

Louisiana Law Review

Volume 37 | Number 1
Fall 1976

The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell

Katherine Shaw Spaht

William Marshall Shaw Jr.

Repository Citation

Katherine Shaw Spaht and William Marshall Shaw Jr., *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 La. L. Rev. (1976)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol37/iss1/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

THE STRONGEST PRESUMPTION CHALLENGED: SPECULATIONS ON *WARREN V. RICHARD* AND *SUCCESSION OF MITCHELL*

*Katherine Shaw Spahr**

*William Marshall Shaw, Jr.***

Book 1 of the Louisiana Civil Code, entitled "Of Persons"¹ and containing a highly ordered system for the regulation of family life, shares with other branches of our private law the harmonious structure that is the hallmark of a civil law system. Because of its smoothly articulated structure, the codal scheme, the product of the thought and experience of many generations of legal scholars and administrators, is highly vulnerable to untoward tinkering with its several parts. A change in detail may signal a restructuring of the whole.

The Civil Code has not been revised in its entirety since 1852.² The spirit of the early nineteenth century, still frozen in many of the Code's provisions, is no longer the only source of society's values. Family life, for instance, and the moral perspectives of society have changed drastically in the last 150 years; yet there has been little significant change in the way our law regulates the parent-child relationship. It continues to burden illegitimate children with disabilities which no longer bear a reasonable relationship to the state's interest. Legislation and adjudication have brought change piecemeal; but too often, in trying to solve a specific problem, the legislature and the courts have had insufficient consideration for the structure of the Civil Code as a whole.

* Associate Professor of Law, Louisiana State University.

** Attorney at Law, Washington, D.C.

The authors wish to express their sincere appreciation to Mrs. Carmen Gonzalez for her research assistance in preparing this article.

1. See generally 2 A. YIANNPOULOS, PROPERTY § 2 in 2 LOUISIANA CIVIL LAW TREATISE 3-4 (1966).

Since Justinian times, the private law has been characterized in civil law systems by three principal divisions. Louisiana retains the tripartite division as evidenced by the three books of the Civil Code—"Of Persons," "Of Things, and Of the Different Modifications of Ownership" and "Of the Different Modes of Acquiring the Ownership of Things."

2. The Reconstruction legislature which enacted the Civil Code of 1870 was primarily motivated in its revision by a desire to eradicate the vestiges of slavery. See Civil Code of Louisiana, Introduction xxv-xxvi (Dainow ed. 1961).

This article focuses upon such an instance, where well-intentioned tinkering portends a dramatic restructuring. In recent years, an increasing impatience with the statutory treatment of illegitimate children has caused courts to interfere with our system for regulating family life. The United States Supreme Court has ruled in a series of cases that many of the disabilities imposed by Louisiana law on illegitimates violate the equal protection clause of the fourteenth amendment.³ Recently the Louisiana Supreme Court has joined in the assault on the codal scheme. The court is apparently motivated by the same concern evinced by its federal counterpart: that illegitimate children not be deprived unreasonably of rights accorded children generally.

However, the recent decisions of the state court have a far different import for our law. They breach a hitherto impregnable bastion of our codal scheme—the presumption that the husband of the mother is the father of all children conceived during the marriage. The assault of the state court is on two flanks: under an equal protection analysis and by statutory interpretation. Each of these attacks will be considered in this article, along with the dangers which the authors foresee for the structure of family law.

AN ANALYTIC FRAMEWORK

In attempting to analyze the recent cases involving the presumption of paternity, the authors, out of convenience, have evolved a conceptual framework with which to approach the questions raised and to which this section introduces the reader. Two processes, interrelated but distinct, have particular significance in this framework. The authors have attached to them, quite arbitrarily, the labels “classification” and “filiation.”

Classification

The parent-child relationship and the body of law supporting it rest upon the fundamental dichotomy denoted by the terms “legitimate” or “illegitimate.”⁴ The class of legitimate children is limited to those who are conceived during the marriage of their parents.⁵ All other children are

3. For a discussion of these cases, see text at notes 18-33, *infra*.

4. LA. CIV. CODE art. 27: “Children are legitimate or illegitimate.” The Civil Code does not consistently embrace this dichotomy, *cf.* LA. CIV. CODE art. 178: “Children are either legitimate, illegitimate, or legitimated.” However, from a reading of the codal scheme as a whole it is evident that this dichotomy is fundamental.

5. LA. CIV. CODE art. 179: “Legitimate children are those who are *born* during the marriage.” (Emphasis added). The articles governing the action *en desaveu* indicate conception, not birth, within the marriage entitles a child to legitimate status. LA. CIV. CODE arts. 184-92. Article 179 may have been mistranslated. See *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Persons*, 30 LA. L. REV.

classed as illegitimate,⁶ albeit this class is further divided into numerous sub-classes.⁷

171, 176 (1970): "Our present articles translate the phrase '*dans le mariage*' by 'during the marriage,' whereas it should be translated 'within the marriage.'" See also R. PASCAL, LOUISIANA FAMILY LAW COURSE 213-14 (2d printing 1975) [hereinafter cited as PASCAL].

6. LA. CIV. CODE art. 180: "Illegitimate children are those who are born out of marriage."

Illegitimate children may be legitimated in certain cases, in the manner prescribed by law."

7. Within the codal framework, historically, the class of illegitimate children was further subdivided into those illegitimate children who could not be acknowledged or legitimated, illegitimate children who obtained a judgment of paternity or maternity against the biological parent (LA. CIV. CODE arts. 208-12), illegitimates who were acknowledged by their biological parent (LA. CIV. CODE arts. 202-07), and illegitimate children who were legitimated (LA. CIV. CODE arts. 198-201).

LA. CIV. CODE art. 181 mentions two sorts of illegitimates: "Those who are born from two persons, who, at the moment when such children were conceived might have legally contracted marriage with each other; and those who are born from persons to whose marriage there existed at the time some legal impediment." Into the latter category fall (1) adulterous bastards, "those produced by an unlawful connection between two persons, who at the time when the child was conceived, were, either of them or both, connected by marriage with some other person," (LA. CIV. CODE art. 182) and (2) incestuous bastards, "those who are produced by the illegal connection of two persons who are relations within the degrees prohibited by law." LA. CIV. CODE art. 183. Adulterous and incestuous bastards, generally speaking, cannot be acknowledged or legitimated. LA. CIV. CODE arts. 198, 200, and 204. However, there are exceptions. In the case of adulterous bastards, if there is a subsequent legal marriage of the biological parents, after the impediment to the marriage is removed, the child may be acknowledged. LA. CIV. CODE art. 204. If he is so acknowledged, he is automatically legitimated. LA. CIV. CODE art. 198. Furthermore, once the impediment to the marriage is removed, a biological parent can in some instances legitimate the child by notarial act, (LA. CIV. CODE art. 200) which necessarily includes the right to acknowledge the child by act. LA. CIV. CODE art. 203. See *Goins v. Gates*, 229 La. 740, 93 So. 2d 307 (La. App. 1st Cir. 1957). The latter right exists regardless of whether the biological parents contract a legal marriage. As to incestuous bastards, by virtue of the 1972 and 1974 legislative amendments to LA. CIV. CODE art. 95, certain children born during the existence of a marriage contracted between persons related within the prohibited degrees prior to 1974 are now to be considered legitimate. (The amendment in 1972, and again in 1974, ratified all marriages contracted in contravention of LA. CIV. CODE art. 95). But, note the specific prohibition contained in LA. CIV. CODE art. 198, prohibiting legitimation of incestuous bastards by subsequent marriage of the natural parents.

Despite the provisions prohibiting in certain instances the acknowledgment and/or legitimation of adulterous and incestuous bastards, there is no such specific prohibition contained in the articles regulating proof of paternity. See *In re Tyson*, 306 So. 2d 822 (La. App. 2d Cir. 1975). An illegitimate, under LA. CIV. CODE art. 208 who has "not been legally acknowledged, may be allowed to prove" his paternal descent by proof as outlined in LA. CIV. CODE arts. 209-10. Upon establishing paternal

For purposes of this article, "classification" is defined as *the process of arranging persons in, or assigning persons to, either the class of legitimate children or the class of illegitimate children*. The related concept of "status" is correspondingly defined as the legal standing of a person as determined by his membership in one of these two classes.

The purpose of classification is to provide a vehicle for regulation of the parent-child relationship, that is, for identifying the rights and obligations which parents incur by the birth of their children. It has as its object the "what" of parental rights and obligations. The classes themselves have no intrinsic importance. Their significance arises when the legislator assigns meaning to status by conditioning the exercise of specific rights and powers upon membership in one of the classes.⁸ It may be said, then, that the importance of classification derives from its *effects*, that is, the legal consequences which the legislator chooses to attach to status. Without those consequences, classification is a futile exercise, and status an empty distinction. In Louisiana, the effects of classification reach throughout the private law, conditioning parental rights and obligations upon their children's status.⁹ Legitimate relations are bound in a tighter web of legally

descent, the illegitimate becomes entitled to claim financial support in the form of alimony. LA. CIV. CODE arts. 240-45.

