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The Problematic Application of Succession of Brown

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The legislature could limit the statute to provide such a right only to juveniles. The second statute provides in part: "The attorney advising the witness shall only advise such witness concerning his right to answer or not to answer . . . and shall not otherwise engage in the proceedings."[48]

Such a statute would assure that the waiver requirements of *Dino* are met and would in no significant way either "interfere with the effective and expeditious discharge of the grand jury's duties,"[49] "saddle a grand jury with minitrials and preliminary showings [that] would . . . impede its investigation,"[50] or "delay and disrupt grand jury proceedings."[51] By avoiding these disruptive effects, such a statute would maintain the integrity of the grand jury system and would offer the greatest protection to the juvenile's right against self-incrimination.

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THE PROBLEMATIC APPLICATION OF *Succession of Brown*

Plaintiffs, decedent father's four acknowledged illegitimate children, sued to annul a judgment of possession recognizing decedent's adopted child as the sole heir. The plaintiffs attacked the constitutionality of article 919 of the Louisiana Civil Code, which prohibits acknowledged illegitimates from participating in the succession of their father if he is survived by legitimate descendants, ascendants, collateral relations, or spouse.[1] The trial court rendered judgment rejecting the plaintiff's demands. This decision was reversed by the Second Circuit Court of Appeal, and the case was remanded for a new judgment of possession to be entered, recognizing plaintiffs as heirs.[2] The Louisiana Supreme Court *affirmed*, declaring article 919

48. *Id* at § 10.27.080 (1971).
49. United States v. Calandra, 414 U.S. 338, 350 (1974).
50. United States v. Dionisio, 410 U.S. 1, 17 (1973).
51. United States v. Calandra, 414 U.S. 338, 349 (1974).

1. 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.
In all other cases, they can only bring an action against their father or his heirs for alimony, the amount of which shall be determined, as is directed in the Title: Of Father and Child.
2. 379 So. 2d 1172 (La. App. 2d Cir. 1980).

unconstitutional under provisions of both the Louisiana and Federal Constitutions,[3] in that "[t]he distinction drawn by art. 919 between these acknowledged illegitimates and all other relations of the decedent is arbitrary, capricious, and unreasonable."[4] *Succession of Brown*, 388 So. 2d 1151 (La. 1980).

The constitutionality of article 919 was upheld by the United States Supreme Court in its 1971 decision of *Labine v. Vincent*.[5] The plaintiff, an acknowledged illegitimate son of the intestate deceased father, was excluded from sharing in the succession by collateral relations of the father. The Court, in a 5-4 decision, applied a test of "minimum rationality"[6] and deferred to the state's power to promulgate rules for the purposes of regulating the disposition of property within the state and protecting legitimate family relationships.[7] The *Labine* Court emphasized that Louisiana's succession laws did not create an "insurmountable barrier"[8] preventing the illegitimate

3. The court found article 919 to be invalid under the equal protection clause of the fourteenth amendment of the United States Constitution, which provides in pertinent part: "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Article 919 was also determined to be in violation of article 1, section 3 of the Louisiana Constitution, which states: "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth . . . ." LA. CONST. art. I, § 3.

4. Succession of Brown, 388 So. 2d 1151, 1154 (La. 1980).

5. 401 U.S. 532 (1971). Prior to the time *Labine* was decided two other decisions were handed down by the United States Supreme Court involving Louisiana laws and illegitimate's rights. *Levy v. Louisiana*, 391 U.S. 68 (1968), in which acknowledged illegitimate children were deemed to have a right to recover damages under the Louisiana wrongful death statute for the death of their mother, and *Glona v. American Guar. and Liab. Ins. Co.*, 391 U.S. 73 (1968), which allowed the mother to recover for the wrongful death of her illegitimate child, were the foundations for the development of illegitimates' rights in Louisiana.

6. In *Labine*, the equal protection analysis merely required that the statute bear a rational relationship to any legitimate state purpose. 401 U.S. at 539. The dissent argued that the majority had simply deferred to the state's power to regulate and had totally disregarded the application of this test. 401 U.S. at 548 (Brennan, J., dissenting).

This extremely deferential approach gave way to a more exacting equal protection analysis. *See* Trimble v. Gordon, 430 U.S. 762, 767 (1977).

7. The United States Supreme Court in decisions after *Labine* rejected the concept that by imposing sanctions on the illegitimate children, men and women's activities could be confined to the legitimate family relationship. Trimble v. Gordon, 430 U.S. 762, 769 (1977); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972). The Louisiana Supreme Court in *Brown* noted the injustice of the sanctions: "[w]e agree that the innocent children should not suffer from the promiscuous adventures of their parents." 388 So. 2d at 1153.

