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SELECTED LEGISLATION OF THE 1979 REGULAR SESSION — A STUDENT COMMENTARY*

[*Editor's note.* This commentary does not purport to be a comprehensive study of the 1979 legislation; rather, the articles treat only selected statutes enacted during the past legislative session.]

CRIMINAL LAW

HARMLESS ERROR

Act 86 of 1979 amends Code of Criminal Procedure article 921, which contains Louisiana's "harmless error" rule, to read: "A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." Prior to its amendment, article 921 provided:

A judgment or ruling shall not be reversed by an appellate court on any ground unless in the opinion of the court after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right.

The catalyst of this amendment was the Louisiana Supreme Court's statement in *State v. Herman*¹ that article 921 precluded the court from looking "behind the substantial violation of the constitutional rights of the accused to determine if other evidence overwhelmingly indicates his guilt."² Proponents of Act 86 contend that article 921 as amended allows the appellate court to affirm when

*The student authors of the Legislative Commentary are Allen M. Posey, Jr., author of the Criminal Law section, and Gordon Terry Whitman, author of the Civil Law section.

1. 304 So. 2d 322 (La. 1974).

2. *Id.* at 325. Representative Emile "Peppi" Bruneau, co-author of Senate Bill No. 247 (Act 86), cited this language from *Herman* in his testimony before the House Criminal Justice Committee on May 30, 1979. The same language was cited by Norble Rose, President of the Louisiana District Attorney's Association, to the Senate Judiciary C Committee at a hearing on May 15, 1979. Proponents of the bill, including Senator Fritz Windhorst, its lead author, Harry Connick, Orleans Parish District Attorney, and John Mamoulides, Jefferson Parish District Attorney, all voiced concern that the convictions of many defendants were being overturned because of some error committed at the trial, even where other evidence overwhelmingly indicated the defendant's guilt.

overwhelming evidence of guilt exists, thus aligning Louisiana's harmless error rule with that of the majority of other states and with the federal jurisprudence.³ An understanding of the probable effects of this Act requires an examination of both the federal and the Louisiana harmless error rules.⁴

The federal statutory harmless error rules provide that errors or defects which do not affect the substantial rights of the parties are to be disregarded.⁵ In an exhaustive analysis of the federal statutory harmless error rule,⁶ the United States Supreme Court in *Kotteakos v. United States*⁷ concluded that if, after examining the proceedings in their entirety, the court "is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except where the departure is from a constitutional norm or a specific command from Congress."⁸ Subsequently, in *Fahy v. Connecticut*⁹ and *Chapman v. California*,¹⁰ the Supreme Court expanded the scope of the harmless error doctrine by indicating that the doctrine may be applicable to some errors of constitutional dimension. In *Fahy* the Court determined the test for

3. At the May 30th House Criminal Justice Committee meeting, Representative Bruneau testified that this bill was an adoption of the "overwhelming-evidence" test used by the majority of other jurisdictions and by the federal courts. The same testimony as to the bill's effect was given in the Judiciary C Committee hearing on May 15th by Connick, Rose, and Pete Adams, Executive Director of the Louisiana District Attorney's Association. The proponents of the bill, however, apparently misinterpreted the rationale underlying the decision in *Herman*. The *Herman* court was unable to follow the federal rule due to Louisiana's constitutional prohibition against review of facts in criminal cases. Thus, the legislature did not have the power to alter the court's decision in *Herman* by amending article 921. See text at note 21, *infra*.

4. For an excellent discussion of harmless constitutional error in the federal courts and in Louisiana, see Comment, *Harmless Constitutional Error—A Louisiana Dilemma?*, 33 LA. L. REV. 82 (1972).

5. FED. R. CRIM. P. 52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

28 U.S.C. § 2111 (1949) provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

FED. R. EVID. 103(a) provides in pertinent part: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . ." Additionally, the trial court must be properly made aware of the error. FED. R. EVID. 103(a)(2).

6. The statute interpreted by the Court was the predecessor to rule 52(a) of the Federal Rules of Criminal Procedure. See note 5, *supra*.

7. 328 U.S. 750 (1946).

8. *Id.* at 764. The Court thus implied that harmless error may not exist where the error violated a constitutional or statutory right.

9. 375 U.S. 85 (1963).

10. 386 U.S. 18 (1967).

reversal to be "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial."¹¹ The *Chapman* Court held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."¹² The development of federal harmless constitutional error rules culminated in *Harrington v. California*,¹³ in which the Court found harmless a violation of the defendant's sixth amendment right of confrontation¹⁴ given the overwhelming evidence against him.¹⁵

The focal point in an examination of Louisiana's harmless error doctrine is *State v. Michelli*.¹⁶ In *Michelli* the defendant sought a reversal of his burglary conviction based upon the admission into evidence at defendant's trial of a statement of a co-participant. Recognizing that in a federal case such a violation might be held harmless if other evidence overwhelmingly indicated the guilt of the accused, the court stated that this was not the rule in Louisiana. Interpreting article 921, the court held that if a violation of a constitutional or statutory right exists, the court must fulfill "its historic appellate function and reverse, ordering a new trial."¹⁷ The court indicated that it was unable to apply the federal rule since the Louisiana bill of exceptions procedure¹⁸ did not provide for a mechanism

11. 375 U.S. at 86-87.

12. 386 U.S. at 24.

13. 395 U.S. 250 (1969).

14. The specific constitutional error found harmless by the Court in *Harrington* was a violation of the "*Bruton* doctrine," first enunciated by the Court in *Bruton v. United States*, 391 U.S. 123 (1968). This doctrine provides that a defendant's right of cross-examination, secured by the sixth amendment's confrontation clause, is violated if, at his joint trial with a co-defendant who does not testify, the co-defendant's confession incriminating the accused is admitted into evidence. The violation occurs notwithstanding jury instructions to the effect that the co-defendant's confession must be disregarded in determining the accused's guilt or innocence.

15. 395 U.S. at 254.

16. 301 So. 2d 577 (La. 1974).

17. *Id.* at 580-81.