An illegitimate child who is acknowledged by his natural parent enjoys not only the right to claim alimony from the parent so acknowledging (LA. CIV. CODE art. 242), but also the restricted right of intestate inheritance. LA. CIV. CODE arts. 918-19. Under the codal scheme an illegitimate could only be acknowledged by one of two methods: (1) notarial act or (2) registering of the birth or baptism of such child. LA. CIV. CODE art. 203. However, the court in *Taylor v. Allen*, 151 La. 82, 91 So. 635 (1921), recognized an alternate method of acknowledgment, hereinafter referred to as informal acknowledgment. Proof of informal acknowledgment consisted essentially of the same proof required for paternal descent under LA. CIV. CODE art. 209. *See also* *Minor v. Young*, 149 La. 583, 89 So. 757 (1921); PASCAL at 262-63. Informal acknowledgment was legislatively recognized in a 1944 amendment to Article 198.

Historically, the effect of legitimation upon the illegitimate's status was to accord to that child the same rights as a legitimate child (LA. CIV. CODE art. 199), to date from the last act required for legitimation. PASCAL at 263. *See also* 1 M. Planiol, CIVIL LAW TREATISE pt. 1, no. 1567 at 869 (11th ed. La. St. L. Inst. transl. 1959); LA. CIV. CODE arts. 198, 200. For comparative treatment of similar statutory and other schemes, see "Bastards," 10 AM. JUR. 2d 837 *et seq.*

8. An example of a classification which had no consequences was LA. CIV. CODE art. 36: "Males who have not attained the age of fourteen years complete, and females who are under twelve, are under the age of puberty; and males who have attained fourteen years complete, and females the age of twelve complete, are distinguished by the name of adults." For an interpretation of article 36 which would have salvaged its significance, see PASCAL at 49. This article was repealed by the Legislature in 1974.

9. For a comprehensive outline of the effect of classification on Louisiana

imposed mutual rights and obligations than are illegitimate relations.

Classification is made according to a three-step *method* prescribed by the Civil Code: (1) identify the mother, (2) identify the father, (3) determine date of conception.¹⁰ If the date of conception falls within the marriage of the father and mother, then the child is legitimate; if not, the child is illegitimate.

Filiation

“Filiation,” for purposes of this article,¹¹ is defined as *the act of fixing paternity*, that is, of identifying a specific man as the biological father of a specific child.

That the fact of paternity is essentially unprovable has had important consequences for the law of persons. It serves no purpose to establish parental obligations unless they are enforceable against identifiable per-

succession and other related laws, with respect to the illegitimate, see Pascal, *Louisiana Succession and Related Laws and the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 46 TUL. L. REV. 167 (1971), and for a historical discussion of the corresponding French provisions, see 1 M. Planiol, CIVIL LAW TREATISE pt. 1, nos. 658-66 (11th ed. La. St. L. Inst. transl. 1959) and 3 M. Planiol, CIVIL LAW TREATISE pt. 1, nos. 1780-1849 (11th ed. La. St. L. Inst. transl. 1959).

In summary, Professor Pascal writes: “[L]egitimate descendants always exclude illegitimate descendants in intestate succession. (LA. CIV. CODE arts. 902, 915, 918-19). Legitimate descendants and fathers and mothers are forced heirs, but their illegitimate counterparts are not. (LA. CIV. CODE arts. 1493-95). Legitimate ascendants and descendants in need may claim alimony from each other regardless of their abilities to provide for themselves if they would (LA. CIV. CODE art. 229); illegitimates may claim alimony only if not able to provide for themselves. (LA. CIV. CODE arts. 240-45). . . . On the other hand, illegitimates cannot be said to be without substantial rights. From their mother who has acknowledged them . . . , illegitimate children inherit her entire patrimony to the exclusion of her surviving spouse and of all relatives other than her legitimate descendants. (LA. CIV. CODE art. 918). From their father who has acknowledged them they inherit only in the absence of even remote legitimate relatives and a surviving spouse (LA. CIV. CODE art. 919); but he may donate to them up to one-fourth of his patrimony (and sometimes one-third) if he leaves legitimate relations, and all of it if he leaves none. (LA. CIV. CODE arts. 1486-87). All illegitimates who either have been acknowledged or, being acknowledgeable but not acknowledged, *cf. In re Tyson*, 306 So. 2d 822 (La. App. 2d Cir. 1975), prove who their parents are may demand alimony from them. (LA. CIV. CODE arts. 240-45). And, even the unacknowledgeable illegitimate may prove who his mother is, unless she is a married woman (LA. CIV. CODE art. 212), and may claim alimony from her. (LA. CIV. CODE art. 245).” *Id.* at 174.

10. See generally LA. CIV. CODE arts. 184-92; PASCAL at 212-59.

11. Note that in Book I, Title VII, Chapter 2, Section 2 (“Of the Manner of Proving Legitimate Filiation,” LA. CIV. CODE arts. 193-97), the word “filiation” means the fact of parentage—either paternity or maternity. However, for purposes of this article, the authors define the word “filiation” in a more restricted manner.

sons, but the identity of the father is almost always within the sole knowledge of the mother—if of anyone—and verifying her testimony affirmatively is impossible.

Consequently, filiation's main concern is with proof: what sort of evidence is required to prove the identity of the father to the satisfaction of the trier of fact. Faced with insuperable problems of proof, the law has created a *mechanism* for legitimate filiation which avoids clumsy case-by-case adjudication. The most important cog in this mechanism is Civil Code Article 184, which establishes "the strongest presumption in the law":

The law considers the husband of the mother as the father of all children conceived during the marriage.

Identification of the mother is comparatively easy. If the date of conception can be shown to fall within an existing marriage between the mother and her husband, then her husband is presumed to be the father, and the necessity of proving paternity affirmatively is obviated. Proof of the date of conception being inexact, the law also establishes, within liberal bounds, the days in which conception is presumed to have occurred, counting back from the date of birth and with reference to the existence of the marriage.¹²

The presumption established in Article 184 was not intended to be irrebuttable. Strict judicial interpretation of the causes of an action *en desaveu*¹³ and severe limitations on the right to bring it¹⁴ have rendered the

12. LA. CIV. CODE art. 186: "The child capable of living, which is born before the one hundred and eightieth day after the marriage, is not presumed to be the child of the husband; every child born alive more than six months after conception, is presumed to be capable of living."

LA. CIV. CODE art. 187: "The same rule applies with respect to the child born three hundred days after the dissolution of the marriage, or after the sentence of separation from bed and board."

Most recently, in *McConkey v. Pinto*, 305 So. 2d 469 (La. 1974), the Louisiana Supreme Court refused to consider evidence in the form of expert medical testimony of the actual date of conception controlling when the child was born more than one hundred eighty days after the marriage. LA. CIV. CODE art. 186. Note that the new legislation (La. Acts 1976, No. 430; *see* note 64, *infra*) contains no provision establishing proof of conception where it occurs prior to the marriage.

13. *See, e.g.*, *Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 262 So. 2d 328 (1972); *Tannehill v. Tannehill*, 261 La. 933, 261 So. 2d 619 (1972); *Williams v. Williams*, 230 La. 1, 87 So. 2d 707 (1956). *See also* *Feltus v. Feltus*, 210 So. 2d 388 (La. App. 4th Cir. 1968); *Kaufman v. Kaufman*, 146 So. 2d 199 (La. App. 4th Cir. 1962); *Singley v. Singley*, 140 So. 2d 546 (La. App. 1st Cir. 1962), for examples of instances in which the husband was successful in disavowing a child born to his wife.

The following are representative of the scholarly commentaries which treat the "strongest presumption in the law": Pascal, *Who Is the Papa?* 18 LA. L. REV. 685 (1958); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—*

presumption practically irrebuttable. Application of the presumption occasionally produces absurd results, but its inviolability has been favored as a protection to children individually and to the family as a unit.¹⁵

Filiation can be described as a "relational" process, in that it has as its purpose the identification of a father-child relationship existing between two specific persons. It relates a specific child to a specific father. Its object is the "who" of paternal rights and obligations. As has been noted above, however, identification of the father is also one step in the codal method for classification of children. Because paternity plays a role in determining the "what" of paternal obligations, filiation, which fixes paternity, is precedent to and has an effect on classification. In this article, the authors will refer to either filiation's "relational" function or its "classificatory"

Persons, 35 LA. L. REV. 261-63 (1975); *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Persons*, 17 LA. L. REV. 310-11 (1957); *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Persons*, 14 LA. L. REV. 121-26 (1953); Comment, *The Uniform Act on Blood Tests: Disavowal and Divorce*, 33 LA. L. REV. 646 (1973); Comment, *Action en Desaveu—Challenging the Presumption of the Husband's Paternity*, 23 LA. L. REV. 759 (1963); Comment, *Presumption of Legitimacy and the "Action en Desaveu" (Part I)*, 13 LA. L. REV. 587 (1953) and Comment, *Presumption of Legitimacy and the "Action en Desaveu" (Part II)*, 14 LA. L. REV. 401 (1954); Note, 17 LA. L. REV. 494-98 (1957). See generally PASCAL at 212-59.

14. LA. CIV. CODE art. 191: "In all the cases above enumerated, where the presumption of paternity ceases, the husband of the mother, if he intends to dispute the legitimacy of the child, must do it within six months from the birth of the child, if he be in the parish where the child is born, or within six months after his return, if he be absent at that time, or within six months after the discovery of the fraud, if the birth of the child was concealed from him; or he shall be barred from making any objection to the legitimacy of such child."

LA. CIV. CODE art. 192: "If the husband dies without having made such objection, but before the expiration of the time directed by law, six months shall be granted to his heirs to contest the legitimacy of the child, to be counted from the time when the child has taken possession of the estate of the husband, or when the heirs shall have been disturbed by the child, in their possession thereof."

