been recodified unchanged. ILL. REV. STAT. ch. 3, § 2-2 (Supp. 1976).

52. In an oral opinion the Illinois Supreme Court affirmed on the basis of its decision in *In re Estate of Karas*, 61 Ill. 2d 40, 329 N.E.2d 234 (1975), which had relied on *Labine*.

53. The Court here stopped short of applying "the strict scrutiny" analysis traditionally applied to "suspect classifications" (see note 30, *supra*) but also rejected the extremely deferential approach used in *Labine*. "As we recognized in *Lucas*, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations . . . . We nevertheless concluded that the analogy was not sufficient to require 'our most exacting scrutiny.' . . . Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' *Lucas* also establishes that the scrutiny 'is not a toothless one . . . .' " 97 S. Ct. at 1463. The

improve the illegitimate's position from the old common law rule of *filius nullius*,[54] the Court considered the reasonableness of the justifications for the remaining prejudices.[55]

The first justification offered was the state's desire to promote legitimate family relationships. The Court acknowledged that this is an acceptable state aim, but reasoned that "the equal protection clause requires more than the mere incantation of a proper state purpose."[56] Moreover, the Court doubted whether the Illinois law was rationally related to the accomplishment of that purpose. The Court pointed out the unjust and illogical reasoning which would attempt to punish parents by imposing sanctions on their children and reasoned that individuals were not likely to shun illicit relations merely because children resulting from their union would be unable to inherit from them. Thus legal burdens placed upon the illegitimate child were declared "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[57] Illinois also argued that the statute posed no "insurmountable barrier"[58] because the daughter could have inherited his property if he had written a will to that effect. The Supreme Court dismissed this contention by reasoning that the question of the constitutionality of Illinois *intestate* succession laws should not depend upon the occurrence or non-occurrence of a hypothetical situation. It was further urged that the Illinois statute attempted to reflect the presumed intentions of citizens who die intestate by disposing of their property according to normal family affinities. The Court, however, found that the theory of presumed intent was not one of the policies behind the enactment of the Illinois law and therefore declined to consider this argument.[59]

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difference seemed to be that the Court refused to give to the Illinois succession laws a presumption of constitutionality where illegitimates are disadvantaged, but instead scrutinized the means selected to determine if they served the law's ostensible purposes.

54. Under this doctrine, an illegitimate child was incapable of inheriting from anyone. *In re* Ellis' Estate, 225 Iowa 1279, 1286, 282 N.W. 758, 762 (1938).

55. *Trimble* was decided on the basis of its effect on illegitimate children, and did not reach the argument that the Illinois law discriminated on the basis of sex. In addition, it had been argued in the Illinois courts that the law was racially discriminatory because of its disproportionate impact on blacks. This argument was not presented to the Supreme Court. 97 S. Ct. at 1463.

56. *Id.* at 1464.

57. *Id.* at 1465. The Court was quoting from the *Weber* decision, 406 U.S. at 175.

58. Labine v. Vincent, 401 U.S. at 539.

59. The Court's refusal to hypothesize additional state purposes beyond those articulated by the state itself in order to show the rationality of the classification is

Of all the justifications advanced for the Illinois law's discriminatory effect, the Court found most substantial the state's interest in regulating the efficient and speedy disposition of property within the state. The state claimed that proof of lineal relationship in the maternal line was fairly easy to establish, but stressed the difficulties and possibilities of fraud when dealing with proof of paternity. The Court admitted that such problems might justify a more demanding standard for illegitimate children claiming under their father's estates, but found this justification not to apply in *Trimble*, since Gordon had been declared to be the child's father in a paternity action prior to his death. The rejection of this justification was not done without substantial concern and consideration by the Court of traditional state sovereignty in the succession law area.[60] In dictum the Court stated that a statute would not offend equal protection requirements if it did not broadly discriminate against illegitimates, "but [was] carefully tuned to alternative considerations."[61] For example, a state law could perhaps reasonably bar illegitimates from inheriting from their natural fathers if it also allowed for exceptions where paternity could be proven in a precise and non-burdensome manner as would be the case for acknowledged children or children whose paternity had been adjudicated. The Illinois law, however, provided for no such consideration. The statute's rational basis may have been permissible but the law was constitutionally flawed because it failed to provide for instances where proof of paternity would *not* be a problem in the orderly settlement of a succession. Thus the law was over-inclusive[62] because it encompassed all illegitimates, even those whose paternal filiation could be ascertained without delaying or burdening the succession procedure. The dissent would have upheld the Illinois law attacked in *Trimble* on the basis that it was constitutionally indistinguishable from the law upheld in *Labine*.[63]

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another departure from the *Labine* approach. In any event, the opinion contained words to the effect that such presumed intent would not meet fourteenth amendment standards because, even if it is assumed that such laws correctly reflect the individual's intent to disinherit his illegitimate child, the law is nevertheless an act of the state rather than the individual, a distinction the Court called "fundamental." 97 S. Ct. at 1467 n.16. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

60. "The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area." 97 S. Ct. at 1465-66.