18. Prior to 1974, no error or irregularity in the proceedings could be challenged after the verdict unless a contemporaneous objection was made and a formal bill of exceptions reserved. LA. CODE CRIM. P. art. 841 (as it appeared prior to 1974 La. Acts, No. 207). "When a bill of exceptions [was] reserved, the clerk or court stenographer would immediately take down the objection, the ruling, and the facts upon which the objection [was] based." LA. CODE CRIM. P. art. 843 (as it appeared prior to 1974 La. Acts, No. 207). It was then necessary that the bills of exception reserved during the trial be submitted to the court and signed by the trial judge prior to the granting of an order of appeal. LA. CODE CRIM. P. art. 845 (as it appeared prior to 1974 La. Acts, No. 207). Generally, the appellate court could consider only bills signed by the trial judge

by which the entire record could be brought before the court. In a footnote, the court justified its holding by noting that its jurisdiction extended only to questions of law and, consequently, it was prohibited from evaluating the evidence.¹⁹ Although the bill of exceptions procedure was subsequently abolished,²⁰ the court's decision in *Herman* reiterated that its inability to consider other "overwhelming evidence" against the accused resulted from a lack of "power to review the facts or weigh the evidence in a criminal case."²¹

If the Louisiana Supreme Court is in fact unable under the state constitution to apply the federal rule, a dilemma is created,²² since the United States Supreme Court held in *Chapman* that where federal constitutional error is at issue, state courts must apply the federal rule.²³ Given that the Louisiana court is unable to apply the federal rule by reviewing the facts, it would seem the only alternative left to the Louisiana court is reversal of the conviction in any case in which the lower court erred with respect to a federal constitutional right.²⁴ This dilemma, however, is a fleeting one; an examination of the harmless error doctrine both before and after *Michelli* reveals practices inconsistent with that language of the *Michelli* and *Herman* cases in which the court had indicated that it is prevented by the Louisiana constitution²⁵ from looking to other overwhelming evidence against the accused when evaluating error.

in conformity with the above article. Those bills contained "only the evidence necessary to form a basis for the bill . . ." LA. CODE CRIM. P. art. 844 (as it appeared prior to 1974 La. Acts, No. 207). Although the accused had the right to have all the testimony of the witnesses on the question of guilt or innocence made a part of the transcript on appeal, that testimony could be considered only to explain the formal bills of exception. LA. R.S. 15:291 (1950). The bill of exceptions procedure was abolished in 1974, and now all that is required is a contemporaneous objection. LA. CODE CRIM. P. art. 841, *as amended by* 1974 La. Acts, No. 207. For criticism of the former bill of exceptions procedure, see *State v. Barnes*, 257 La. 1017, 245 So. 2d 159, *appeal dismissed*, 404 U.S. 931 (1971); Note, *Criminal Procedure—Appellate Review—Failure to Perfect Bill of Exceptions Bars Review of Trial Error*, 46 TUL. L. REV. 1009 (1972).

19. 301 So. 2d at 580 n.7.

20. 1974 La. Acts, No. 207. See note 18, *supra*. For a discussion of some of the changes effectuated by this Act, see *Highlights of the 1974 Regular Session*, 35 LA. L. REV. 597, 597-601 (1975).

21. 304 So. 2d at 325.

22. See Comment, *supra* note 4, at 90.

23. 386 U.S. at 21.

24. *But see State v. Hills*, 259 La. 436, 250 So. 2d 395 (1971). In *Hills*, the court did not reverse the defendant's aggravated rape conviction; it held that the introduction of evidence seized in violation of the fourth amendment was harmless error under the *Harrington* rule. *Id.* at 453-54, 250 So. 2d at 400-01.

25. LA. CONST. art. V, § 5(C) provides: "[T]he jurisdiction of the supreme court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law." The 1921 constitution contained a similar provision. LA. CONST. art. VII, § 10, para. 3 (1921, repealed 1974).

With regard to harmless error, the *Michelli* majority stated that "[t]he Louisiana statutory rule has remained the same through the years" ²⁶ The court failed to note, however, that the application of that rule as judicially administered had often varied significantly from that espoused in the *Michelli* decision. On at least four occasions in the five years preceding *Michelli*, the Louisiana Supreme Court was influenced by other independent evidence in the trial record in its application of the harmless error statute. ²⁷

Subsequent to the acknowledgment by the *Michelli* court of its inability to review the facts or weigh the evidence in a criminal case, inconsistent decisions involving harmless error and review-of-

26. 301 So. 2d at 580.

27. In *State v. Hills*, 259 La. 436, 250 So. 2d 394 (1971), the court, in reviewing the defendant's aggravated rape conviction, held that the introduction of an illegally seized jacket of an alleged victim in another similar offense by the defendant was harmless error under the *Harrington* rule (the error was harmless because the evidence against the defendant was overwhelming).

In *State v. Mixon*, 258 La. 835, 248 So. 2d 307 (1971), the court, in reviewing the defendant's armed robbery conviction, found that the introduction of evidence of an identification of the defendant made at a lineup not attended by the defense counsel was not reversible error. The court, after a review of the testimony as a whole, reasoned that such evidence was harmless beyond a reasonable doubt under the *Chapman* rule.

In *State v. MacGregor*, 257 La. 956, 244 So. 2d 846 (1971), the court addressed a non-constitutional error committed during defendant's trial. The prosecutor in his closing argument referred to the defendant as an "unpredictable animal" and made other somewhat prejudicial remarks. The supreme court held the error to be harmless under the *Harrington* overwhelming-evidence-of-guilt test. However, Justice Barham in a concurrence pointed out that the court should not have applied that test since only the following evidence was before the supreme court: the prosecutor's statement during argument; defense counsel's objection; the court's ruling; the court's admonition to the jury; and the trial court's per curiam, which simply concluded that the remark was harmless because there was sufficient evidence to convict. 257 La. at 963, 244 So. 2d at 848 (Barham, J., concurring).

In *State v. Hopper*, 253 La. 439, 218 So. 2d 551 (1969), *on remand from* 392 U.S. 658 (1968), the confessions of two co-defendants had been admitted at their joint homicide trial in violation of the *Bruton* doctrine. See note 14, *supra*. The court, however, found that in the context of the circumstances presented, the error constituted only a technical violation of the defendant's rights.

We have assiduously examined this case from all aspects and are persuaded that the joint trial of the defendants has been fair in every respect. In fine, defendants have no defense; in concert they committed a vicious crime to which they separately and voluntarily confessed their guilt in detailed statements inculcating each other.

253 La. at 440, 218 So. 2d at 555. While the court mentioned neither the *Chapman* rule nor the constitutional prohibition against appellate review of fact, see note 25, *supra*, and accompanying text, such a conclusion could not have been drawn without an examination of evidence independent of the admission of each co-defendant's confession. Indeed, a reading of the case reveals that the writers of both the majority and dissenting opinions reviewed the evidence in detail in reaching their respective conclusions.

fact have been rendered. While the *Michelli* rule has often been followed,²⁸ many decisions which cite *Michelli* as controlling have pointed out that the record would not support an application of the federal harmless error doctrine in any event since the evidence against the defendant was not overwhelming.²⁹ Still other cases have applied the *Harrington* overwhelming-proof-of-guilt test³⁰ or some other test which entails a review of the entire record.³¹ In none of the cases in these latter two categories, however, has the court mentioned the applicability of the present constitutional prohibition against appellate review of facts in criminal cases.³²

28. See *State v. Lemelle*, 353 So. 2d 1312 (La. 1978); *State v. Green*, 315 So. 2d 763 (La. 1975); *State v. McCully*, 310 So. 2d 833 (La. 1975); *State v. Murphy*, 309 So. 2d 134 (La. 1975); *State v. Moore*, 305 So. 2d 532 (La. 1975); *State v. Herman*, 304 So. 2d 322 (La. 1974).