15. In *Succession of Saloy*, 44 La. 433, 443, 10 So. 872, 872-76 (1892), Justice Bermudez opined, "When, aware of the circumstances under which he might have exercised the right of repudiation, the husband, who is the sovereign arbiter of his honor, fails to do so, the door is forever closed and no one can afterwards assert a right strictly personal to him. Permitting such a thing would be to strike a heavy blow at the sacredness of family ties, keep the honor of the wife and of the children in a condition of constant trepidation, and allow the foundation of society to be at all times, exposed to tottering and upturning. . . . The sanctity with which the law surrounds marital relations and the reputation and good fame of the spouses and of the children born during their marriage is of such inviolability that the mother and the children can never brand themselves with declarations of adultery, illegitimacy and bastardy, and their character is not permitted lightly to be thus aspersed, however true in themselves the stern and odious facts may unfortunately be."

function by way of distinguishing between the different roles that filiation plays in the regulation of the father-child relationship.

Filiation and classification both refer in the first instance to the existence of a marriage between the parents. The marriage contract in our monogamous society confers upon the husband the right to exclusive sexual access to the wife and therefore provides a basis for the presumption of article 184.¹⁶ By contrast, filiation outside of marriage depends primarily upon the reputed father's voluntary admission, either express or tacit, of paternity.¹⁷ A valid reason for distinguishing between children on the basis

16. "The concept of legitimacy developed early as a refinement of the blood tie to distinguish the offspring of stable, permanent relationships (with certain paternity) from the product of casual, impermanent liaisons (with uncertain paternity)." H. KRAUSE, *ILLEGITIMACY: LAW & SOCIAL POLICY* 1 (1971).

"In a society so constituted monogamy won favor owing to the certainty of the blood relationship amongst issue of the union. The wife is singled out from other women by being appropriated to one man, and, when she becomes a mother, the presumptive paternity of the husband, though never so conclusive as the maternity, has a strength about it that no other form of marriage can give. The demarcation between legitimate and illegitimate offspring arose in Europe primarily from the certainty of parentage established by the monogamous union and latterly from the sanctity bestowed on such unions by the Catholic Church. . . ." W. HOOPER, *THE LAW OF ILLEGITIMACY* 2 (1911).

"In almost every culture the family is a basic institution honored in the mores and desired by individuals. Paul said [I. Corin. 7:7] 'To avoid fornication, let every man have his own wife and let every woman have her own husband.' " S. QUEEN & J. ADAMS, *THE FAMILY IN VARIOUS CULTURES* 151 (1952).

As recently as 1974, in *Creech v. Capital Mack, Inc.*, 287 So. 2d 497, 513-14 (La. 1974), Justice Summers in a dissenting opinion stated, "The life, happiness, prosperity and stability of the family are a matter of constant concern throughout our Code. They are concerns which are the outgrowth of natural law, equity and folksy common sense. No system is fundamentally sound or likely to survive which tends to dissolve the family as a unit. History reveals that no society has attained and maintained a high state of civilization unless the family unit was the basis of its structure."

17. See note 7, *supra*. The difference between express and tacit admissions of paternity lies in voluntary express admissions by the alleged father of his paternity—*i.e.*, legitimation by subsequent marriage and formal or informal acknowledgment, legitimation by notarial act, "formal" acknowledgment by act (LA. CIV. CODE art. 203) or registering the birth or baptism, "informal" acknowledgment essentially by the same proof required to prove paternal descent (LA. CIV. CODE arts. 209 (1), 209 (2)) and circumstances indicating that a particular person is the father. In the latter category, examples of such circumstances would be (1) when the mother was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived (LA. CIV. CODE art. 209 (3)), and (2) the oath of the mother, supported by proof of the cohabitation of the reputed father with her, out of his house if the mother is not a woman of dissolute manners or has not had an unlawful connection with one or more men either before or since the birth of the child. LA. CIV. CODE art. 210.

of status is the greater confidence the law has in filiation within marriage. The possibility of fraud or error in fixing paternity is diminished by moral constraints and the husband's vigilance. In order to protect children from the stigma of illegitimacy, however, Louisiana courts have frequently related two persons in the father-child bond who could not possibly have a biological connection. The concern of the courts to abate the effects of classification has been indulged to the neglect of the relational function of filiation.

WARREN: THE CONSTITUTIONAL ATTACK

The United States Supreme Court, in a series of decisions commencing in 1968, ruled unconstitutional provisions of state and federal laws which had the effect of denying to illegitimate children certain rights enjoyed by legitimate children. In *Levy v. Louisiana*¹⁸ and *Glona v. American Guarantee and Liability Ins. Co.*,¹⁹ the Court declared unconstitutional judicial interpretations²⁰ of Civil Code article 2315, the Louisiana wrongful death

18. 391 U.S. 68 (1968). In *Levy* five unacknowledged illegitimate children sought recovery for the wrongful death of their mother under LA. CIV. CODE art. 2315. The rationale of the majority of the Court was that since the illegitimacy of the children's birth bore no rational relation to the nature of the wrong allegedly inflicted upon their mother, and since it was invidious to discriminate against the children when no action or conduct of theirs was possibly relevant to the harm that was done their mother, the equal protection clause of the fourteenth amendment was violated by denying them the right to maintain an action for their mother's wrongful death. For a discussion of the impact of *Levy* on Louisiana law, see *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Persons*, 30 LA. L. REV. 171, 171-178 (1970).

19. 391 U.S. 73 (1968). In *Glona* a mother was suing to recover for the wrongful death of her illegitimate son. In distinguishing factually *Glona* from *Levy*, the United States Supreme Court nonetheless held that to deny the mother of an illegitimate the right to recover for his wrongful death under LA. CIV. CODE art. 2315 would be a violation of the equal protection clause of the fourteenth amendment. According to the majority of the Court, there is no rational basis "for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served." *Id.* at 75.

20. *Levy* and *Glona*, described as "constitutional curiosities" by Justice Harlan in his dissent (for a discussion of these cases, see notes 18 and 19, *supra*), bewilder the authors. By long-standing judicial interpretation of the wrongful death statute, the cause of action lay only with legitimate (or certain illegitimate) relations. (*See* note 21, *infra*.) If this interpretation is the only possible one to give the statute in light of the legislative intent, then the entire statute is unconstitutional, and all relations, legitimate or illegitimate, are left without a remedy. State courts are the proper tribunals to interpret state law. The authors believe that the Supreme Court, rather than reversing, should have remanded *Levy* to allow the state court to re-interpret the statute in light of its opinion. The federal district court in which *Glona* was brought would be bound under the *Erie* doctrine by the state court interpretation. The tendency of the

statute,²¹ which denied to certain illegitimate relations the benefits of that act. Similarly, in *Weber v. Aetna Casualty and Surety Co.*,²² it held unconstitutional that provision which relegated dependent, unacknowledged illegitimate children to a lower order of priority for benefits under the Louisiana Workmen's Compensation Statute.²³ In cases arising under the laws of other states²⁴ and under federal statutes,²⁵ the United States Supreme

Court to treat state courts as stepchildren of the federal system, particularly in equal protection cases, may have been a contributing factor to the results in *Warren and Mitchell*, where constitutional issues were handled in such a manner as to avoid review by the United States Supreme Court.

21. For a history of the decisions interpreting this provision, see Johnson, *Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1 (1976).

22. 406 U.S. 164 (1972). In *Weber* the United States Supreme Court held that Louisiana's workmen's compensation law which denied the right of dependent unacknowledged illegitimate children to recover benefits for the death of their natural father on an equal footing with dependent legitimate children violated the equal protection clause of the fourteenth amendment.

23. LA. R.S. 23:1021(3) (1950), as amended by La. Acts 1975, No. 583, defines children as "only legitimate children, step-children, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204, and 205." LA. R.S. 23:1232 (1950) establishes the priority of payment of workmen's compensation benefits to the various classifications of dependents, and by virtue of Section 1021(3) and its definition of children, unacknowledged illegitimates were relegated to eighth position as "other dependents." LA. R.S. 23:1232 (8) (1950).

24. *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973). In *New Jersey Welfare Rights Organization v. Cahill*, the question involved the constitutionality of the New Jersey "Assistance to Families of the Working Poor" legislation (N.J. STAT. 44:13-1 *et seq.*). Under New Jersey's statutory scheme, limited benefits to qualified families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both. . . ." N.J. STAT. 44:13-3 (a). The appellants argued that the "practical effect" of the statute was to deny benefits to illegitimate children while granting such benefits to legitimate children. In a per curiam opinion the United States Supreme Court sustained the arguments of the appellants that the statute violated the equal protection clause of the fourteenth amendment—"for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate." *Id.* at 621. In its opinion the Court cited *Weber*, (see note 22, *supra*), *Levy*, (see note 18, *supra*), and *Gomez v. Perez*, (see note 29, *infra*), as compelling the conclusion in the instant case. See also *Stanley v. Illinois*, 405 U.S. 645 (1972), in which an Illinois statute, declaring children of unmarried fathers upon the death of the mother, dependents, or wards of the state without any hearing on parental fitness, was held unconstitutional as a denial of due process and equal protection of the law guaranteed by the fourteenth amendment.

25. *Jimenez v. Weinberger*, 417 U.S. 628 (1974) and *Mathews v. Lucas*, 44

Court has continued to expand the rights of illegitimates to approximate those enjoyed by legitimate children, and thus narrow the gap resulting from difference in status.