61. *Id.* at 1466. The Court was applying language from its recent decision in *Matthews v. Lucas*, 427 U.S. at 513. This is similar to the idea of "less restrictive alternatives." See United States v. Brown, 381 U.S. 437 (1965).

62. See note 33, *supra*.

63. 97 S. Ct. at 1468 (Burger, C.J., dissenting). Mr. Justice Rehnquist filed a lengthy dissent in which he deprecated the majority for "endless tinkering with

Soon after *Trimble* was decided, *Succession of Robins* was considered by the Louisiana Supreme Court. *Robins* involved the testamentary disposition of property by a father to his sons who were adulterous bastards.[64] The father, who had left no lawful relations, had willed all of his separate property to the sons and acknowledged them in the same will. Robins' surviving widow attacked the will under Civil Code article 1488,[65] but the trial court held the article unconstitutional in light of the equal protection provision of the 1974 Constitution, and its decision was affirmed by the supreme court.[66]

As the court so strongly emphasized in the opinion, the holding of *Robins* is limited solely to the validity of article 1488,[67] and the question the court pondered was not whether illegitimate children may be treated differently from legitimates, but whether the law may reasonably discriminate against adulterous bastards *within* the class of illegitimates.[68] The court illustrated the unreasonableness of the distinction by pointing out the absurdity of its effects. Only the fact that the sons were *adulterously* conceived *by the man who willed them his property* prevented them from receiving the legacy. Had the sons been merely illegitimate they could

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legislative judgments," under the guise of interpreting the equal protection clause. Justice Rehnquist maintained that the majority's scrutiny of the Illinois law's purposes was actually a questioning of legislative *motive*, and that its analysis of the methods chosen by the legislature to achieve these purposes was actually a value judgment by the majority of what it thought the state *ought* to do with its successions law rather than what, constitutionally, it could or could not do. He would return to the concept of extreme deference as applied in *Labine* and would not interfere in the ordinary legislative process of the state on the basis of equal protection unless the distinctions or classifications drawn by a law are "mindless or patently irrational." 97 S. Ct. at 1468-73 (Rehnquist, J., dissenting).

64. See text at note 8, *supra*.

65. Both sons were fully capable of supporting themselves, so that the exception to article 1488 did not apply here. 349 So. 2d at 281.

66. See note 3, *supra*.

67. "Preliminarily, we emphasize that the present issue does not arise in the context of passing upon the reasonableness of legislative classifications of legitimate versus illegitimate children for purposes of intestate heirship, Articles 886-88, 902, 917-920, nor even for purposes of testamentary succession, Article 1483. Nor does it arise in the context of the legislative reasonableness of the intestate succession of a surviving widow to her husbands's property in default of legitimate descendants, to the exclusion of the husband's illegitimate children. Articles 917, 919." 349 So. 2d at 277.

68. "(The narrowed issue essentially involves the reasonableness of the legislative classification of adultery-conceived illegitimates as being incapable of receiving testamentary dispositions from their parents, when such dispositions are not prohibited as to *other* illegitimate children, nor as to (technically) ['legitimate'] children likewise conceived as the result of an adultery.)" 349 So. 2d at 277. [Note: the word in brackets appears as "legitimate" in the slip opinion, but as "illegitimate" in the reporter. The former term seems to make more sense.]

have received one-third of the father's property.[69] If the sons had been conceived in adultery by a person other than Robins, they could have received by will the whole of Robins' property to the exclusion of the surviving spouse.[70] The same would have been true if Robins had never acknowledged them informally in his will.[71] Finally, and most absurd of all, the court felt the sons would have been able to receive the entire legacy had their mother been married to another man at the time she conceived them. The law would have regarded them as legitimate sons of her husband even though they were in fact conceived of an adulterous union.[72]