8. The Supreme Court attempted to distinguish *Levy v. Louisiana*, 391 U.S. 68 (1968), from the law at issue in the *Labine* case. The Court wrote: "We emphasize that this is not a case, like *Levy* where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana

from sharing in the father's succession, since there were various alternative methods by which the father could protect the child, should he choose to do so, during his lifetime. The Court concluded that, under the facts of the case, the state's choices exemplified in article 919 were permissible under the Equal Protection Clause.

After *Labine*, equal protection analysis in cases involving the classification of birth underwent significant change. The most important decision of the period following *Labine* was *Trimble v. Gordon*,[9] which involved an Illinois statute allowing an illegitimate child to inherit from the natural mother, but not from the natural father.[10] The Court refused to recognize illegitimacy as a "suspect classification" requiring strict scrutiny,[11] but noted that the statute must bear a rational relationship to a legitimate state purpose[12] and that the scrutiny to be applied in cases involving illegitimacy status "is not a toothless one."[13]

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has barred this illegitimate from inheriting from her father." 401 U.S. at 539.

The Court described the various methods by which the father could have assured his illegitimate daughter of a share in his succession. *Id.* It would appear that the Court granted great weight to the "no insurmountable barrier" argument.

9. 430 U.S. 762 (1977). Many other cases involved equal protection challenges in which the United States Supreme Court struck down state and federal provisions on the basis that they unreasonably discriminated against illegitimates. *See* Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972); David v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972). For a thorough discussion of these cases and their contribution to the recognition and protection of the illegitimate's rights, *see* Lorio, *Succession Rights of Illegitimates in Louisiana*, 24 LOY. L. REV. 1 (1978). *See also* Comment, *Can Louisiana's Succession Laws Survive in Light of the Supreme Court's Recent Recognition of Illegitimates' Rights?*, 39 LA. L. REV. 1132 (1979).

10. ILL. REV. STAT. ch. 3, § 12 (1973). The statute required the father to marry the illegitimate child's mother and to acknowledge the child as his own in order for the child to inherit from the father who died intestate. The child would be classified as legitimate; thus, the state effectively precluded any illegitimate child from sharing in the succession of the deceased father.

11. 430 U.S. at 767. This argument was asserted and rejected in the previous year in *Matthews v. Lucas*, 427 U.S. 495 (1976). The Court was of the opinion that similarities existed between the classification of illegitimates and those of the suspect classifications but concluded that strict scrutiny was not required. *Id.* at 506. The only classifications recognized by the Supreme Court as suspect are race, nationality, and alienage. *See* Comment, *supra* note 9, at 1135 n.16.

12. The Court noted that the justification of a state law involves more than the "mere incantation of a proper state purpose." The constitutionality of the law in question "depends upon the character of the discrimination and its relation to legitimate legislative aims." 430 U.S. at 769, *citing* Matthews v. Lucas, 427 U.S. 495, 504 (1976).

13. *See* Matthews v. Lucas, 427 U.S. 495, 510 (1976).

Applying an intermediate level of scrutiny, the Court dismissed the state's argument that such a law would promote legitimate family relationships—an assertion which had been recognized by the Court as a valid state interest in *Labine*[14]—and noted that such a statute "bears only the most attenuated relationship to the asserted goal."[15] The *Trimble* Court also rejected the state's contention that the law did not create an "insurmountable barrier" for the illegitimate child to inherit from his natural father.[16] Focus on the presence or absence of such a barrier confused the analysis, the Court explained, and thus the availability of alternatives to the father was afforded no constitutional significance.[17] The state's interest in regulating the disposition of property within the state upon death was recognized as legitimate and important, but the Court was of the opinion that the means employed by the state to achieve that goal were not sufficiently related to that interest.[18] The Illinois law, effecting a statutory exclusion of *all* illegitimates insofar as inheriting from their fathers was concerned, was therefore unconstitutional. The *Trimble* Court recognized that the Illinois statute could be distinguished from Civil Code article 919 at issue in *Labine*, but nonetheless noted that "[d]espite 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."[19]

Recognizing that the stricter analysis of *Trimble* foreshadowed the eventual overruling of *Labine*,[20] the Louisiana Supreme Court

14. Labine v. Vincent, 401 U.S. 532, 536-37 (1971).

15. 430 U.S. at 768.

16. *Id.* at 773. See note 8, *supra*.

17. 430 U.S. at 773-74.

18. *Id.* at 770-71. The failure of the lower court to consider a compromise between the two extremes of individual determinations of paternity and complete exclusion of all illegitimates was viewed by the Court as the deciding factor in its determination that the Illinois law was unconstitutional. In effect the statute was overinclusive, in that the means selected by the state were not closely tailored to accomplish the legitimate state ends of protecting the orderly disposition of property at death and the stability of land titles. *Id.* at 771.