Against this background, the Louisiana Supreme Court was confronted in *Warren v. Richard*²⁶ with a case involving rival claimants under the

U.S.L.W. 5139 (June 29, 1976) involved the question of constitutionality of provisions of the Social Security Act under the *due process clause* of the fifth amendment.

In *Jimenez v. Weinberger*, the appellants, a father and his two non-legitimated illegitimate children born after the onset of his disability, sought benefits from the father's disability insurance denied to the children under 42 U.S.C. §§ 402(d)(3)(A), 416(h)(2)(A), (B), 416(h)(3)(B). The effect of the cited provisions of the Social Security Act is that illegitimate children born after the onset of the parent's disability cannot obtain benefits unless they are eligible under the provisions regarding legitimation, inheritance or defective marriage ceremonies. The United States Supreme Court held that the provisions of the Social Security Act in question were "a denial of the equal protection of the law guaranteed by the due process clause of the Fifth Amendment" in that afterborn illegitimate children are divided into two subclassifications: (1) those illegitimate children entitled to benefits (a) who can inherit under state intestacy laws or (b) who are legitimated under state law, or (c) who are illegitimate only because of some formal defect in their parents' ceremonial marriage and (2) those illegitimate children conclusively denied benefits because they do not fall within one of the foregoing categories. Although the Court recognized that "the prevention of spurious claims is a legitimate governmental interest . . . , [i]t does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims." *Id.* at 636.

Again, in *Mathews v. Lucas*, the Court was faced with a constitutional challenge to provisions of the Social Security Act which denied appellees insurance benefits for failure to prove that the deceased wage earner was, at the time of his death, living with the child or contributing to his support. The appellees argued that certain children were relieved of the burden of "such individualized proof of dependency" under 42 U.S.C. §§ 402(d)(3), 416(h)(2)(A), (B), 416(h)(3), and thus "statutorily entitled, as the Lucas children [appellees] are not, to survivorship benefits regardless of actual dependency." 44 U.S.L.W. at 5140-41. The Court concluded, however, that the challenged provisions were constitutional in that the statutory classifications were "reasonably related to the likelihood of dependency at death." *Id.* at 5143. Further, "[s]uch presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny." *Id.* In distinguishing *Jimenez v. Weinberger*, *supra*, Justice Blackmun stated, "this conclusiveness in denying benefits to some classes of afterborn illegitimate children, which belied the asserted legislative reliance on dependency in *Jimenez*, is absent here, for, as we have noted, any otherwise eligible child may qualify for survivorship benefits by showing contribution to support, or cohabitation, at the time of death." *Id.* at 5144.

26. 296 So. 2d 813 (La. 1974).

wrongful death statute.²⁷ The decedent was (1) the legitimate son of plaintiff and (2) the biological father of a child whose mother was married to another man, the husband, at the time that the child was conceived and born. Defendant tortfeasor raised an exception of no right or cause of action to plaintiff's suit, and moved for summary judgment, alleging a court-approved compromise and settlement with the child, whose claim under article 2315 preempted that of plaintiff. Plaintiff contended that the child could not recover for decedent's death, since the child was conclusively presumed to be the legitimate issue of the husband of its mother under Civil Code article 184.²⁸ Affirming the lower courts, the supreme court held that a child is entitled to recover for wrongful death of its biological father, to the exclusion of decedent's legitimate ascendant, even though the child is conclusively presumed under state law to be issue of another man.

In reaching its decision in *Warren*, the court relied solely upon the constitutional interpretations of the United States Supreme Court in those cases involving the denial of rights to illegitimates because of their status. The court placed specific emphasis upon *Levy, Glona, Weber, and Gomez v. Perez*,²⁹ and declared:

As we understand the rationale of the decisions of the United States Supreme Court, it is the biological relationship and dependency which is determinative of the child's rights in these cases, and not the classification into which the child is placed by the statutory law of the state.³⁰

The court was therefore "compelled" to hold as it did, for an adverse holding "would ignore the existence of the child's biological father."³¹

It is not out of place to inquire whether the court in *Warren* properly understood the rationale of the federal decisions. Those cited in *Warren*

27. LA. CIV. CODE art. 2315.

28. LA. CIV. CODE art. 184: "The law considers the husband of the mother as the father of all children conceived during the marriage."

29. 409 U.S. 535 (1973). In *Gomez* the mother of an illegitimate child sought financial support for the child from the natural father; however, under Texas law a natural father had no legal obligation to support his illegitimate child. In a per curiam opinion the United States Supreme Court held that the statutory denial of support to an illegitimate child from the child's natural father violated the equal protection clause of the fourteenth amendment: "We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Id.* at 538.

30. 296 So. 2d 813, 817 (La. 1974).

31. *Id.*

were grounded upon a denial of equal protection guaranteed by the fourteenth amendment, and it is on such a basis that *Warren* rests.³² "Equal protection" is more than a mere shibboleth; the term denotes a way of approaching and analyzing a case. In setting up an equal protection claim, a party shows the existence of two discrete classes of persons, membership in one of which entitles a person by law to rights denied members of the other class. The court examines the effect of the unequal treatment to determine whether the discrimination has a "rational basis" or whether it is "invidious."³³ In short, an equal protection analysis presupposes classification and focuses upon the effects of classification.

The cases cited in *Warren* follow this pattern. Each case involved children who were classified as illegitimate. In each, parental descent was shown by proof sufficient under the requirements of state law, and classification was made in conformance with state law. In each, a child or a parent was denied a right accorded children or parents generally solely on the basis of status. In each, the question before the Supreme Court involved *the effect of classification*. In each, the deprivation on account of status bore no rational relationship to a legitimate state interest and thus was held unconstitutional.

Contrast the federal cases with the situation in *Warren*. The child in *Warren* enjoyed legitimate status. She was deprived of no rights on the basis of status. The effects of classification were not at issue. The plight of illegitimate children, as a class, was not ameliorated by this decision. At issue in *Warren* was the process of filiation imposed upon the child by state law. Under prior jurisprudence she was not entitled to recover for the wrongful death of decedent because, in the eyes of the law, *he was not her father*. The fixing of paternity precedes classification, and it was at this point that plaintiff objected. The state process of filiation might "ignore the

32. *Id.* at 816-17.

33. The test of equal protection has been formulated variously. In all of its written incarnations, it is imprecise and difficult to apply. See *e.g.*, *Mathews v. Lucas*, 44 U.S.L.W. 5139, 5141 (June 29, 1976): "Statutory classifications, of course, are not *per se* unconstitutional; the matter depends upon the character of the discrimination and its relation to legitimate legislative aims. 'The essential inquiry . . . is . . . inevitably a dual one: What legitimate [governmental] interest does the classification promote? What fundamental personal rights might the classification endanger?' *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972)." In formulating the test of equal protection applicable to statutes discriminating between individuals on the basis of their legitimacy, the court held that it was not a suspect classification requiring strict judicial scrutiny traditional in cases involving discrimination on the basis of race. *Id.* at 5142.

existence of the child's biological father," but that is because it was engineered to do so.

It is submitted that *Levy* and *Glon* did not "substitute a biological classification for the legal classification Louisiana had long observed,"³⁴ if, by that phrase, the Louisiana Supreme Court means that they changed our process of filiation. All the cited cases are clearly distinguishable, and indeed there is evidence that the United States Supreme Court purposely evaded the problem of fixing paternity.³⁵ In the authors' opinion, the court in *Warren* erred by assimilating problems of filiation to problems of classification, whereas they should be approached in different ways. Part of the confusion arises because filiation does have a classificatory function, but it was the relational, not the classificatory, function which was "at fault" in *Warren*. Some confusion also arises, it is suspected, because of the traditional tendency of the courts to view the presumption of paternity as a mere device to save innocent children from the opprobrium of illegitimacy, to the disregard of its relational function.³⁶

Warren raises problems in application. It destroys the conclusiveness of Article 184 in all cases arising under *Levy* and progeny, yet provides no substitute standards by which paternity may be proven. It is not even clear that it is restricted to those cases in which it can be shown that the husband

34. 296 So. 2d 813, 816 (La. 1974).

35. One purpose of Article 184 is to preclude fraudulent or erroneous claims of paternity, which is a notoriously difficult fact to prove affirmatively. In the cases cited, the Court emphasized that its decisions would not have the effect of changing the burden of proof which the state requires to show the true facts of parentage.

Justice Brennan, in a dissenting opinion in *Labine v. Vincent*, 401 U.S. 532, 552, (1971), in which he found unconstitutional Louisiana's laws discriminating against illegitimates with respect to successions law, nonetheless stated that "Louisiana might be thought to have an interest in requiring people to go through certain formalities in order to eliminate complicated questions of proof and the opportunity for both error and fraud in determining paternity after the death of the father." In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972), the Court stated, ". . . the state interest in minimizing problems of proof, is not significantly disturbed by our decision." In the per curiam opinion in *Gomez v. Perez*, 409 U.S. 535, 538 (1973), the Court recognized ". . . the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside. . . ." Justice Douglas, in speaking for the majority of the Court in *Glon v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968), wrote, "Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof."