29. See, e.g., *State v. Green*, 315 So. 2d 763 (La. 1975); *State v. Murphy*, 309 So. 2d 134 (La. 1975); *State v. Moore*, 305 So. 2d 532 (La. 1975).

30. In *State v. Berain*, 360 So. 2d 822, 830 (La. 1978), the court concluded that prejudicial statements of the prosecutor in his closing argument "did not contribute to the verdict: the evidence of defendant's guilt was overwhelming—including his own admission of the misconduct charged . . ." In *State v. Meunier*, 354 So. 2d 535 (La. 1978), the defendant was convicted of making abusive telephone communications. Although the trial court admitted evidence of telephone calls outside the period charged in the bill of information, the court held the error to be harmless, partly because of the overwhelming evidence of telephone calls within the specified period. In *State v. Williams*, 347 So. 2d 184, 187 (La. 1977), the trial court's failure to identify the confidential informant who was a participant in the unlawful drug sale for which defendant was convicted was held to be harmless error because defendant neither alleged nor showed that he was prejudiced by the failure and because "the proof of guilt [was] overwhelming." In *State v. Ivy*, 307 So. 2d 587, 592 (La. 1975), defendant objected to the state's use of the grand jury testimony of defendant's daughter as the basis for cross-examination at trial. The court, after reviewing "the entire record made part of the bill of exceptions number two," found this to be harmless error, since the evidence of guilt was "overwhelming, consisting of testimony of at least seven eyewitnesses."

31. In *State v. Kellogg*, 350 So. 2d 656 (La. 1977), the court reversed defendant's aggravated battery conviction because the trial court denied him the right to adduce evidence of the filing of a civil suit by the victim-witness against the defendant; such evidence was intended to show bias or intent on the part of the victim-witness. The court was influenced by the fact that this was a close factual dispute and that the only eyewitnesses were the defendant, the victim, and the victim's wife. In *State v. Bean*, 337 So. 2d 496, 498 (La. 1976), a state witness testified as to statements made to that witness by an eyewitness to the effect that the defendant had stabbed the victim. The court held that in light of the entire record, this constituted reversible error since the "evidence against the defendant in this case was circumstantial."

In *State v. Sockwell*, 337 So. 2d 451, 454 (La. 1976), a police officer was allowed to testify, despite timely objection, regarding what the victim of the robbery had told him. The court held this to be harmless error because an "examination of the entire record makes clear that the ruling has not resulted in a miscarriage of justice, prejudicial to the substantial rights of the accused; nor does it constitute a substantial violation of a constitutional or statutory right."

32. Justice Barham, however, in a dissenting opinion in *State v. Ivy*, 307 So. 2d 587, 593 (La. 1975), indicated that the majority had applied a harmless error rule which could not be used under Louisiana law, thus referring by implication to his dissenting

Before proceeding to a discussion of the changes effectuated by Act 86, one other aspect of the *Michelli* and *Herman* decisions warrants comment. In both decisions the court interpreted article 921 to require a reversal where there is a substantial violation of a constitutional or statutory right or where a miscarriage of justice occurs.³³ The court's decision in *State v. Ardoin*,³⁴ however, recognized that the language of article 921 is "couched in the negative";³⁵ "[a] judgment or ruling shall not be reversed . . . unless in the opinion of the court after an examination of the entire record,"³⁶ one of the enumerated conditions of article 921 is met. Consequently, neither every substantial violation of a constitutional or statutory right nor every miscarriage of justice necessitates a reversal.³⁷ The United States Supreme Court's opinion in *Chapman*, of course, can be said to have modified this rule somewhat with respect to federal constitutional error whenever the Louisiana court insists that it is unable to review the facts in criminal cases.³⁸

Act 86 of 1979 should be analyzed against this background of the federal harmless error doctrine and that of Louisiana. It appears that the legislative intent underlying this act was to grant the Louisiana Supreme Court the statutory right to hold trial court errors harmless where other evidence overwhelmingly indicates the guilt of the accused. However, if one accepts the reasoning of the *Michelli* and *Herman* cases, the legislature does not possess the power to grant that right. The *Michelli* and *Herman* decisions point to the Louisiana constitutional prohibition against appellate review of facts in criminal cases as the barrier to the adoption of the federal overwhelming-evidence test. If the problem lies in constitutional, rather than in statutory provisions, then the legislature is unable to statutorily alter the *Michelli-Herman* rule.

opinion in *State v. Anderson*, 254 La. 1107, 1140, 229 So. 2d 329, 341 (1969), *rev'd* 403 U.S. 949 (1971), and his concurring opinion in *State v. MacGregor*, 257 La. 956, 963, 244 So. 2d 846, 848 (1971), where he discussed Louisiana's constitutional prohibition against review of facts in criminal cases.

33. "If there is a violation of a constitutional or statutory right, there is no suggestion that this court should not fulfill its historic appellate function and reverse, ordering a new trial." *State v. Michelli*, 301 So. 2d at 580. "Under the Louisiana statutory rule [article 921] this court must reverse the conviction if there is a substantial violation of a constitutional right or if there is a miscarriage of justice." *State v. Herman*, 304 So. 2d at 325.

34. 340 So. 2d 1362 (La. 1976).

35. *Id.* at 1365.

36. LA. CODE CRIM. P. art. 921 (as it appeared prior to 1979 La. Acts, No. 86).

37. 340 So. 2d at 1365.

38. Since state courts are required by *Chapman* to apply the federal rule, which entails a review of all the facts where federal constitutional rights are violated, see text at notes 23-24, *supra*, if our state constitution precludes the application of that federal rule, *Chapman* would appear to mandate a reversal.