Despite its primary reliance on the Louisiana Constitution, the court employed language similar to that used by the United States Supreme Court in its equal protection decisions.[73] The Louisiana court stated that the constitution requires laws to affect alike all those similarly situated in the absence of a rational basis for the differentiation which was reasonably related to a valid state purpose.[74] The only state purpose urged upon the court was that of preserving the sanctity of marriage by penalizing adultery, but the court quickly seized upon the language of the United States Supreme Court in *Trimble* and pointed out the injustice and futility of penalizing children for the misdeeds of their parents.[75] The majority could find no rational state purpose served by article 1488, and held it to be in clear violation of the 1974 Constitution because it discriminated on the basis of birth. The dissenting justices argued that since article 1488 had been part of the fabric of Louisiana law since the Digest of 1808 and had been an integral part in the scheme of priorities in succession law, it was unlikely that the new constitution had intended to obliterate it. The dissent also maintained that the law served a valid state purpose by maintaining "public moral standards,"[76] and should be given a presumption of constitutionality.[77] The minority was especially troubled that this interpretation of the Louisiana Constitution would be the first of many decisions

69. *Id.* at 279-80. *See* LA. CIV. CODE art. 1486.

70. 349 So. 2d at 279. *See* LA. CIV. CODE art. 1496.

71. 349 So. 2d at 279. *See* LA. CIV. CODE art. 209; Succession of Cervini, 228 La. 1054, 84 So. 2d 818 (1956).

72. 349 So. 2d at 279. *See* LA. CIV. CODE arts. 184-90.

73. See text at notes 30-33, *supra*.

74. 349 So. 2d at 278.

75. "[W]e have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." 97 S. Ct. at 1464-65, *quoted at* 349 So. 2d at 280.

76. 349 So. 2d at 285.

77. ***But see*** Hargrave, *supra* note 35.

which would eventually place illegitimates on equal footing with legitimate children in all areas of the law.

There are reasons to believe that this concern of the dissent is not without substance. Although the holding of *Robins* is extremely narrow and the factual setting could not have been better suited for such a holding, there is language in the decision which could lead to a more expansive use of article I, section 3 to affect other areas of succession law where illegitimates are disabled or excluded. Furthermore, in *Trimble* the Supreme Court indicated that it would no longer employ the deferential approach of *Labine* in considering discriminatory state succession laws, but instead would make a careful constitutional analysis of the law's purpose and the means employed to effect that purpose.[78] The result could be a judicial and legislative restructuring of some facets of Louisiana succession law at the *state* level.

The immediate, concrete effects of *Trimble* and *Robins* have actually changed the law very little. *Robins*, of course, specifically invalidated article 1488 only as it pertained to adulterous bastards,[79] so that natural parents may now donate mortis causa to their adulterous illegitimate children the same part of their property they can leave to their natural illegitimate children.[80] *Robins* removed only one of the many legal bur-

78. "[W]e found in *Labine* a recognition 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 the decedents. . . . We reaffirm that view, but there is a point beyond which such deference cannot justify discrimination. Although the proposition is self evident . . . state statutes involving the disposition of property at death are not immunized from equal protection scrutiny." 97 S. Ct. at 1464 n.12. "[I]t 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." 97 S. Ct. at 1468 n.17. See note 53, *supra*.

79. The question of what effect *Robins* may have on the rights of incestuous bastards remains unanswered. It seems, however, that all of the arguments used by the majority in *Robins* to demonstrate the unreasonableness of article 1488 as applied to adulterous bastards apply equally well to the plight of incestuous children. Given the proper factual setting the court may well do away with article 1488's burdens on incestuous bastards. It is not denied that the state may have a legitimate interest in preventing incest, perhaps even more than in preventing adultery, but both *Robins* and *Trimble* are unequivocal in stating that a law may not attempt to affect the actions of the parents by imposing discriminatory burdens on the children. In any event Louisiana already provides criminal sanctions for incest imposed directly upon the participants, thereby adequately and more directly fulfilling the state's interest in the area. *See* LA. R.S. 14:78 (1950).

80. See text at notes 20-22, *supra*.

dens imposed upon illegitimates and did not touch upon the question of whether illegitimates in general could be discriminated against by succession law. *Trimble*, on the other hand, was broader in its effect, but did not deal with Louisiana law, and thus can not be said to have immediate effects on our law.[81] The Illinois law at issue differed from the analogous Louisiana provision because it barred any illegitimate from inheriting from his father. Article 919 merely places the illegitimate on a lower rung of the successions ladder, and provides for alimony so that the child is not completely shut off from the estate.