36. See, e.g., a discussion of children born of null marriages in PASCAL at 219, wherein the author concludes: "A more obvious attempt to give preference to legitimate status over truth regarding actual paternity, to the complete disregard of justice to the husband of the mother, could not be found."

could not possibly be the father: If anyone who believes that he has a biological relationship to a decedent has a constitutional right to make out the true facts of paternity, by any evidence and regardless of a contrary presumption,³⁷ then every wrongful death action bears the seeds of a suit to fix paternity. Moreover, the father-child relationship so fixed will apparently bear the consequences normally associated therewith only for those limited purposes defined by the United States Supreme Court. The result is part-time paternity. For instance, the United States Supreme Court has upheld, provisionally at least, Louisiana's succession laws discriminating against illegitimates.³⁸ There is under the Louisiana Supreme Court's reasoning no constitutional compulsion to "substitute the biological classification" in cases arising under succession law. Thus, with regard to inheritance, the decedent's child is a stranger to his succession, although the child may recover for his wrongful death.

37. The procedural posture of *Warren* is interesting. Both lower courts had dismissed plaintiff's action on an exception of no right or cause of action and an alternative motion for a summary judgment filed by defendant. See *Warren v. Richard*, 283 So. 2d 507 (La. App. 1st Cir. 1973). The supreme court granted certiorari and reviewed a record which contained by way of relevant evidence (1) a birth certificate and prior tutorship proceedings on behalf of the child, both of which indicated that the child was the biological issue of decedent, and (2) affidavits alleging that the child's mother was married to a man other than the decedent at the time the child was born. Submission of affidavits would indicate that the procedural vehicle used was the motion for summary judgment. If so, the supreme court implicitly found that there was no genuine issue of material fact. LA. CODE CIV. PRO. art. 967. It must be inferred therefrom that the fact of marriage establishing the presumption of Article 184 is of no probative value in determining "biological" as opposed to "legal" paternity. If such is the case, it is common sense to suppose that motives of judicial economy overcame procedural niceties and that, in the proper instance, such evidence would be given probative effect for determining "biological" facts.

38. *Labine v. Vincent*, 401 U.S. 532 (1971). *But see*, *Succession of Fuselier*, 325 So. 2d 296, 301-02, n.5 (La. App. 3d Cir. 1975). "I believe that Article 83 of the Louisiana Civil Code is violative of the equal protection clause of the Constitution of the United States. Notwithstanding the 5 to 4 vote of the Supreme Court of the United States in *Labine v. Vincent*, . . . I believe the facts of this case would have provoked a totally different result These observations do not detract in any way from my admiration of those gifted French lawyers, judges and legal scholars who were the redactors of our Code. They were worldly and worldly-wise during their moment in history and their codification of the law in such critically important and complicated areas as legitimacy and succession rights has, in many important ways, withstood the relentless and inexorable tests of time. Yet, I believe that our Civil Code must be interpreted in the bright reflected light of the Constitution and I believe that the constitutional safeguard of equal protection connotes an ever changing, always vibrant quest for fairness and impartiality in the administration of justice." (Beer, J.).

The authors disagree with the holding in *Warren*, but that is not to say that the result is wrong. As has been observed elsewhere,³⁹ the presumption of article 184, being essentially irrebuttable, may offend notions of due process where its application does not promote justice for all interested parties.⁴⁰ However, the due process analysis presupposes a distinction between filiation and classification, a distinction which the court in *Warren* failed to make.

MITCHELL: THE STATUTORY ATTACK

Legitimation is the process by which a child, classified as illegitimate, achieves legitimate status.⁴¹ Legitimated children enjoy the same rights as legitimate children from the date of legitimation.⁴² Civil Code article 198 provides for one method of legitimation:

Children born out of marriage, except those who are born from an incestuous connection, are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them for their children, either before or after the marriage.

As is clear from the legislative history of article 198, legitimation has won increasing favor as a device for the protection of children.⁴³

39. PASCAL at 216-19.

40. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) and Justice Rehnquist's dissenting opinion in *Jimenez v. Weinberger*, 417 U.S. 628, 638 (1974).

41. See note 7, *supra*.

42. LA. CIV. CODE art. 199: "Children legitimated by a subsequent marriage have the same rights as if they were born during marriage." See also discussion in note 7, *supra*.

43. In *Succession of Mitchell*, Justice Tate relies heavily upon the legislative history of LA. CIV. CODE art. 198 as a basis for his decision that an adulterous child presumed the legitimate child of the husband of the mother under LA. CIV. CODE art. 184 can nonetheless be legitimated by the subsequent marriage of the natural parents. "As originally enacted by the Civil Code of 1808, it provided (almost verbatim to French Civil Code Article 331) that children born out of marriage, 'except those who are born from an incestuous or *adulterous* connection,' 'may be' legitimated by the subsequent marriage of their parents, 'whenever the latter have *legally acknowledged* them for their children, either before their marriage or by their contract of marriage itself.' La. Digest of 1808, chp. III, sec. I, art. 21 The article, as re-enacted in the Code of 1825 (Art. 217) and the Code of 1870 (Art. 198), was amended by Act 50 of 1944. This amendment made legitimation by the subsequent marriage automatic ('are legitimated') by the acknowledgment at any time, either before or *after* the marriage, 'whenever the [parents] have formally [as before] or informally [new] acknowledged them for their children.' Pertinently, the article was further amended by Act 482 of 1948 to remove expressly the bar to legitimation of children born of an *adulterous* connection. Thus, the legislative history of amendment to the code article indicates

In *Succession of Mitchell*,⁴⁴ the Louisiana Supreme Court used an interpretation of article 198 to obtain a just result. Plaintiffs therein claimed an interest in a succession by representation of their biological father.⁴⁵ At the dates of their birth, however, their mother was married to another man; only subsequent to their births did she obtain a divorce from her first husband and marry the plaintiffs' biological father. The court accepted as proven plaintiffs' allegations of biological descent. Reversing the lower courts,⁴⁶ the supreme court held, that under article 198, children are

an express legislative intent to permit the legitimation of adulterous children by the subsequent marriage of their parents. This 1948 amendment was the latest of a series of legislative amendments favoring automatic legitimation by the subsequent marriage of their parents of children born outside of a marriage between them but admitted to be their biological children." 323 So. 2d at 454-55.

44. 323 So. 2d 451 (La. 1975).

45. The succession in which the children in *Mitchell* sought to inherit was that of their biological father's sister. She had died without leaving ascendants or descendants; thus, her brothers and sisters and their descendants were her legal heirs by virtue of LA. CIV. CODE art. 912. The biological children of her predeceased brother claimed a share of the estate by representation. LA. CIV. CODE art. 897: "In the collateral line, representation is admitted in favor of the children and descendants of the brothers and sisters of the deceased, whether they come to the succession in concurrence with the uncles and aunts, or whether, the brothers and sisters of the deceased having died, the succession devolves on their descendants in equal or unequal degrees." See also LA. CIV. CODE art. 898.

46. The lower courts, district and appellate, rejected the claim of the children that they were legitimated by the subsequent marriage of their parents; and they "did so in reliance upon *George v. Bertrand*, 217 So. 2d 47 (La. App. 3d Cir. 1968), cert. denied, 253 La. 647, 219 So. 2d 177 (La. 1969) and *Succession of Barlow*, 197 So. 2d 682 (La. App. 4th Cir.), cert. denied, 250 La. 917, 199 So. 2d 921 (1967)." 323 So. 2d at 452. The Louisiana Supreme Court expressly granted certiorari in *Succession of Mitchell* "to consider the correctness of the cited intermediate decisions in *George* and *Barlow* . . ." *Id.*

In *Succession of Barlow*, one of the parties to a contest for the property of the deceased based her claim as legal heir upon the marriage of her mother and the deceased subsequent to her birth. Isabelle Barlow Nettles alleged that she was the legitimated child of the deceased, even though she was born during the marriage of her mother to Nathan Lestrick. Conceding that the presumption of LA. CIV. CODE art. 184 applied, counsel for Mrs. Nettles argued that she was also the legitimated child of the deceased by virtue of LA. CIV. CODE art. 198 (legitimation by subsequent marriage of the natural parents). In rejecting the argument of counsel, the court examined the 1948 amendment to Article 198 which deleted the prohibition against legitimation of a child born of an adulterous union. However, the court reasoned that Mrs. Nettles could not be legitimated under Article 198 because she was not illegitimate and, in the words of that article, not "born out of marriage." Furthermore, the court added, "If the argument were valid, what of her relationship in such a situation to her mother? Would she be both legitimate and legitimated? We think this would be a conflict of status not sanctioned by LSA-C.C. art. 178, which provides: 'Children are either legitimate, illegitimate, or legitimated.' Note the 'either or'

legitimated with respect to their biological father even if they are presumed under article 184 to be the legitimate children of another man.

The court framed the issues in terms of status.⁴⁷ Is a "technically"⁴⁸

possibilities only." 197 So. 2d 682, 684 (La. App. 4th Cir. 1967).

In *George v. Bertrand* the alleged father brought a suit for the wrongful death of his son under LA. CIV. CODE art. 2315. The basis of the alleged father's claim was that the child was his biological son who was legitimated by the subsequent marriage of him and the mother. (LA. CIV. CODE art. 198). However, the evidence showed that the child was conceived during the marriage of the mother to her legal husband, Willie Jackson, and thus the presumption of LA. CIV. CODE art. 184 applied. The court determined that since no action to disavow the paternity had been brought by Willie Jackson, "there is no reason that the presumption should not apply." 217 So. 2d 47, 48 (La. App. 3d Cir. 1968). In citing *Succession of Barlow*, *supra*, the court reasoned that "a child could not be both legitimate, in that he was born during the marriage of his mother and her husband, and legitimated in that his mother and her second husband, in their marriage, had attempted such legitimation." *Id.* The codal basis for such a conclusion in *Succession of Barlow* and *George* was LA. CIV. CODE art. 178: "Children are either legitimate, illegitimate, or legitimated." Thus, under Article 178, if the child were both legitimate and legitimated as to two "fathers," he would occupy a dual status as to the mother. Furthermore, the court noted, "If we were to allow Ruffin George [alleged father] to maintain this action, what of the rights of the legal father, Willie Jackson? Would both be able to maintain an action under La. C.C. Art. 2315 for the death of 'their' son? We think the necessity of ruling for defendants is obvious." *Id.* at 49.