Article V, section 5(c) of the Louisiana Constitution of 1974 provides: "[T]he jurisdiction of the supreme court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law." This provision adopted from the 1921 constitution³⁹ has traditionally been interpreted to preclude the court's examination of the trial record to determine for itself the sufficiency of the evidence.⁴⁰ Only where no evidence existed to support an essential element of the crime was the court allowed to reverse.⁴¹ The traditional interpretation was modified somewhat where the issue was total lack of circumstantial evidence to prove the crime or an essential element of it. In that instance the test became "whether or not there is some evidence from which the trier of fact could reasonably conclude that beyond a reasonable doubt the accused had committed every element of the crime with which charged."⁴²

This traditional interpretation has now been altered by the recent decision of the United States Supreme Court in *Jackson v. Virginia*.⁴³ In *Jackson* the Court held that due process requirements of the federal Constitution mandate that the reviewing court determine at least "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁴⁴ Two recent Louisiana Supreme Court decisions⁴⁵ recognized that the *Jackson* standard is applicable to the review of convictions by the state supreme court. In *State v. Matthews*⁴⁶ the court stated that the *Jackson* test may be slightly broader than the Louisiana test when applied in reviewing convictions supported only by circumstantial evidence; according to the *Matthews* court, the *Jackson* decision suggested "that review and reversal may be mandated where weak *direct* evidence is exculpatory explainable by the overwhelming preponderance in the record of other evidence found credible by the trier of fact."⁴⁷ Thus, the Louisiana Supreme Court recognized that it now must examine all the facts to determine if those facts are sufficient to sustain a conviction under the *Jackson*

39. LA. CONST. art. VII, § 10, para. 3 (1921, repealed 1974).

40. *E.g.*, *State v. De la Beckwith*, 344 So. 2d 360 (La. 1977); *State v. Plummer*, 281 So. 2d 716 (La. 1973).

41. *E.g.*, *State v. Tennant*, 352 So. 2d 629 (La. 1977), *cert. denied*, 435 U.S. 945 (1978).

42. *State v. Lindinger*, 357 So. 2d 500, 501 (La. 1978).

43. 99 S. Ct. 2781 (1979).

44. *Id.* at 2789.

45. *State v. Abercrombie*, No. 64,185 (La. Sept. 4, 1979); *State v. Matthews*, No. 64,079 (La. Sept. 4, 1979).

46. No. 64,079 (La. Sept. 4, 1979).

47. *Id.*, slip op. at 5 (emphasis added).

standard. Yet this appears to be exactly what the court in *Michelli* and *Herman*⁴⁸ indicated its inability to do in determining the harmlessness of error committed at the accused's trial.

In light of the *Matthews* decision and numerous other decisions in which the court examined facts independently of the error committed,⁴⁹ it must be questioned whether, in deciding whether error is harmless, a review of all the facts is in fact proscribed by the Louisiana constitution. The court is continuously examining facts where that examination is incidental to the decision of a question of law.⁵⁰ In reviewing the facts pursuant to an article 921 harmless error determination, the court would not be substituting its judgment as to whether the evidence sufficiently indicates the guilt of the accused for that of the trier of fact.⁵¹ The inquiry instead would be whether the jury, considering all the evidence adduced, could have been influenced in its decision by the error committed at trial.⁵² Such an inquiry would seem to be within the court's jurisdiction over "questions of law."

The writer suggests that if, in applying article 921, review of facts is actually proscribed by the Louisiana constitution, the result is the emasculation of the harmless error doctrine. This doctrine can be viable and useful only if the court refutes the restrictive language of the *Michelli* and *Herman* cases. Such a course of action is urged; it is preferable to reject this language rather than to continue to apply the review of fact rule inconsistently and arbitrarily. It has been suggested by an earlier writer that there exist three alternatives in deciding whether trial court error is harmless. The court may consider (1) all the evidence untainted by the error, (2) only the error itself, or (3) a combination of both factors.⁵³ *Michelli* and *Herman* appear to permit only the second alternative. It is sub-

48. See text at notes 16-21, *supra*.

49. See notes 30-31, *supra*.

50. For example, the situation often arises in which improper evidence admitted despite timely objection is held to be harmless because the same evidence had been admitted earlier at trial without objection by defense counsel. See, e.g., *State v. Williams*, 347 So. 2d 214 (La. 1977); *State v. McGuffey*, 301 So. 2d 582 (La. 1974). *McGuffey*, in fact, was decided the same day as *Michelli*. While the results of these decisions do not seem offensive, to reach those results the court necessarily had to review other facts. If the court can review a portion of the other evidence to determine whether a particular error is harmless, it should follow, a fortiori, that the entire record can be reviewed to determine whether an error is harmless.

51. Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L.R. 814, 819 (1970).

52. This inquiry may be phrased in a variety of ways. The *Fahy* and *Chapman* standards provide guidance. See text at notes 11-12, *supra*. For a thorough discussion of the topic, see R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970).

53. Comment, *supra* note 4, at 85.

mitted that a determination of the harmlessness of an error made by considering only that error in a vacuum is an exercise in futility. The ultimate issue is what impact, if any, the error could have had on the fact finder. To resolve this issue with reasonable accuracy, the court should consider what evidence was presented to the finder of fact.

As discussed earlier, notwithstanding the *Michelli* and *Herman* language, the court has often looked to the other untainted evidence in addition to the error itself to determine the harmlessness of that error.⁵⁴ In his majority opinion in *Michelli*, Justice Dixon expressed concern that some local judges, prosecutors, and police will avoid illegal procedures and practices only if convictions are reversed as a result of such errors.⁵⁵ Perhaps, then, the court's occasional refusal to consider the entire record in order to find overwhelming evidence of guilt is motivated by its solicitude for the rights of the accused.

The author has no quarrel with the court's use of the harmless error rule to protect the constitutional rights of defendants and to ensure that legal procedures are followed in the administration of criminal justice at the local level. However, these objectives could have been achieved by a conscientious application of article 921 rather than by a finding that reversal is mandated by the Louisiana constitutional prohibition of review of facts in criminal cases.⁵⁶ The court's ambivalent attitude towards factual review in determining harmless error should be abandoned. Such an attitude will inevitably foster disillusionment and an erosion of confidence in the decisions rendered by the Louisiana Supreme Court. Criminal justice at the appellate level is better administered and the integrity of the guilt-determination process better preserved by consistent, predictable judicial policies.

As previously indicated, the legislature's intent to adopt the federal "overwhelming-evidence" test will not be accomplished by the passage of Act 86 since that body cannot mandate the court's interpretation of the constitutional prohibition of factual review in criminal trials. The question remains, however, whether the Act will effectuate any other change in the interpretation of article 921. This answer must also be a negative one. While errors resulting in a

54. See notes 30-31, *supra*.

55. 301 So. 2d at 579.

56. Under the new law, the court can reverse anytime it finds substantial rights of the accused affected. As recognized by Senator Landry at the May 15th meeting of the Senate Judiciary C Committee, the new legislation appears to create a lesser standard than the old standard of prejudice to the substantial rights of the accused. Thus, conceivably the court would be able to reverse for errors of lesser consequence under the new law.