19. *Id.* at 776 n.17.

20. Two cases decided after the *Trimble* decision, although dealing with testate successions, demonstrated the acceptance and application by the Louisiana Supreme Court of a more searching and exacting analysis of asserted state goals and their rational relation to the state law in question. *Succession of Robins*, 349 So. 2d 276 (La. 1977), held article 1488 of the Louisiana Civil Code unconstitutional. Article 1488 restricted the freedom of the natural father or mother to dispose of property by testament to children born of an adulterous relationship by limiting such dispositions to nothing more than that required for the child's sustenance. *Succession of Thompson*, 367 So. 2d 796 (La. 1979), invalidated article 1483, which prohibited acknowledged illegitimate children from receiving from their natural father or mother by donation *inter-*

held article 919 unconstitutional in *Succession of Brown*.[21] In *Brown*, the right of the four acknowledged illegitimate children to share in the *intestate* succession of their father under article 919 was dependent on the absence of legitimate descendants of their father. The father had, however, adopted one of his acknowledged illegitimate children, and she was recognized by the trial court as the sole heir, thus excluding the plaintiffs.[22] The Second Circuit Court of Appeal reversed the trial court's decision and held article 919 to be unconstitutional.[23] On appeal to the Louisiana Supreme Court, the issue squarely presented to the court was the constitutionality of article 919.[24] The equal protection analysis used to review the statute was entirely different from the test of minimum rationality earlier applied to article 919 by the United States Supreme Court in *Labine*.[25] Guided by the Court's later pronouncements in *Trimble* and *Lalli v. Lalli*,[26] the Louisiana Supreme Court studied the article to determine if the classification was "substantially related to permissible state interests."[27] The court considered the three interests asserted by the state to justify the Louisiana law, rejecting, as had *Trimble*, arguments that such a law promoted legitimate family relationships and the contention that alternatives were readily available to the father to ensure the illegitimate a part of his succession.[28] The focus of the

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vivos or *mortis causa* property in excess of that necessary for the child's sustenance whenever there were legitimate descendants.

21. 388 So. 2d 1151 (La. 1980).

22. Under the provisions of Civil Code article 214 the adopted child becomes the legitimate child of the adoptive parent(s) and is accorded the right to inherit from the adoptive parent(s) as if the child were actually the legitimate child of the adoptive parent(s). Thus the adopted child in *Brown* was recognized as the legitimate descendant of the deceased father and under article 919 primed the claims of the illegitimate children.

23. 379 So. 2d 1172, 1178 (La. App. 2d Cir. 1980).

24. *Quiett v. Estate of Moore*, 378 So. 2d 362 (1979), on original hearing, involved the constitutionality of article 919. The plurality opinion, however, held that the issue of constitutionality was not properly before the court and decided the case on other grounds. In an excellent dissenting opinion, Justice Tate argued that article 919 should be ruled unconstitutional and submitted an equal protection analysis to justify such a holding. 378 So. 2d at 365-66 (Tate, J., dissenting). On rehearing the Louisiana Supreme Court once again decided the case on other grounds, avoiding the question of article 919's constitutionality. 378 So. 2d at 367.

25. 401 U.S. 532 (1971). The two-tiered analysis used in *Labine* and other cases, citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), was no longer applicable, the court explained. An intermediate level of analysis had been developed for certain classifications, including illegitimates, and the court cited *Lalli* and *Trimble* as examples of intermediate scrutiny. For other categories determined by the United States Supreme Court to require such analysis, *see* Orr v. Orr, 440 U.S. 268 (1979) (sex); Matthews v. Lucas, 427 U.S. 495 (1976) (birth).

26. 439 U.S. 259 (1978).

27. 388 So. 2d at 1153.

28. *Id.*

court was primarily on the state interest, recognized as valid in *Trimble*,[29] in the orderly disposition of property after death and the permissible means by which the state could provide protection of such interest.[30] Article 919 was deficient because it barred all acknowledged illegitimates from sharing in the intestate succession of their father if he left legitimate relations or a surviving spouse.[31] The case did not involve the problems of proof of paternity and spurious claims, since the children had been acknowledged by their father.[32] The court was able to focus, instead, upon the unequal treatment of illegitimates. The emphasis of the court apparently was based on the consideration that there were ways in which illegitimates could be accorded greater rights, while at the same time balancing the important state interest in stable land titles and the orderly disposition of property. Since, in the court's opinion, article 919 was not such a balancing, but rather a flat denial of succession rights to the acknowledged illegitimate if other relatives existed,[33] the provision arbitrarily discriminated against those illegitimates and denied them the equal protection of the law.