However, the two decisions may have a significant impact on Louisiana law by providing policies and guidelines for determining the constitutionality of other provisions in succession law which are challenged in future litigation. Future cases in this area will very likely be decided under the state constitution because of its equal protection provision which specifically covers distinctions of birth. In that sense, the reasoning in *Robins* will be significant. However, the interpretation given to the fourteenth amendment in *Trimble* and its forerunners remains important since the Louisiana equal protection provision was intended to be a restatement of the federal provision but with greater specificity.[82] It is reasonable to assume that Louisiana courts would prefer to settle future disputes in the area at the state level, with one eye on the Louisiana Constitution and the other on the United States Supreme Court.

It thus appears certain that the courts will continue to apply the rational basis test in an attempt to find a reasonable link between legitimacy classifications and the valid state purpose behind the law, while at the same time determining whether the article is "carefully tuned to alternative considerations"[83] in satisfying that purpose. The purposes most often put forth have been the stability of family life (to encourage marriage and discourage illegitimacy), the speedy and accurate determination of title to property upon death, and the "presumed intent" theory. The history of

81. *Trimble* did not expressly overrule *Labine*, and it did distinguish the Louisiana law from the Illinois statute: "Louisiana laws at issue in *Labine* were quite different. Those laws differentiated on the basis of the character of the child's illegitimacy . . . . The Louisiana categories are consistent with a theory of social opprobrium regarding the parents' relationships and with a measured, if misguided, attempt to deter illegitimate relationships." 97 S. Ct. at 1464 n.13. *See also* 97 S. Ct. at 1468 n.17. Still the majority in *Trimble* considered *Labine* somewhat of an anomaly. "*Labine v. Vincent* . . . is difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent." 97 S. Ct. at 1464 n.12. See also note 78, *supra*.

82. VERBATIM TRANSCRIPTS, *supra* note 35, at 64.

83. See note 61, *supra*.

Louisiana law points strongly to the recognition of the family stability policy as the principal motivating force behind the law of successions[84] and the only possible explanation for Louisiana's unique treatment of illegitimates in testate succession. These articles are an obvious attempt to discourage illegitimate relationships by allowing parents to give property to their legitimate children but not to the illegitimate ones. However, it is not clear that preventing parents from willing property to their illegitimate children achieves the desired results, and certainly a rising illegitimacy rate would support an argument to the contrary.[85] In addition, it is questionable whether Louisiana succession law would influence the average person's decision to have children outside of marriage, or even that the average person would know of the legal effects of his decision upon future children. So, in most cases, the law does not deter illegitimacy at all, and works only to discriminate against the innocent illegitimate child. If the discrimination no longer serves the purpose for which it was intended it should be reconsidered.[86] Unless some other valid state end served by the classifications in the testate succession law can be advanced, articles 1483-87 may well be declared unconstitutional along with 1488.[87]

Intestate successions, however, are a more difficult problem, because different state purposes are involved. As was argued in *Trimble*, states have a real interest in the quick and orderly disposition of property at death. Disinheriting illegitimates serves this purpose since it obviates both problems of lengthy litigation to ascertain filiation and the possibility of fraud which would undoubtedly accompany the assimilation of illegitimates into the intestate succession scheme.[88] Such an argument would

84. See text at notes 25-29, *supra*. This was also recognized by the Court in *Trimble*, 97 S. Ct. at 1464 n.13.

85. In 1953 the total number of illegitimate births in Louisiana was 6,871 or 81.1 for every 1,000 live births. DIVISION OF PUBLIC HEALTH STATISTICS, LOUISIANA STATE DEPARTMENT OF HEALTH, STATISTICAL REPORT OF THE DIVISION OF PUBLIC HEALTH STATISTICS, 16 (1953). In 1963 this number had increased to 8,666 illegitimate births or 101.6 per 1,000 live births. DIVISION OF PUBLIC HEALTH STATISTICS, LOUISIANA STATE DEPARTMENT OF HEALTH, STATISTICAL REPORT OF THE DIVISION OF PUBLIC HEALTH STATISTICS, 22 (1963). In 1973 illegitimate births in Louisiana had risen to 12,285 total and 185.0 per 1,000 live births. OFFICE OF PUBLIC HEALTH STATISTICS, LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, 1973 VITAL STATISTICS OF LOUISIANA, 25 (1973).

86. McGowan v. Maryland, 366 U.S. 420, 425 (1961).

87. It may also be argued that Louisiana's laws protect the illegitimate child and the natural parent from the "scandal" involved when the illegitimate child claims or receives his inheritance. However, since such a child may still claim alimony under article 920 or a subsistence legacy under article 1488, the likelihood of a "scandal" is present to the same extent as the law now stands.