"miscarriage of justice" or amounting to a "substantial violation of a constitutional or statutory right" have been deleted as grounds for reversal under the statute, these changes will likely have little impact on the present harmless error doctrine. The latter errors would appear to be encompassed within that category of errors which "affect substantial rights of the accused"; moreover, the court has seldom reversed solely based on errors that result in a miscarriage of justice.⁵⁷ The deletion of a reference to an examination of the entire record would also seem to be of little consequence since the court's inherent power to exercise its jurisdiction⁵⁸ and the spirit of article 921⁵⁹ would indicate that the court can consider as much of the record as required to determine the harmless nature of the error.

Since it has no substantial effect on the harmless error doctrine, Act 86 might be viewed as a message directed by the legislature to the Louisiana Supreme Court: where the defendant is obviously guilty, the best interests of the public are met by affirmance of convictions, even where error exists. Given that the interpretation of the statute is not within the ambit of the legislature's authority, the message is at best a suggestive one.

HOMICIDE

Prior to Act 74 of 1979, first degree murder was defined as "the killing of a human being when the offender has specific intent to kill or inflict great bodily harm."⁶⁰ By contrast, the second degree murder statute which defines Louisiana's "felony murder" required no specific intent, but only that the offender be engaged in one of the enumerated felonies at the time of the killing.⁶¹ Act 74 alters the

57. An error resulting in a "miscarriage of justice" appears to refer to the violation of some right not specifically granted by the constitution, either state or federal, or by statute. Such a right, however, could easily be deemed to be a part of the fundamental right to a fair trial or an element of due process, and thus fall within the substantial rights of the accused.

58. LA. CODE CRIM. P. art. 17 provides:

A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

59. LA. CODE CRIM. P. art. 3 provides: "Where no procedure is specifically prescribed by this Code or by statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions."

60. LA. R.S. 14:30 (Supp. 1976).

61. LA. R.S. 14:30.1 (Supp. 1978) provided:

Second degree murder is the killing of a human being when the offender is

definitions of both crimes. First degree murder still requires specific intent, but Act 74 imposes the additional requirement that one of four enumerated aggravating circumstances be satisfied.⁶² Felony murder is retained as one of the bases for second degree murder, but Act 74 adds, as an alternative basis, the killing of another with "a specific intent to kill or to inflict great bodily harm."⁶³ Thus, this new alternative basis for second degree murder is identical to the pre-Act 74 definition of first degree murder. Act 74 further amends the second degree murder statute by increasing the applicable penalty.⁶⁴ A final provision of Act 74 is the addition of four aggravating circumstances to be considered in the sentencing phase of the trial of a capital offense.⁶⁵

engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

62. LA. R.S. 14:30 (Supp. 1976), as amended by 1979 La. Acts, No. 74, § 1, provides:

First degree murder is the killing of a human being:

(1) when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) when the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

63. LA. R.S. 14:30.1 (Supp. 1978), as amended by 1979 La. Acts, No. 74, § 1.

64. Prior to Act 74, the penalty for second degree murder was punishment "by life imprisonment at hard labor without benefit of probation or suspension of sentence" or eligibility for parole for forty years. LA. R.S. 14:30.1 (Supp. 1978). Act 74 increases the penalty by completely denying probation, parole, and suspension of sentence. This is the same penalty which may be recommended by the jury as an alternative to the death penalty in a first degree murder conviction. LA. R.S. 14:30 (Supp. 1979).

65. 1979 La. Acts, No. 74, § 2, amending LA. CODE CRIM. P. art. 905.4. Under the recently adopted scheme of Louisiana's Code of Criminal Procedure, the death penalty may be imposed only after a sentencing hearing during which the jury considers both the aggravating and mitigating "circumstances of the offense and the character and propensities of the offender." LA. CODE CRIM. P. art. 905.2. See LA. CODE CRIM. P. arts. 905-05.9, added by 1976 La. Acts, No. 694, § 1.

Legislative revision was first initiated in response to *Furman v. Georgia*, 408 U.S. 238 (1972), which required that juries be provided guidelines to follow in order to preclude the arbitrary and capricious imposition of death sentences. At the time *Furman* was decided, Louisiana imposed a mandatory death sentence for murder. LA. R.S. 14:30 (1950). As a response to *Furman*, the legislature created two grades of murder: first degree, 1973 La. Acts, No. 109, amending LA. R.S. 14:30 (1950); and second

An understanding of the rationale underlying the adoption of Act 74 is facilitated by a brief examination of prior legislation and recent jurisprudence regarding Louisiana's homicide statutes. The legislature in 1976 defined first degree murder as the killing of a human being when the offender had a specific intent to kill or inflict great bodily harm.⁶⁶ Second degree murder was defined as the killing of a human being when the offender was engaged in one of seven dangerous felonies even though he had no intent to kill.⁶⁷ The 1976 legislature also provided for a sentencing hearing in capital cases and delineated certain aggravating and mitigating circumstances to be considered by the jury in deciding whether the appropriate punishment was death or life imprisonment without benefit of probation or parole or suspension of sentence.⁶⁸

The passage of Act 121 of 1977 created an apparent flaw in the above homicide scheme.⁶⁹ That Act added to the then-existing law the provision that second degree murder also included the killing of a human being when the offender had specific intent to kill, but the killing was accomplished without any of the aggravating circumstances listed in Louisiana Code of Criminal Procedure article

degree, 1973 La. Acts, No. 111, adding LA. R.S. 14:30.1. Only first degree murder was punishable by death. See Rault, *On Louisiana's New Homicide Statutes: Purpose, Constitutionality and Problems of Interpretation*, 19 LOY. L. REV. 563, 570-71 (1973). Following the decision of *Roberts v. Louisiana*, 428 U.S. 325 (1976), which held that Louisiana's legislative response to *Furman* was constitutionally inadequate, the legislature in 1976 adopted a new scheme of first and second degree murder, 1976 La. Acts, No. 657. The sentencing procedure was adopted for use in first degree murder cases. Act 74 of 1979 amends article 905.4 by adding the following aggravating circumstances:

[1] [T]he offender was engaged in the perpetration or attempted perpetration of . . . aggravated arson, aggravated escape . . . or simple robbery;

[2] the offender . . . has a significant prior history of criminal activity;

[3] the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant;

[4] the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

66. 1976 La. Acts, No. 657, amending LA. R.S. 14:30 (Supp. 1975).

67. 1976 La. Acts, No. 657, amending LA. R.S. 14:30.1 (Supp. 1975).

68. 1976 La. Acts, No. 694, adding LA. CODE CRIM. P. arts. 905-05.9. See note 65, *supra*.