The equal protection analysis in *Brown* was applied only to acknowledged illegitimates; the rights of unacknowledged illegitimates were not discussed because a narrow fact situation was presented in *Brown*. However, the Louisiana legislature, perhaps relying on the probable affirmance of the Second Circuit Court of Appeal's decision, amended articles 208 and 209 and repealed articles 210 and 212 of the Louisiana Civil Code.[34] These amended articles go much

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29. 430 U.S. at 770-71.

30. 388 So. 2d 1153.

31. Considering the chances that some legitimate relatives, especially collateral relations, will exist, the acknowledged illegitimate usually will be effectively barred from inheriting from the deceased father.

32. *See* LA. CIV. CODE art. 203. Informal acknowledgment of the illegitimate child is also recognized by the Louisiana courts and consists of proof of any express or implied recognition of the child by the parent. *See* Taylor v. Allen, 151 La. 82, 91 So. 635 (1921). *See also* R. PASCAL & K. SPAHT, LOUISIANA FAMILY LAW COURSE § 13.8 (2d ed. 1979); Spaht & Shaw, *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59, 61 n.7 (1976).

33. 388 So. 2d at 1153-54.

34. LA. CIV. CODE art. 209, *as amended by* 1980 La. Acts, No. 549, § 1 provides: "Illegitimate children who have not been acknowledged as provided in Article 203, may be allowed to prove their filiation."

LA. CIV. CODE art. 209, *as amended by* 1980 La. Acts, No. 549, § 1, states:

> 1. An illegitimate child may be entitled to a rebuttable presumption of filiation under the provisions of this Article. Or any child may establish filiation, regardless of the circumstances of conception, by a civil proceeding instituted by the child or on his behalf in the parish of his birth, or other proper venue as provided by law, within the time limitation prescribed in this Article.
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> 2. A child who is shown to be the child of a woman on an original certificate of

further than the decision in *Brown*, setting up a procedure by which *unacknowledged* children may prove filiation entitling them to share in their fathers' succession.

Under the new legislation, a child not *formally acknowledged* under the provisions of article 203[35] may establish his filiation in a civil proceeding by a preponderance of the evidence[36] tending to prove paternity.[37] The amended legislation includes a special section that provides:

> Any illegitimate child nineteen years of age or older shall have one year from the effective date of this Act to bring a civil proceeding to establish filiation under the provisions of this act and if no such proceeding is instituted within such time, the claim of such an illegitimate child shall be forever barred.[38]

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birth is presumed to be the child of that woman, though the contrary may be shown by a preponderance of the evidence.

3. An illegitimate child not shown as the child of a woman on an original certificate of birth may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the illegitimate child of that woman.

4. A child of a man may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the child of that man. Evidence that the mother and alleged father were known as living in a state of concubinage and resided as such at the time when the child was conceived creates a rebuttable presumption of filiation between the child and the alleged father.

5. Proof of filiation must be made by evidence of events, conduct, or other information which occurred during the lifetime of the alleged parent. A civil proceeding to establish filiation must be brought within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first. If an illegitimate child is born posthumously, a civil proceeding to establish filiation must be instituted within six months of its birth, unless there is a presumption of filiation as set forth in Section 2 above. If no proceeding is timely instituted the claim of an illegitimate child or on its behalf to rights in the succession of the alleged parent shall be forever barred. The time limitation provided in this Article shall run against all persons, including minors and interdicts.

35. LA. CIV. CODE art. 203, *as amended by* 1979 La. Acts, No. 607, § 1, provides: "The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother of either of them, or it may be made in the registering of the birth or baptism of such child."

36. The original legislation proposed to the legislature included the term "clear and convincing evidence." La. S.B. 1060, § 1, Original, 6th Reg. Sess. (1980). This was deleted and "preponderance of the evidence," the standard burden of proof in civil cases and a much less stringent requirement than "clear and convincing," was inserted in lieu thereof by amendment in the House Committee on Civil Law and Procedure.

37. *See Developments in the Law, 1979-1980—Persons*, 41 LA. L. REV. 385 (1980) [hereinafter cited as *Persons, 1979-1980*].

38. 1980 La. Acts, No. 549, § 4.