88. This is a possible explanation for the Louisiana laws which place a greater

surely be advanced in asserting the constitutionality of Civil Code articles 917-920 which bar illegitimate children from inheriting when the parent has legitimate descendants. However, as *Trimble* also mentioned, if the state interest could be served adequately by alternative provisions which would eliminate or lessen the impact of the discrimination, then those provisions must be written into the law.[89]

A possible solution to this problem in Louisiana would be to allow all *acknowledged illegitimate* children and all children whose paternity has been judicially determined, to enter the regular succession on an equal basis with legitimate children.[90] This would include rights to intestate inheritance, donations, and forced heirship. Potential problems caused by such a change, such as in stability of land titles, could be avoided by adopting a modification which would allow the acknowledged illegitimate to claim his inheritance or donation not as a fractional interest in, but rather as a credit against, the succession, payable either in cash or by partition of the decedent's assets and liabilities.[91] The discretion would lie entirely with the legitimate heirs (so long as the proportionate value is given) and all movable and immovable property would remain under the control of the legitimate heirs unless and until specific assets were transferred in satisfaction of an illegitimate child's claim.[92] Such a proposal would reduce the discriminatory effect of the intestacy laws by eliminating the over-inclusiveness and lifting an unjust legal burden from most illegitimate children. Although this scheme would not help the incestuous child who could not, under article 204, be acknowledged, one could argue based on *Robins* that no rational basis could be advanced for treating incestuous children differently from other illegitimates in the acknowledgement area.[93] Therefore, changes in the acknowledgement process would be required in order to allow any illegitimate child to be acknowl-

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burden on illegitimate children inheriting from the father than from the mother. Proof of paternity is invariably more difficult and uncertain than proof of maternity. See text at notes 15-17, *supra*.

89. See text at note 61, *supra*.

90. Acknowledgement could either be of a formal, statutory nature under Civil Code article 203 or of an informal type. According to Professor Pascal, "Informal acknowledgement results from any act of the parent expressing or implying parentage of the child, and decisions have given it the same effect as formal acknowledgement for all purposes in favor of the child, but never in favor of the parent." Pascal, *supra* note 27, at 169. *See* LA. CIV. CODE articles 208-12 for methods of proving paternity.

91. This plan was earlier suggested by Professor Pascal. See Pascal, *supra* note 27, at 181-82.

92. *See id.*

93. See note 79, *supra*.

edged by either parent without regard to type of illegitimacy or subsequent legal marriage between the parents.

The constitutionality of Louisiana's intestacy laws is in serious doubt unless some changes are made to allow them to survive a *Trimble*-type analysis.[94] Although the Court in *Trimble* did distinguish the Louisiana law from the Illinois statute in certain respects such as the provision for alimony, it left no doubt that it would use the new analysis if it considered the Louisiana law.[95] There is serious doubt that alimony provisions alone would dissuade the Court from seeing an unreasonable discrimination in Louisiana's succession law. Alimony cannot be considered an inheritance, and does not even apply where the child is capable of supporting himself. Furthermore, any assertion of the presumed intention rationale in Louisiana would likely meet the same fate as it did in *Trimble,* where the Court said such a presumption, when given the force of law, amounts to nothing more than state enforcement of private prejudices.[96]

It is hoped that the necessary changes will come from the Louisiana legislature. If, however, the present laws should be declared unconstitutional in whole or in part by the courts it is respectfully suggested that the new rule be applied *prospectively* only.[97] This would avoid the disturbance of settled property titles established in reliance upon the constitutionality of Louisiana's succession law. Whether it is the legislature or the courts which finally settle the matter, it seems probable that *Trimble* and *Robins* are the harbingers of substantial changes in some very basic and deep-rooted Civil Law tenets.

P. Keith Daigle

94. An unsuccessful attempt was made to affect the law in this area in the 1977 regular session of the Louisiana Legislature. La. H.B. 122-29, 40th Reg. Sess. (1977). These bills would have liberalized the restrictions on legitimates only in the maternal succession, and thus would be similar to the Illinois law invalidated in *Trimble*.

95. See note 78, *supra*.

96. See note 59, *supra*.

97. Both the United States Supreme Court and the Louisiana Supreme Court have generally applied their rulings prospectively where vested contract or property rights are concerned. *See, e.g.*, Bradley v. School Bd., 416 U.S. 696 (1975); Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932); Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 146, 150 So. 855, 858 (1933).