More significant than the majority opinion in *George*, in light of the opinion in *Succession of Mitchell*, *supra*, is the dissent from denial of a rehearing by then Judge Tate. In disagreeing with the opinion on original hearing, Judge Tate relied, as he did in *Succession of Mitchell*, upon the legislative history of LA. CIV. CODE art. 198: "The majority's interpretation ignores this deliberate legislative amendment and thwarts or greatly limits the legislative intention that children, such as the decedent here, be legitimized in accordance with their actual parentage if their parents subsequently become married to one another." *Id.* at 50. As possible solutions to the problems that such a conclusion might cause, Judge Tate suggested (1) that the presumption of Article 184 should be displaced by the subsequent marriage and legitimation of the child under Article 198, which is the modern French solution; (2) that there should be no objection to a child having "two fathers," citing putative marriages as an example (although he did recognize that such a solution might pose problems, *Id.* at 51 n.1); or (3) that "the presumption of legitimacy by birth during an existing marriage does not extend to circumstances such as the present, where a child does not enjoy the reputation of legitimacy because born during his mother's open concubinage with other than the father." *Id.* at 52.

47. The court stated that an alternate ground requiring the result in *Mitchell* was *Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 262 So. 2d 328 (1972). The court preferred to rely on Article 198, however. In *Babineaux* the plaintiff brought an action individually and as the representative of four minor children for the wrongful death of her husband and their father. One of the children was born during the legal marriage of his mother to Roland Arnold (but more than two years after a separation in fact) and less than 180 days after a bigamous marriage ceremony between plaintiff

legitimate child excluded on account of status from receiving the benefits of legitimation? The court found that the legislative intent, as gauged by the history of article 198, was to extend the benefits of legitimation to *all* adulterous children, including those who were “technically” legitimate.

Article 198 defines the class to which it applies: “children born out of marriage.” All adulterous children are indeed born out of marriage and are thus within the class to which the article applies. *Mitchell*, however, presented a case where the children were presumed under Article 184 to be the biological issue of their mother’s first husband. The state’s process of filiation fixed paternity in such a way that the children were born *within* marriage in the contemplation of the law.

The children, however, alleged that the presumption of Article 184 was false as applied to their case. An essential element of their case was proof that their mother had committed adultery with the man whom they claimed as the father. This was not an action to disavow paternity, which can only be brought by the husband or his heirs. This was an action to fix

and the decedent. Both the trial and appellate courts’ judgments sustained the exception of no right of action in regard to the plaintiff’s suit in her own behalf and in her representative capacity for the one child. According to the Louisiana Supreme Court, the status of the child could not be decided without further evidence, thus the case was remanded to the trial court for “proceedings not inconsistent with the views herein expressed.” 262 So. 2d at 338. The child was born during the legal marriage of his mother to her husband, thus the presumption of L.A. CIV. CODE art. 184 applied; and he was conceived before and born during the bigamous marriage between his mother and the decedent. The court considered the following evidence necessary: (1) had the child been disavowed by Arnold? (2) was the child subject to such a disavowal action under Civil Code Article 191? (3) was the decedent in “good faith” under Civil Code Articles 117-118, such that the “putative marriage” doctrine could be invoked? Dependent upon the answers to the preceding questions, the court opined: “This child may very well be the legitimate child of Arnold alone, the legitimate child of Babineaux alone, or the legitimate child of Arnold and Babineaux.” 262 So. 2d at 338. Significantly, in a footnote within the previously quoted sentence, the Court distinguishes the facts in *Babineaux* from those in *George v. Bertrand* and *Succession of Barlow*: “Cf. Art. 178; *Succession of Barlow, supra*, and *George v. Bertrand, supra*, where the courts were considering the child as occupying both a *legitimate* and a *legitimated* status as opposed to a *double legitimate* status.” 262 So. 2d at 338 n.12.

48. “This intent, we have found, is to permit legitimation by the subsequent marriage of their parents of *all* adulterous children, whether *technically* illegitimate or *technically* legitimate at birth (whether or not subsequently disavowed by a long-separated husband *if* he returns or discovers his wife has had a child during his absence).” (Emphasis added). 323 So. 2d 451, 457 (La. 1975). Classification as legitimate or illegitimate is governed by *technical* rules. The use of the qualifying adjective “technical” in this context carries perhaps a pejorative connotation, but serves no descriptive purpose.

paternity, to establish filiation. However, the first step in *Mitchell* was necessarily to show that the husband was not the father, which is also the object of an action *en desaveu*. The question thus posed was what legal evidence is sufficient to rebut the presumption of Article 184 in such a case. The answer the court gave is noteworthy. In startling contrast to prior jurisprudence,⁴⁹ the court implicitly held (1) that a class of persons, undefined but certainly including persons other than the husband or his heirs, may rebut the presumption of Article 184, (2) without any apparent time limits within which they must act, (3) by meeting an undefined standard of proof which is in any event less rigorous than that required for an action *en desaveu*.⁵⁰

The greatest import of *Mitchell* is that it changes the rules by which paternity is fixed. The presumption apparently still operates to fix paternity upon a "legal" father, but there is now an alternative avenue by which

49. The leading case is *Succession of Saloy*, 44 La. 433, 10 So. 872 (1892); see note 15, *supra*.

In *State v. Randall*, 219 La. 578, 53 So. 2d 689 (1951), the Louisiana Supreme Court stressed the importance of restricting proof of paternity contrary to LA. CIV. CODE art. 184. The mother of a two year old child filed an affidavit charging the defendant alleged father with criminal neglect of family under LA. R.S. 14:74 (1950). The child was born during the lawful marriage of the mother to Leonard Bolden (not the defendant, alleged father), who had not disputed the paternity of the child. However, the state, in its prosecution, offered evidence to establish the defendant's paternity. The lower court, over the objection of defendant's counsel, permitted the introduction of the evidence despite the argument that the conclusive presumption of Civil Code Article 184 prohibited its admissibility. On appeal, the Louisiana Supreme Court considered whether or not Act 164 of 1950 (*amending* LA. R.S. 14:74 (1950)) repealed by implication, at least in part, LA. CIV. CODE art. 184. Section 74, Title 14, of the Louisiana Revised Statutes of 1950 read in part as follows: "Criminal neglect of family is the desertion or intentional non-support: . . . (2) By either parent of his minor child, whether legitimate or illegitimate, who is in destitute or necessitous circumstances. *Solely for the purpose of determining the obligation to support, the court shall admit proof of paternity or maternity, or both.*" Recognizing that "repeals by implication" are not favored, the court concluded that "by the phrase 'admit proof of paternity,' the Legislature might well have intended only the introduction of evidence in the case of a legitimate child to prove an accused's marriage to the child's mother and his failure to disavow legitimacy timely; and in the case of an illegitimate child to establish that the child's mother was unmarried and that . . . the accused was responsible for its birth." 53 So. 2d at 691. According to the court, the preceding was the proper interpretation of the statutory provisions for two reasons: (1) "there is nothing to indicate an intention to repeal the discussed codal articles with the consequent destruction of the established conclusive presumption of legitimacy," and (2) such a construction of the provisions "best comports to reason and justice" for "[a]n unqualified destruction of the established conclusive presumption . . . might lead to injustice, oppression and absurd consequences." *Id.*

50. *But cf.* La. Acts 1976, No. 430, § 1: quoted in note 64, *infra*.

paternity may be fixed upon a second man, the "biological" father. The extent of the change is unclear, because the court did not directly allude to it. It is clear, however, that, until *Mitchell*, the only legal evidence by which children could rebut the presumption of Article 184 was by producing a judgment of disavowal obtained by their mother's husband. Now children apparently have the right to show the true facts of paternity by any probative evidence, at least where the biological father subsequently married their mother. There is no persuasive reason for supposing that this change in the process of filiation depends upon and is restricted to the terms of Article 198. A logical extension of *Mitchell* would open this alternative avenue of filiation (1) to any interested party (2) in any situation in which the existence of a father-child relationship is pertinent.

DUAL PATERNITY

In both *Warren* and *Mitchell*, children were presumed to be issue of their mothers' husbands, the so-called "legal" fathers. In both, children were permitted to prove that they were in fact issue of other men, the so-called "biological" fathers. The question arises whether the legal father remains bound in a father-child relationship with children even after the children have proven that he could not possibly be their biological father.

In *Warren*, where the child occupied illegitimate status with respect to her biological father, the court stated that the legal father's rights and obligations subsisted parallel to those of the biological father.⁵¹ In *Mitchell*, where the children assumed legitimate status with respect to their biological father, the court believed that it was unnecessary to decide that issue.⁵² The

51. "The argument rightly assumes that there is no question that the child may recover for the wrongful death of her legitimate father." 296 So. 2d 813, 815 (La. 1974).