As suggested by Professor Spaht,[39] the legislature may have included this section because it anticipated that *Succession of Brown* would be applied retroactively.[40]

By remanding the case in *Brown* to the trial court for an accounting to be made by the adopted child and a new judgment of possession to be rendered recognizing plaintiffs as heirs along with the adopted child, the court undoubtedly intended its decision to be retroactive, at least as to the litigants.[41] If the court chooses to apply *Brown* retroactively as to the litigants but prospectively as to all others, such a decision will most probably follow the reasoning of a recent dissenting opinion in *Corpus Christi Parish Credit Union v. Martin*.[42] At issue in that case were provisions of the Louisiana Civil Code allowing the husband, alone, to mortgage or sell community immovable property acquired in both spouses' names.[43] The dissent would have declared the code articles unconstitutional and applied such a ruling prospectively to all but the actual litigants in the *Martin* case. Justification for a very limited retroactive application of the decision was based on the desire by the dissent to insure that the discussion of the law's invalidity would not "be considered merely as dicta"[44] and also because of the particular equities involved in the *Martin* case.[45] Included in these equities in *Martin* were misrepresentations by the lender to the wife that she was without legal remedy to prevent her husband from mortgaging the property. The dissent seemed to imply that absent "peculiar" equities in the case,

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39. *Persons, 1979-1980, supra* note 37, at 387.

40. The first circuit appears to have assumed that *Brown's* effect is retroactive. In *Succession of Richardson*, 392 So. 2d 105 (La. App. 1st Cir. 1980), the appellate court reversed a trial court judgment recognizing a collateral relation as the decedent's sole heir and remanded the case with instructions that the decedent's acknowledged illegitimate son be recognized as heir. The decedent died on October 30, 1978, and the court followed *Brown* without discussing the retroactivity question.

The issue of whether or not the holding by a court that a statute is unconstitutional should be applied only to cases arising thereafter or to cases commenced before the date of the decision involves a number of considerations. *See* Linkletter v. Walker, 381 U.S. 618, 627 (1965), *quoting* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940). *See generally* Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977); Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Comment, *Retrospective Effect of an Overruling Decision*, 7 LA. L. REV. 133 (1946).

41. The Second Circuit Court of Appeal remanded the case and the Louisiana Supreme Court affirmed this holding of retroactive application insofar as the four acknowledged illegitimate children were concerned. 388 So. 2d at 1154.

42. 358 So. 2d 295, 299 (La. 1978) (Tate, J., dissenting).

43. *See* LA. CIV. CODE arts. 2334 & 2404 (as they appeared prior to 1979 La. Acts, No. 709).

44. 358 So. 2d at 303.

45. *Id.* at 303 n.4.

the decision should not be given retroactive application. In *Brown* equities peculiarly applicable only to the litigants in that case do not appear to exist.

A second option of the court would be to give the *Brown* decision an expanded retroactive application to a date prior to the *Trimble* decision. Other jurisdictions have considered such a date, but the cases therein involved invalidation of statutes similar to that held unconstitutional in *Trimble*, at a period in time much closer to the actual decision in *Trimble*. *Pendleton v. Pendleton*[46] involved the claim of an illegitimate child to a share in his father's succession and was pending at the time of the *Trimble* decision. The Kentucky Supreme Court declared that the invalidation of the state statute would "have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the *Trimble* opinion), except for those specific instances in which the dispositive constitutional issue raised in this case was in the process of litigation."[47] An Arkansas Supreme Court decision considered whether retroactive effect should be given to *Trimble* to invalidate the disposition of property upon the intestate's death in 1972.[48] The plaintiff claimed to be the deceased's illegitimate child and instituted suit based upon the premise that the *Trimble* case had struck down an Illinois statute similar to that in effect in Arkansas.[49] The court recognized that the Arkansas statute was invalid under *Trimble*, but the court denied the plaintiff's demand, finding that *Trimble* should not be applied retroactively. Considered as the main reasons for denying retroactive application were the adverse effect on the certainty of land titles and the accompanying interference with the development of real property.[50] Such an extended retroactive application would create, in the court's opinion, too much instability in land titles by allowing a larger number of illegitimates to attack the title to real property, alleging that they were the ones who should have inherited the property.[51]

A third option available to the court is the date of the *Trimble* decision, April 26, 1977. To extend the *Brown* decision retroactively

46. 560 S.W.2d 538 (Ky. 1978).

47. *Id.* at 539.

48. Frakes v. Hunt, 583 S.W.2d 479 (Ark. 1978), *cert. denied*, 444 U.S. 942 (1979).

49. ARK. STAT. ANN. § 61-141(d) allowed an illegitimate child to inherit from his mother in the same manner as a legitimate child, but prohibited the illegitimate from inheriting from the father.

50. 583 S.W.2d at 499.