69. 1977 La. Acts, No. 121, amending LA. R.S. 14:30.1 (Supp. 1976). The passage of Act 121 was apparently precipitated by the feeling that in murder cases devoid of aggravating circumstances, some means of facilitating plea bargains, convictions, and sentencing were necessary. It was also felt that not all persons convicted of first degree murder should be subjected to a capital sentencing hearing. See *State v. Payton*, 361 So. 2d 866, 869 (La. 1978).

905.4.⁷⁰ The Louisiana Supreme Court in *State v. Payton*,⁷¹ referring to Act 121 of 1977, stated:

By defining second degree murder as an unaggravated, specific intent homicide, the legislature clearly intended by implication to remove this type of conduct from the definition of first degree murder and to redefine the capital offense as a specific intent homicide accomplished with a statutorily prescribed aggravating circumstance.⁷²

The court concluded that the result of the 1977 legislative action was to limit the crime of first degree murder to a specific intent homicide accompanied by one or more of the aggravating circumstances listed in Code of Criminal Procedure article 905.4.⁷³ Four of these aggravating circumstances are incorporated by Act 74 into the first degree murder statute.

The passage of Act 74 was apparently in response to the *Payton* court's interpretation of Louisiana's homicide statutes.⁷⁴ It should be noted that the specific intent section of the second degree murder statute⁷⁵ which had troubled the *Payton* court was deleted in 1978.⁷⁶ Consequently, the *Payton* decision was rendered nugatory insofar as it could be read to compel the 1979 legislature's action; Act 74 of 1979 attempted to correct a problem which no longer existed. Act 74, however, was enacted in an apparent effort to effectuate, in a

70. La. R.S. 14:30.1 (Supp. 1976), as amended by 1977 La. Acts, No. 121, § 1.

71. 361 So. 2d 866 (La. 1978).

72. *Id.* at 870.

The court found, however, that a problem was created due to the legislature's "clear intent" to incorporate, by reference to article 905.4, the aggravating circumstances under which the killing was accomplished. One of these circumstances was an offense committed in an "especially heinous, atrocious or cruel manner." Evidence of such a circumstance would be highly prejudicial and inflammatory to a jury, and therefore, the inclusion of this aggravating circumstance as a substantive element of the crime would improperly impair the defendant's right to a fair determination of his guilt or innocence. The inclusion in the Act of a severability clause, however, allowed the court to "declare invalid only the legislative attempt to define first degree murder as a specifically intended homicide 'committed in an especially heinous, atrocious or cruel manner.'" *Id.* at 872. The other aggravating circumstances under which the crime was committed were held to be essential elements of first degree murder because of the legislature's clear intent. *Id.* at 872-74.

73. 361 So. 2d at 870. See note 62, *supra*.

74. Pete Adams, Executive Director of the Louisiana District Attorney's Association, in testifying before the Senate Judiciary C Committee on April 24, 1979, and before the House Criminal Justice Committee on May 30, 1979, stated that Senate Bill No. 110 (Act 74) was proposed to bring the first and second degree murder statutes in compliance with the decision of the Louisiana Supreme Court in *Payton*.

75. LA. R.S. 14:30.1 (Supp. 1976), as amended by 1977 La. Acts, No. 121, § 1.

76. 1978 La. Acts, No. 796, amending LA. R.S. 14:30.1 (Supp. 1977). See note 61, *supra*, and accompanying text.

constitutionally permissible manner, the intended results of Act 121 of 1977.

The new homicide statute would seem to have several salutary consequences, especially from the prosecution's point of view. Since the death penalty is seldom carried out in Louisiana,⁷⁷ there appears to be no compelling reason to treat all specific intent murders as capital crimes. The effective maximum penalty suffered by one convicted of specific intent murder is life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence;⁷⁸ that same sentence can now be imposed upon the offender who is convicted of second degree murder.⁷⁹ Only ten of twelve jurors must concur to convict⁸⁰ and the trial court will not be required to sequester each juror after he is sworn.⁸¹ Consequently, the return of a guilty verdict is facilitated and the cumbersome sentencing hearing avoided. The state is also provided the opportunity to plea bargain whenever the charge of a specific-intent murder is made; however, the benefit to the accused of negotiating such a plea is questionable in light of the now increased penalty for second degree murder and the unlikelihood of an actual execution of the death penalty. The new scheme will also spare many of those convicted of murder from the emotional trauma of being subjected to a possible death penalty.

In those instances where convictions are sought and returned under the first degree murder statute, the sentencing hearing itself will remain unchanged.⁸² To reach a verdict of guilty of first degree murder, the jury must, of necessity, have already found at least one aggravating circumstance;⁸³ however, the remaining aggravating⁸⁴ and mitigating circumstances⁸⁵ must still be considered before the jury may recommend the death sentence.⁸⁶

77. Cynthia Simpson, of the Office of the Warden, Angola State Penitentiary, told the author on September 12, 1979: "The last execution in Louisiana took place on June 9, 1961. There are none scheduled at this time."

78. The penalty for first degree murder is death *or* life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury. LA. R.S. 14:30 (Supp. 1979).

79. Act 74 makes the penalty for second degree murder the same as the alternate penalty (the only one actually carried out) for first degree murder. See notes 64 & 77, *supra*.

80. See LA. CONST. art. I, § 17; LA. CODE CRIM. P. art. 782.

81. In a capital case, each juror is sequestered after he is sworn, while in a non-capital case, the jury must be sequestered after the court's charge and may be sequestered at any time upon order of the court. LA. CODE CRIM. P. art. 791.

82. See 361 So. 2d at 872.

83. For the substantive elements of the crime of first degree murder, see note 62, *supra*.

84. LA. CODE CRIM. P. art. 905.4.

85. LA. CODE CRIM. P. art. 905.5.

86. 361 So. 2d at 868 & 872.

One interesting outcome of Act 74 is that the two aggravating circumstances most influential in compelling a recommendation of the death penalty, *i.e.*, heinous murders and murders committed by prior-convicted violent felons, are no longer sufficient, by themselves, to allow the imposition of the death penalty.⁸⁷ Of course, this peculiar result is of little practical consequence since the Louisiana death penalty is *de jure* only.

While the Louisiana Supreme Court in *Payton* apparently sanctioned in advance the homicide scheme implemented by Act 74, the ultimate question is whether the enactment will be constitutionally acceptable to the United States Supreme Court. The *Payton* court analogized the homicide framework now enacted by Act 74 to the capital murder provisions upheld by the Supreme Court in *Jurek v. Texas*.⁸⁸ This analogy suggests that the statutory scheme implemented by Act 74 will indeed pass constitutional muster.⁸⁹

87. The defendants in *Payton* attempted to argue this peculiar result to their benefit. *Id.* at 873.

88. 428 U.S. 262 (1976).