52. 323 So. 2d at 457. *But see* *Dugas v. Henson*, 307 So. 2d 650 (La. App. 3d Cir. 1975) (former husband sought to disavow the paternity of a child born 279 days after a judgment of separation from bed and board). The former husband argued that "the strong policy in favor of the presumption of legitimacy is eliminated herein, inasmuch as the child can be deemed the legitimated child of Wayne Henson [biological father] and Dianne Fournet [mother] by virtue of their marriage, C.C. Art. 198. . . ." *Id.* at 654. The court concluded that a child who is presumed to be the legitimate child of the mother's husband cannot also be the legitimated child of the biological father and mother should they subsequently marry, citing *George* and *Succession of Barlow*. Less than a year before the decision in *Succession of Mitchell*, the Louisiana Supreme Court denied certiorari in *Dugas*, 310 So. 2d 851 (La. 1975). However, Justice Barham was of the opinion that certiorari should be granted, one of the reasons being that ". . . it was conclusively proved that the child is the biological

court recognized in both cases the problems raised by dual paternity.⁵³ These are potentially troublesome in connection with wrongful death actions, successions and support.

Where there exists both a legal and a biological father, both clearly may recover for the wrongful death of the child, and the child clearly enjoys a right to recover for the wrongful death of both fathers. A claimant under article 2315 must prove actual damages, however, which are difficult to show where there existed no personal or economic ties between claimant and decedent.⁵⁴ Thus, the courts have a measure of control over potential abuse of wrongful death actions.

child of Henson who is now the husband of the mother of the child." *Id.* Thus, "[t]he child is the legitimated child of Henson." *Id.*

53. In *Warren*, the Louisiana Supreme Court stated, "We are not unmindful of the problems a logical extension of these holdings may create, such as a child in these circumstances recovering from both fathers for support and maintenance, or conversely, requiring the child to support both fathers, in a proper case." LA. CIV. CODE arts. 227, 229. 296 So. 2d at 817.

In speculating about what effect, if any, the legitimation by subsequent marriage would have upon the children's presumed status as the legitimate children of the first husband, the court in *Succession of Mitchell* posed the following question: "Or does the legitimation simply create in a *second* person the legal relationship of father to the now-legitimated child, without displacing any presumed similar legal relationship arising from the first marriage?" 323 So. 2d 451, 457 (La. 1975). In a footnote, the court analogized the result, should the answer be affirmative, to the situations of (1) a child presumed to be the legitimate child of two fathers, due to overlapping presumptions of legitimacy (*but cf.* La. Acts 1976, No. 430, § 1—Article 186 as reenacted, note 64, *infra*); (2) an adoptive child who may inherit from both his natural and his adoptive father (LA. CIV. CODE art. 214); and (3) children of both a legal and a putative marriage considered as one man's legitimate issue (*see Cortes v. Fleming*, 307 So. 2d 611 (La. 1974)). *Id.* at n.6.

54. Two recent Louisiana appellate court cases are illustrative—*Cosey v. Allen*, 316 So. 2d 513 (La. App. 1st Cir. 1975); *Meaux v. Wiley*, 325 So. 2d 655 (La. App. 3d Cir. 1975).

In *Cosey v. Allen*, the presumed legitimate father (husband of the mother under LA. CIV. CODE art. 184) sued for the wrongful death of three children, only one of whom by his own admission was his biological child. Although the court recognized that he had the *right* to recover his own damages as a result of the wrongful deaths of his children, it held that the law did not compel "the conclusion that he was damaged by their deaths . . . even nominally" and sustained the trial court's award of \$500. 316 So. 2d at 517.

In *Meaux v. Wiley*, however, the appellate court reduced a trial court award of \$40,000 to the plaintiff for the wrongful death of his son to \$20,000, as "the record is devoid of testimony or evidence indicating the nature of the relationship between Meaux [father] and his deceased son." 325 So. 2d at 657. As justification for the award of \$20,000 to Meaux, the court stated, "That amount is allowed on *the basis of the natural grief sustained by a father over the death of his son.*" (Emphasis added). *Id.* The court considered Meaux's claim of damages for the wrongful death of another

Dual paternity creates more difficult problems in successions law and with respect to the obligations of support. Fathers and children enjoy rights with respect thereto without regard to existing personal and economic ties. In the *Mitchell* fact situation, the practical possibility exists that a child could be entitled to inherit as a *forced heir* in the succession of two fathers and that they may both inherit as forced heirs in the child's succession.⁵⁵ In the latter event, how is the forced portion to be allocated?⁵⁶ Because the child can now claim support from both fathers,⁵⁷ the question arises as to the nature of the obligations owed by them. Are the fathers liable jointly,⁵⁸ severally,⁵⁹ in *solido*,⁶⁰ or in *solidum*,⁶¹ or are they not bound together at all?

son—Joseph Bert Crain—possibly conceived and born during the marriage of his mother and another man (her previous husband). In relying on *Mitchell*, although the reasoning is not clear, the court held that “there was no bar to the legitimation of Joseph by Bertrand and Martha’s subsequent marriage,” even if Joseph had been conceived and born during the marriage of his mother and her first husband. *Id.* This latter conclusion is, of course, based upon the assumption that the mother had obtained a divorce from her first husband (*see* note 7, *supra*), and there was in fact no evidence to the contrary.

55. *See* LA. CIV. CODE arts. 902, 915, 1493-94.

Despite Justice Tate’s statement in *Succession of Mitchell*, “[t]he present facts indicate no substantial possibility that the courts will in fact ever be called upon to decide any practical consequences of the issue concerning the children’s continued legitimacy insofar as the long-disappeared Charles Connor [presumed legal father] . . .” (323 So. 2d 451, 457 (La. 1975)), there is a possibility that the courts would have to recognize the right of two fathers to inherit as forced heirs. For example, in *Cosey v. Allen*, (*see* note 54, *supra*) it was the presumed legitimate father who reappeared after an eight year absence and instituted the wrongful death action.

56. The authors can only speculate as to possible solutions for the dilemma. It is possible that the forced portion accorded to the father could simply be divided between the two claimants. On the other hand, the preferable solution might be to increase by appropriate legislation the percentage “reserved” for the father in cases where there are *two*.

57. LA. CIV. CODE arts. 227, 229. Presumably, it would first be necessary for the child to establish a legal obligation of support, which is easily accomplished in cases such as *Succession of Mitchell* by the legitimation under Civil Code Article 198 and the presumption of Civil Code Article 184.

58. LA. CIV. CODE arts. 2080, 2085-87.

59. LA. CIV. CODE arts. 2078, 2084.

60. LA. CIV. CODE arts. 2082, 2091-2107.

61. *In solidum* obligations, the Roman term, are also known to Louisiana jurisprudence as imperfect solidarity. *See Gay & Co. v. Blanchard*, 32 La. Ann. 497 (1880). For an excellent discussion of the differences between obligations *in solido* and *in solidum*, see J. SMITH, LOUISIANA AND COMPARATIVE MATERIALS ON CONVENTIONAL OBLIGATIONS 350-51 (4th ed. 1973). A later case utilizing the concept of imperfect solidarity was *Commercial Ins. Agency, Inc. v. Wilson*, 293 So. 2d 246 (La. App. 3d Cir. 1974), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations*, 35 LA. L. REV. 291, 291-98 (1975). *See also* Comment,

Important consequences, both procedural and substantive, depend upon the answer to that question. The child, of course, owes a reciprocal obligation of support to both fathers.⁶²

The problems of dual paternity are not insoluble. However, the solutions lie outside the confines of the Civil Code because the redactors clearly did not contemplate dual paternity. The solutions will emerge only from case-by-case adjudication. The authors have confidence in the ability of the courts to fashion a just resolution of these problems. However, a civil law system should not operate in this fashion, and it need not do so in this instance. By restoring the distinction between filiation and classification, the courts could avoid the problems of dual paternity.

A PROPOSAL

Warren and Mitchell were inspired by the desire (1) to treat justly children who in the past have been punished for the misbehavior of their parents and (2) to have legal paternity coincide with biological paternity. For the reasons outlined in this article, they are not likely to accomplish either. The problems presented have their roots in filiation, not in classification. A failure to distinguish clearly between filiation and classification led the court to create alternative processes of filiation which have no basis in the Civil Code or in jurisprudential tradition. Logically extended, the result is a subversion of the presumption of Article 184 and the creation of novel problems of dual paternity.

It is particularly urgent that the distinction between filiation and classification be restored. It is likely that future decisions of the United States Supreme Court will remove many of the remaining impediments imposed upon illegitimate children, particularly in successions law.⁶³

Solidary Obligations, 25 TUL. L. REV. 217, 220 (1951) and such foreign sources as 4 MARCADÉ, EXPLICATION DU CODE CIVIL no. 1201 (5th ed. 1852) and 2 M. PLANIOL, CIVIL LAW TREATISE pt. 1, no. 777 at 417 (11th ed. La. St. L. Inst. transl. 1959).