51. *Id.* at 498. The dissenting opinion, noting that *Trimble's* remand was not prospective only in application, argued that the court should assume that *Trimble* had retroactive effect until the Supreme Court decided otherwise. 583 S.W.2d at 503 (Fogleman, J., dissenting).

to this date, the Louisiana court would have to interpret *Trimble* as having in effect overruled *Labine*, thus rendering article 919 unconstitutional on that date. The *Trimble* decision sets forth the proper means of equal protection analysis but distinguished article 919 of the Lousiana Civil Code from the statute at issue in *Labine*.[52] The reasoning in favor of this date would probably be that, had the Louisiana courts applied this stricter analysis to article 919 at the date of the *Trimble* decision, they would have invalidated the Louisiana statute. This would have vested rights in acknowledged illegitimates to share in the successions of their deceased intestate fathers. However, *Trimble* did not expressly overrule *Labine*, thereby invalidating article 919,[53] and the Louisiana courts may be hesitant to use this kind of extended analysis to apply *Brown* retroactively to the date of the *Trimble* decision.

The date of Sidney Brown's death, January 1, 1978, is the fourth option open to the court in determining the possible retroactive application of the *Brown* decision. As will be discussed later,[54] this may be the most logical point from which to allow illegitimates to assert their newly acquired rights.[55] The actual invalidation of article 919 resulted from litigation arising out of the death of Brown, and his acknowledged illegitimate children, based on the remand of the case in *Brown*, are to be extended the benefits of that invalidation. This equitable application of the decision in *Brown* to similarly situated parties is the strongest policy argument in favor of such retroactive operation.

There are other alternative dates available to the court,[56] but the

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52. See text at note 19, *supra*.

53. *See* Lorio, *supra* note 9, at 2; Comment, *supra* note 9, at 1132.

54. See text at note 72, *infra*.

55. In *Allen v. Harvey*, 568 S.W.2d 829 (Tenn. 1978), the Tennesee Supreme Court applied its invalidation of a statute similar to that in *Trimble* prospectively, except as to "any cases pending in the courts of Tennessee on the date this opinion is released, asserting the right of children born out of wedlock to inherit from their natural father." *Id.* at 835. The holding was limited "to cases where paternity is established by clear and convincing proof and to cases where rights of inheritance have not finally vested." *Id.*

The holding in *Allen* protects bona fide purchasers who acted in reliance on the belief that no illegitimate child existed or that the illegitimate was not entitled to a share of the succession under the existing Tennessee statute. This would not be possible in Louisiana because R.S. 9:5682 allows an heir excluded from a succession to bring an action to recover property acquired by third persons from the recognized heirs within ten years of the judgment of possession.

56. The effective date of the 1974 Louisiana Constitution which included in article 1, section 3 the following: "[n]o law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth," LA. CONST. art. I, § 3, was January 1, 1975. The 1974 constitution contained another section which provides: "Laws which are in conflict with this constitution shall cease upon its effective date." LA. CONST. art.

above seem to be the most plausible in considering the application to be given the *Brown* decision. In determining the issue of retroactivity the court should examine, in the context of the four options mentioned, the effect each date would have on the general purpose of *Brown*, that is, the granting of greater rights in intestate successions to acknowledged illegitimate children.[57] Also to be considered are the newly-acquired rights of unacknowledged illegitimate children as provided in Act 549 of 1980.[58]

Under the provisions of recently amended article 208, a child formally acknowledged under article 203 is not required to bring a proceeding to prove filiation.[59] Also, the formally acknowledged child is not included in the special section of the Act allowing one year from July 23, 1980, for the illegitimate to bring a civil proceeding.[60] Thus, the formally acknowledged child's main concern with regard to the issue of retroactivity of the *Brown* decision is the date from which he can exercise his rights. Consider, for example, a child who was formally acknowledged and whose father died in September of 1977. If the court determined that *Brown* was retroactive to the *Trimble* decision, April 26, 1977, then this child could attack a judgment of possession in his father's succession in which he was not recognized as an heir. This child could also bring an action under Louisiana Revised Statute 9:5682, which provides:

> An action by a person who is an heir or legatee of a deceased person, and who has not been recognized as such in the judgment of possession rendered in the succession of the deceased by a court of competent jurisdiction, to assert any right, title, or interest in any of the property formerly owned by the deceased against a third person who has acquired this property from or through a person recognized as an heir or legatee of the deceased in this judgment of possession, is prescribed in ten years . . . .[61]

This section would allow the child to recover succession property alienated by the heirs to third parties, so long as the action is brought within ten years of the registry of the judgment of possession.[62] Thus, this ten-year liberative prescription is the only time

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XIV, § 18(B). Argument can be made that this section had the effect of invalidating article 919 of the Civil Code.

57. 388 So. 2d at 1154.

58. 1980 La. Acts, No. 549, § 1.