89. 361 So. 2d at 870-71.

A detailed comparison of Louisiana's new capital murder statutory scheme with those of Georgia, Texas, and Florida which have been upheld is beyond the scope of this comment. See *Jurek v. Texas*, 428 U.S. 262 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), *Gregg v. Georgia*, 428 U.S. 153 (1976). For a comparison of Louisiana's capital murder system, as it existed after the 1976 legislative session, to the laws in the above states, see Comment, *First-Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas, and Louisiana*, 24 LOY. L. REV. 709 (1978). That discussion is still pertinent, however, because the only major change effected by the new legislation is the addition of four of the aggravating circumstances to the substantive element of first degree murder—the very change in the Texas statutes that was approved by the Supreme Court in *Jurek*. The sentencing hearing itself is the same with the exception of the three additions to the list of aggravating circumstances. See note 65, *supra*.

The only other change made by Act 74 that warrants mention is the amendment to the second degree murder statute. By allowing to the prosecution the option to charge an accused with the non-capital offense of second degree murder, despite the fact that the crime was committed under one of the four circumstances now listed in the first degree homicide statute, the prosecution has been given the "standardless discretion" to prevent a defendant who is technically chargeable with first degree murder from ever being subjected to the death penalty. In other words, it is within the power of the prosecutor to choose which accused persons will be exposed to capital punishment. It would thus seem that the legislature has provided the state with a means of circumventing the *Roberts* requirement that standards be established for consideration by the sentencing authority in order to preclude the arbitrary and capricious imposition of the death sentence. Since each defendant accused of having killed with specific intent and under one of the four circumstances now listed in Revised Statutes 14:30 could potentially suffer the death penalty, the imposition of the death sentence on any one of those convicted is arbitrary and capricious with respect to those who were tried only for second degree murder solely at the unbridled discretion of the district attorney.

The Supreme Court, however, rejected this argument in *Jurek*, saying that the

OBSCENITY

Act 252 of 1979 amended the indecent exposure section of the obscenity law by providing that the crime of obscenity is the intentional "[e]xposure of the genitals, pubic hair, anus, vulva, or female breast nipples in any public place or place open to the public view with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive."⁹⁰ The legislative incentive to change the language of this section was the interpretation given the previous section of the statute by the Louisiana Supreme Court in *State v. Muller*.⁹¹ In the *Muller* case, the court addressed the issue of whether the defendant, who had exposed himself in a supermarket, had violated the section of the statute defining obscenity as the intentional

[e]xposure of the genitals, pubic hair, anus, vulva or female breast nipples in any location or place open to the view of the public or the people at large *such as* a street, highway, neutral ground, sidewalk, park, beach, river bank or other place or location viewable therefrom with the intent of arousing sexual desire.⁹²

On original hearing the court held that a supermarket was encompassed by the jurisprudential definition of "public place,"⁹³ and that since the words "such as" were traditionally construed to set off an illustrative list, the defendant's conduct was proscribed by the statute.⁹⁴ On rehearing, however, the court found that Act 274 of

district attorney's decision removes a defendant from possible subsection to the death penalty, while the *Furman* decision dealt with the issue of whether or not to impose the death penalty on those who had been *convicted* of a capital offense. 428 U.S. at 199. The Court further noted that it had never held that a decision to afford an individual defendant mercy violates the Constitution. *Id.*

90. 1979 La. Acts, No. 252, *amending* LA. R.S. 14:106(A)(1) (Supp. 1977). For the text of this section prior to its amendment, see text at note 92, *infra*.

91. 365 So. 2d 464 (La. 1978). In testifying before the Senate Judiciary C Committee on June 5, 1979, Representative Rice, author of House Bill 234 (Act 252), stated that the bill was prompted by the *Muller* decision.

92. LA. R.S. 14:106(A)(1) (Supp. 1977) (emphasis added).

93. [A] public place within the ordinance, and as applied to an enclosure, room or building, must be considered as one wherein, by general invitation, members of the public attend for reasons of business, entertainment, instruction or the like, and are welcome so long as they conform to what is customarily there done An eating house is a public place . . . and a restaurant is an eating house under another name. It is within this definition that a church is a public place . . . and so a barber shop.

365 So. 2d at 465, *quoting* *State v. Christine*, 239 La. 259, 118 So. 2d 403 (1960). *Christine* had relied on *Nelson v. Natchez*, 197 Miss. 26, 19 So. 2d 747 (1944).

94. 365 So. 2d at 465. In so interpreting the section, the court on original hearing affirmed the trial judge's denial of the defendant's motion to quash the bill of information.

1974 had removed from the above section of the statute the words "public place" and replaced them with the words "any location or place open to the view of the public . . . or other place . . . viewable therefrom."⁹⁵ The court then applied the following well-established rules of statutory construction: "where the new statute is worded differently from the preceding statute, the Legislature is presumed to have intended to change the law"⁹⁶; it is the court's duty to ascertain the meaning of ambiguous phrases, which duty may be discharged by resort to a consideration of the words and phrases with which they are associated.⁹⁷ Finding that those places listed in the statute were all outdoors and in the public domain, whereas a supermarket was an enclosed space invested with some degree of exclusivity, the court held that supermarkets were not places intended to be included in the legislature's classification.⁹⁸

The present Act amends this section to delete the words "such as" and the listing following those words, returning the words "public place" to the statute.⁹⁹ This change may not, however, have entirely clarified the issue as to what places are encompassed by this section of the statute. In *Muller* the court interpreted the prior language of the section (*i.e.*, "any location or place open to the view of the public or the people at large . . . or other place or location viewable therefrom") as delimiting two classes of locations where indecent exposure was proscribed. The first class was held to include "location[s] or place[s] open to the view of the public or the people at large such as a street, highway, neutral ground, sidewalk, park, beach, [or] river bank."¹⁰⁰ The second class was held to include "'other place[s] or location[s] viewable therefrom,' that is, a location or place one can see from one of the first class of locations or places."¹⁰¹ By deleting the language "or other place or location viewable therefrom," the second category of places would appear to be eliminated from the scope of this section of the statute. While the phrase "any location or place open to the view of the public or the people at large" would seem broad enough to contemplate both classes of places, such was not the construction given to these words by the *Muller* court. It is admitted, however, that since the illustrative listing of places which followed this phrase modified its meaning somewhat, the deletion of the listing may invite a broader inter-

95. 365 So. 2d at 466 (on rehearing).

96. *Id.* at 467.