62. LA. CIV. CODE art. 229.

63. A case which may affect the ruling of *Labine v. Vincent* (see note 38, *supra*) is *Trimble v. Gordon*, 44 U.S.L.W. 3552 (June 29, 1976). In *Trimble* the United States Supreme Court granted a motion to proceed in forma pauperis and noted probable jurisdiction. An Illinois circuit court judgment had the effect of denying heirship to an illegitimate child in accordance with Section 12 of the Illinois Probate Act, "which, as construed by the Illinois Supreme Court, permits illegitimate child to inherit from and through mother but not from and through father unless child was legitimated prior to father's death. . . ." *Id.* This judgment was affirmed on appeal by the Illinois Supreme Court in a bench announcement on September 24, 1975 (docket no. 47339). In *In re Estate of Karas*, 61 Ill. 2d 40, 329 N.E.2d 234 (1975), as in *Trimble*, the issue was whether the Illinois provision permitting an illegitimate to inherit from her

Classification will in the future have less significance. It would still seem a basic goal to fix paternity on the basis of a biological connection, to relate in the father-child bond two persons who in fact possess that bond. Filiation will in the future retain its significance.

The legislature has recently amended the articles governing the action *en desaveu*.⁶⁴ The husband has now a reasonable opportunity to show

mother but not her father (unless he had legitimated her) was unconstitutional, a denial of due process and equal protection of the law. In upholding the constitutionality of Section 12 of the Probate Code, the court cited *Labine v. Vincent* as controlling, the effect of which according to the court had not been lessened by the Supreme Court cases which followed (see text at notes 18-25, *supra*). According to the Illinois Supreme Court, the equal protection test to apply in examining the constitutionality of Section 12 was formulated as follows: "Under traditional concepts of Federal equal protection a legislative classification will be upheld if it bears a rational relationship to a valid governmental purpose, and the burden of rebutting the presumptive validity of the classification rests upon the party challenging its constitutionality When the classification, however, affects fundamental rights . . . or involves a 'suspect classification' . . . , the burden is placed upon the State to demonstrate that the distinction is justified by a compelling governmental interest." 329 N.E.2d at 238. In commenting upon whether or not a classification based on illegitimacy was a "suspect classification" the Illinois Supreme Court stated, "No decision has been cited in which a classification based on illegitimacy has been expressly held to be a suspect classification. Rather the decisions concerning illegitimacy previously set forth would seem to have been determined on whether or not the classification could be said to be predicated on a rational basis." *Id.* at 240. In *Labine v. Vincent*, according to the Illinois court, "The Supreme Court noted that Louisiana's intestate succession scheme was rationally based on its interest to encourage family relationships and to establish a method of property disposition. . . . And we do not believe that Illinois has any lesser interest than Louisiana in regulating the transfer of a decedent's property in its jurisdiction." *Id.* at 238. According to the court, "We further recognize that the State maintains an interest in prohibiting spurious claims against an estate. The parties to these appeals tend to agree that proof of . . . paternal relationship may not be so readily ascertainable but that such considerations should be decided individually on the facts of each case. While establishing paternity in a proceeding to determine heirship is possible, situations may arise which are fraught with fraudulent circumstances." *Id.* at 240.

64. La. Acts 1976, No. 430:

"Article 184. Presumed paternity of husband

The husband of the mother is presumed to be the father of all children born or conceived during the marriage.

Article 185. Presumption of paternity, date of birth

A child born less than 300 days after the dissolution of the marriage is presumed to have been conceived during the marriage. A child born three hundred days or more after the dissolution of the marriage is not presumed to be the child of the husband.

Article 186. Presumption of paternity, negation

The husband of the mother is not presumed to be the father of the child if another man is presumed to be the father.

non-paternity. However, these changes do not affect cases where the husband fails to bring an action *en desaveu*, and, as *Mitchell and Warren* demonstrate, it is often in the interest of other parties to show non-paternity.

The authors suggest a remedy intended to preserve the integrity of the process of filiation. It is proposed that the legislature amend Civil Code Articles 193-197 to clarify the means by which legitimate filiation may be proven. The changes proposed have as their basis an interpretation of these articles suggested elsewhere.⁶⁵ In view of the reluctance of the courts to

Article 187. Action in disavowal, burden

The husband can disavow paternity of a child if he proves by a preponderance of the evidence any facts which reasonably indicate that he is not the father.

Official Revision Comment

Article 187 was amended to provide that evidence used in an action for disavowal of paternity may consist of any facts which reasonably indicate that the husband is not the father of the child. Examples of the type of facts which may create a preponderance of evidence in an action to disavow may include (but are not limited to) such items as blood grouping test results or any other reliable scientific test results that preclude paternity of the husband, proof of sterility of the husband at the probable time of conception, and remoteness of the husband from the wife that makes the cohabitation unlikely at the probable time of conception.

Article 188. Husband's loss of right to disavow

A man who marries a pregnant woman and who knows that she is pregnant at the time of the marriage cannot disavow the paternity of such child born of such pregnancy. If another man is presumed to be the father, however, then the provisions of Article 186 apply. The husband also cannot disavow paternity of a child born as a result of artificial insemination of the mother to which he consented.

Article 189. Time limit for disavowal by the husband

A suit for disavowal of paternity must be filed within one hundred eighty days after the husband learned or should have learned of the birth of the child; but if the husband for reasons beyond his control is not able to file suit timely, then the time for filing suit shall be suspended during the period of such inability.

Article 190. Time limit for disavowal by heir or legatee

If the husband dies within the delay for filing suit to disavow paternity without having instituted such action, an heir or legatee whose interest in the succession will be reduced shall have one year from the death or one year from the birth of the child, whichever period is longer, within which to bring such an action."

Section Four of the same Act specifically provides that the article comments are "not intended to be considered as part of the law and are not enacted into law by virtue of their inclusion in this Act." In addition, Section Three of the Act, in adding Code of Civil Procedure Article 5091.1, provides for the appointment of an attorney to represent the child in all disavowal actions.

65. Professor Robert A. Pascal contends that Civil Code Articles 184-192 must be read in conjunction with Civil Code Articles 193-197, so as "to take into account the totality of the law on legitimate filiation." PASCAL at 216. Thus, "[t]he conclusion

accept this interpretation, however, a legislative amendment seems desirable. The amendment would set out this general distinction:

1. If a child is designated by registry as the child of the mother's husband, then Article 184 establishes a presumption of paternity by the husband which may be rebutted only by the husband or his heirs in accordance with the articles governing the action *en desaveu*.
2. If a child is *not* designated by registry as the child of the mother's husband, then Article 184 establishes a presumption of paternity by the husband which may be rebutted by any interested party in an action and by a preponderance of the evidence.

The proposal preserves the benefit of the presumption for children born during their mother's marriage but makes its effect depend upon registry. Registry, traditionally important in the civil law,⁶⁶ provides documentary

is inescapable: Articles 184-192 apply only to the child who has either valid registry or reputation in his favor as the child of the mother's husband. Only then is the husband required to bring the action to disavow the child." (Emphasis added). *Id.* at 217. This inescapable conclusion is reached by examining Articles 193-97. Under Civil Code Article 193, one must produce the registry of his birth or baptism to prove legitimate filiation. (See also LA. R.S. 40:159 (1950)). If the registry no longer exists or has been lost, the party may prove his legitimate filiation by general reputation in accordance with Civil Code Articles 194-95. If the party cannot prove his legitimate filiation by either registry or reputation, then he may do so by any evidence of probative value. LA. CIV. CODE art. 196. But, "*in this latter instance at least, under Article 197, proof against the claimed legitimate filiation may be made by showing (1) that the person is not the child of the woman he pretends is his mother and, the maternity being proved, (2) that he is not the child of the husband of the mother.*" PASCAL at 217. The last clause could not be limited to proof of a judgment of disavowal obtained by the husband of the mother; otherwise, the entire suit to prove filiation to the husband "would be useless." *Id.* Furthermore, registry of the child as that of another "should not be considered to oblige the husband to disavow the child or accept its legitimate paternity." *Id.* A child in such a case is not being held out to be legitimate, but by its registry is illegitimate. The general presumption of Article 184, Professor Pascal contends, should be limited to instances in which the mother asserts the legitimacy of the child from the beginning. "With regard to reputation it could hardly be contended that the married woman living in open concubinage, or living notoriously promiscuously and separate from her husband, could create a reputation of legitimacy simply by treating the child as if he were her husband's." *Id.* The author concludes with the following comments: "And, above all, Articles 184-192 should be envisioned as efforts to provide a legal determination of paternity when the facts are doubtful. They must not be construed as if intentionally contrived vehicles of injustice." *Id.* at 218. See also Judge Tate's dissent from a denial of rehearing in *George v. Bertrand*, 217 So. 2d 47, 52 (La. App. 3d Cir.), cert. denied, 253 La. 647, 219 So. 2d 177 (1969), and *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Persons*, 30 LA. L. REV. 171, 171-78 (1969).

66. See J. BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW §§ 573-76 (1912). "We

evidence of paternity, on which third parties can rely. The proposal also eliminates the problem of dual paternity.

It is suggested that the state has an interest in having legal paternity coincide as nearly as possible with biological paternity. Yet more so, the state has an interest in preserving the codal structure of our private law. Both ends would be served by the proposed changes.

have not always had special methods of proof for *birth, marriage, and death*, that is to say, for the principal facts relating to the civil status of persons. For a long while recourse was had to ordinary means in order to establish them, such as testimony, writings, a confession even, or an oath, presumptions Marriage and filiation depended ordinarily on the possession of status. . . . The keeping of registers of civil status relegated to the background these imperfect modes of proving; they were only allowed when registers were lacking, that is to say, when the registers had perished or had not been kept up. As a contrast to this, full faith was given to these registers, which had the advantage of furnishing a preconstituted proof established under the best conditions of impartiality and sincerity." *Id.* at 862-63.