59. See note 34, *supra*.

60. *See Persons, 1979-1980, supra* note 37, at 387.

61. LA. R.S. 9:5682 (Supp. 1977).

62. The statute further provides that the ten-year period will run from "the registry of the judgment of possession in the conveyance records of the parish where the property is situated . . . ." *Id.*

limitation acknowledged illegitimates will be concerned with once the court determines the retroactive date of *Brown*.

An unacknowledged illegitimate child, nineteen years of age or older, has one year, ending July 23, 1981, within which to bring a civil proceeding to establish filiation.[63] If the child fails to do so, his claim will be barred by the running of this peremptive period. For the purpose of illustration assume the following facts: a twenty-eight-year-old unacknowledged illegitimate whose father died in May of 1979, brings a civil proceeding to establish filiation and is successful in doing so within the provided time period. If the court determines that *Brown* should be applied retroactively to the date of Sidney Brown's death, January 1, 1978, this child will be allowed to exercise the rights given to him by the amended articles. However, if the court chooses to apply *Brown* retroactively only as to the litigants but prospectively as to all others, this child will be precluded from sharing in his father's succession. This child will have to be concerned with both the one-year peremptive period for bringing the proceeding and also the decision by the court as to *Brown's* retroactive effect.

In the newly amended legislation there is a provision which entitles a child conceived while the mother and alleged father were known to be living in a state of concubinage to a rebuttable presumption of filiation to the alleged father.[64] It is unclear whether this child is included in the special section of Act 549 requiring him to bring a civil proceeding to establish filiation within the peremptive period.[65] Thus, the concern of this child will be whether or not he is included in this section; if the child is not included, he will occupy a position equivalent to that of an acknowledged illegitimate child, as previously discussed.[66] Perhaps it would be wise for those children entitled to a rebuttable presumption to bring the proceeding rather than to take the chance that their claims would be barred by the running of the time period.

The final situation created by the *Brown* decision and the recent amendments to articles 208 and 209 is the plight of the unac-

63. 1980 La. Acts, No. 549, § 4.

64. *Id.* at § 1.

65. Professor Spaht suggests that:

> [b]ecause of the statutory language, if an illegitimate child is entitled to the presumption of filiation, he may invoke it in any proceeding at any time without the limitation of the prescriptive period in article 209. Such an interpretation, however, violates the obvious legislative intent to avoid the problem of "stale claims" referred to by the court of appeal in *Succession of Brown*.

Persons, 1979-1980, supra note 37, at 385-86.

66. See text at note 59, *supra*.

knowledged illegitimate child under the age of nineteen whose father died more than six months before the effective date of Act 549, July 23, 1980. This child is prohibited from exercising any rights in his father's intestate succession, since he is not included in the section allowing one year within which illegitimates over the age of nineteen may bring a civil proceeding. This child or his tutor will be unconcerned with the issue of retroactivity of the *Brown* decision because he is already excluded from exercising any succession rights. It is questionable whether the effect of this omission in the legislation is constitutional.[67]

Considerations to be studied by the court militating against the retroactive application of the decision in *Brown* include the important state interests in orderly disposition of property at death,[68] the stability of land titles,[69] and the rights of third parties who have relied on the prior law.[70] These factors must be weighed against the possible inequities which could result if other similarly situated parties are denied the benefits accorded to the litigants in *Brown*.

If *Brown* were applied retroactively to a date before the *Trimble* decision, the effect would be to create a significant amount of uncertainty in the title to immovable property. The possibility that there exists either a legitimate or illegitimate child with a claim against a third party for an interest in succession property could be substantially increased. These same third parties may be unwilling to purchase succession property as a consequence of this increased uncertainty. Such an expanded retroactive application would be unwise in light of the almost certain accompanying instability of titles and the possible interference with the improvement of immovable property. Other jurisdictions have recognized this and denied retroactive application accordingly.[71]

However, the other dates previously mentioned do not appear to pose at least as much of a problem with the certainty of titles as

67. In light of the lower level of equal protection analysis applied to cases involving the classification of age, a challenge based on equal protection grounds may not be successful. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). However, stronger argument can be made that this omission violates due process in that is not only denies the child a reasonable time within which the child could assert his rights but in fact precludes the child from doing so.

68. 388 So. 2d at 1153. A more in-depth discussion is contained in the court of appeal's decision. *See* Succession of Brown, 379 So. 2d 1172, 1175-76 (La. App. 2d Cir. 1980).

69. As recognized in *Trimble v. Gordon*, 430 U.S. 762 (1977), even the valid state interest of protecting the stability of land titles and regulating the orderly disposition of property is not absolute. *Id.* at 771.

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

71. See text at notes 46-51, *supra*.

expanded retroactive application would. For different reasons already discussed,[72] the date of the *Trimble* decision should be rejected. It is submitted that the most logical date from which to apply the *Brown* decision retroactively is the date of the death of Sidney Brown, January 1, 1978. The extent to which the stability and certainty of titles would be affected would be limited to deaths occurring on or after that date or to successions pending on that date, whichever should be determined by the Louisiana Supreme Court. This would allow litigants in similar situations to exercise the same rights and benefits the litigants in *Brown* were afforded. All unacknowledged children over the age of nineteen who would be covered by this retroactive application must bring their proceeding to establish filiation by July 23, 1981.[73] This should expedite the disposition of these claims and help to ease the burden on judicial administration created by retroactive application. If *Brown* only applies to deaths occurring after January 1, 1978, the fear of stale claims will, for the most part, be avoided, and judgments of filiation will be obtained within a period of time allowing reasonable administration.

Also, the rights of third parties with regard to succession property will, in all probability, not be impaired to any substantially greater extent. Under *Brown* the formally acknowledged illegitimate child would be considered an heir under R.S. 9:5682[74] and must be allowed the same succession rights as a legitimate descendant.[75] To allow the acknowledged illegitimate to bring the same action as a legitimate child not recognized in a judgment of possession and to recover succession property in the hands of a third person does not violate the policy behind the statute.[76] Instead, it eliminates the arbitrary discrimination that once existed in this area. If the problem is viewed as insufficient protection for third parties, then the problem lies with the statute and not with the fact that acknowledged illegitimates are now allowed to bring the same action. The protection of third parties is clearly a valid state goal, and quite possibly the

72. See text at notes 52-53, *supra*.

73. 1980 La. Acts, No. 549, § 4.

74. LA. R.S. 9:5682 (Supp. 1977).

75. Professor Pascal recommended that "the acknowledged illegitimate shall be considered to have his inheritance and his legitime primarily *in the form of a credit against the deceased's succession*, rather than that of a fractional interest . . . ." Pascal, *Lousiana Succession and Related Laws and the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 56 TUL. L. REV. 167, 181 (1971).

76. In *Jackson v. D'Aubin*, 338 So. 2d 575 (La. 1976), the Louisiana Supreme Court stated what it considered to be the purpose of R.S. 9:5682: "the legislature has endeavored to give a measure of protection to third persons who acquire property from or through a recognized (but not necessarily a true) heir or legatee." *Id.* at 581.

statute should be amended to shorten the liberative prescriptive period to a shorter limit, such as one year.[77] However, the fact that illegitimates now will be able to bring suit based on this statute should not control the disposition of the retroactivity issue.

In light of the factors of equity to similarly situated litigants,[78] the more limited effect the decision would have on stability of land titles and the orderly disposition of property, the avoidance of stale claims in proceedings to establish filiation, and minimal interference with the rights of third persons, it is respectfully submitted that the date of Sidney Brown's death is the most logical and most equitable choice available.

It should be recognized that the decision in *Brown*, whatever its ultimate application, can be viewed as a substantial development in the area of illegitimate's rights in Louisiana intestate succession law. The case's impact on intestate successions certainly will be realized and probaby will influence changes in related areas of the law, including testate successions and the concept of forced heirship.[79] In view of these far-reaching effects, it is extremely important that the extent of retroactive effect of the decision in *Succession of Brown* be clarified as soon as possible.

Vance A. Gibbs

THE SUPERVISOR AS AN AMERICAN HOSTAGE: *Belcher Towing Company v. NLRB*

Captain Frank Mosso of the Belcher Towing Company was discharged after failing to report union activity aboard the company-

77. In this way a third person would obtain good title in one year from the date of the judgment of possession rather than ten years. This limited period would help to remove some of the uncertainty surrounding title to immovable property.

78. *Succession of King*, No. 7,612 (La. App. 3d Cir. 1980), would present a difficult factual situation to the court. An illegitimate child, whose birth certificate named King as the father, and who had always been recognized publicly as King's child, claimed she was an acknowledged illegitimate and attacked the constitutionality of article 919. The Third Circuit Court of Appeal did not decide the issue of the constitutionality of the provision, finding that such a constitutional challenge must be raised at trial. The court dismissed the child's claim. It appears that the court would consider the case res judicata as to the child in *King* and would deny any rights in her father's intestate succession.

79. For a discussion of the effects of the *Brown* decision on other areas of Louisiana succession law, *see* Comment, *Another Look at Louisiana Succession Law: The Ramifications of Succession of Brown*, 41 LA. L. REV. 1256 (1981).