97. *Id.*

98. *Id.* The court then reversed the trial court's ruling, sustained the defendant's motion to quash the bill of information, and dismissed the prosecution against the defendant.

99. See text at note 95, *supra*.

100. 365 So. 2d at 467.

101. *Id.*

pretation of the phrase so that both classes of places mentioned in *Muller* might now be viewed as encompassed within its meaning.

Another potentially troublesome area is the interpretation of the term "public place."¹⁰² By including this term in Act 252, the legislature has impliedly adopted its jurisprudential definition. That definition, however, purports to embrace only those enclosed areas where the public may be present by "general invitation,"¹⁰³ thereby excluding a fortiori private gatherings from coverage. Consequently, one might not be in violation of the statute by "streaking" across the dais at a by-invitation-only political dinner or by "flashing" the officers of the Women's Auxiliary at their monthly planning luncheon. While the probable intent of the legislature to proscribe such conduct should not be ignored,¹⁰⁴ neither should one disregard the well-settled rule that criminal statutes are to "be construed strictly in favor of the defendant and lenity."¹⁰⁵

Another change made by Act 252 is the addition of the language "or which appeals to prurient interest or is patently offensive."¹⁰⁶ These phrases have traditionally been included in the definition of obscene material, but were used in the conjunctive.¹⁰⁷ Thus, the categories of exposures prohibited are apparently expanded by the disjunctive inclusion of exposure which "appeals to the prurient interest" or which "is patently offensive." Such a broadened class of proscribed conduct should be permissible since "the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior."¹⁰⁸ The terms "patently offensive" and "prurient interest" have both been held to be not unconstitutionally vague and to provide valid standards to be applied by a trier of fact.¹⁰⁹

102. See note 93, *supra*.

103. See note 93, *supra*.

104. LA. R.S. 14:3 (1950) provides:

The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.

Thus, when the purpose of the statute is within its letter, it should be construed in accordance with that purpose although the letter would admit a narrower interpretation. See *State v. Butler*, 331 So. 2d 425 (La. 1976).

105. *State v. Muller*, 365 So. 2d 464, 467 (La. 1978); *State v. Young*, 357 So. 2d 503 (La. 1978).

106. 1979 La. Acts, No. 252, § 1, *amending* LA. R.S. 14:106(A)(1) (Supp. 1977) (emphasis added).

107. See LA. R.S. 14:106(A)(2) to (3) (Supp. 1979); *Roth v. United States*, 354 U.S. 476 (1957).

108. *Miller v. California*, 413 U.S. 15, 26 n.8 (1973).

109. *State v. Burch*, 365 So. 2d 1263 (La. 1978); *State v. Wrestle*, 360 So. 2d 831 (La. 1978).

The addition of the "prurient interest *or* patently offensive" language seems to have closed a loophole in the old statute. If a person had disrobed in a commercial building as a protest against President Carter's order to raise thermostat settings, his conduct would not have been proscribed by the prior statute due to an absence of intent to arouse sexual desire. Under the new law, the intent of the accused is irrelevant, and the effect of the exposure on his audience assumes primary significance.

It is submitted that the changes made by Act 252 are broader than the *Muller* decision necessitated. While the addition of the "prurient interest *or* patently offensive" language is apparently justified, the problem addressed in *Muller* could have easily been rectified by adding to the illustrative list several enclosed locations and places.¹¹⁰ Like Act 274 of 1974, Act 252 of 1979 may have created additional problems in defining and proscribing certain obscene conduct.

110. See text at note 94, *supra*.

CIVIL LAW

USUFRUCT OF THE SURVIVING SPOUSE

Act 678 of 1979 appears to be another manifestation of a general and growing concern by the legislature for the financial problems which the death of a husband or wife may cause the surviving spouse.¹ The Act amends Civil Code article 916 to permit a testator to leave his spouse a usufruct over the *separate* property inherited by their children. This usufruct may be granted for life or any other designated period, is treated in the same fashion as a legal usufruct,² and is not to be considered an impingement on the legitime of forced heirs.³

The surviving husband or wife was first given a legal usufruct over the community property inherited by issue of the marriage in 1844.⁴ This usufruct, which arises when the deceased has not made a contrary disposition of his share of community property,⁵ is granted for the life of the surviving spouse but terminates upon remarriage.⁶ In 1975, the legislature provided that the usufruct would not terminate upon remarriage of the surviving spouse if the predeceased spouse had "confirmed" the usufruct by testament, *i.e.*, specifically

1. The legislature has consistently acted to place the surviving spouse in a more advantageous position, particularly as to community property. In 1910, the surviving spouse was allowed to inherit community property in full ownership when the deceased left no descendants or ascendants, rather than restricting the survivor to a usufruct. 1910 La. Acts, No. 57, *amending* LA. CIV. CODE art. 915. Only a few years later, the legislature provided that the presence of ascendants would not exclude the surviving spouse from taking a portion of the deceased mate's community property. 1916 La. Acts, No. 80, *amending* LA. CIV. CODE art. 915. Recently, the legislature has removed parents as forced heirs as to community property, thus allowing a testator to leave his spouse his entire community interest in the absence of legitimate descendants. 1979 La. Acts, No. 778, § 1, *amending* LA. CIV. CODE art. 1494. As will be discussed textually at length, the extent of interests which may be left to the surviving spouse in usufruct has also been increased.

2. A legal usufruct is one that is created by operation of law. LA. CIV. CODE art. 544. The usufruct established by Civil Code article 916 is one such example. Succession of Waldron, 323 So. 2d 434, 436 n.4 (La. 1975).

3. LA. CIV. CODE art. 916, as amended by 1979 La. Acts, No. 678, § 1.

4. 1844 La. Acts, No. 152, § 2. This provision was incorporated into the Civil Code of 1870 as article 916.

5. Though Civil Code article 916 by its terms applies when the deceased spouse has not disposed of his share in the community property by testament, the jurisprudence has required an *adverse* disposition to defeat the surviving spouse's usufruct. *E.g.*, Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957). See L. OPPENHEIM, SUCCESSIONS AND DONATIONS § 19, in 10 LOUISIANA CIVIL LAW TREATISE 63 (1973).

6. LA. CIV. CODE art. 916.

stated his wish for the usufruct to continue for the life of the survivor or some designated period.⁷ The legislature created a separate legal usufruct in 1976 to cover the family home if it is community property and even in the absence of children of the marriage.⁸

By keeping the community property intact, the legal usufructs described above minimize the disruption and financial hardship experienced by the surviving spouse and family of the deceased.⁹ Because these legal usufructs attach only to community property, a surviving spouse under a matrimonial regime of separate property prior to Act 678 could not be similarly assisted. While a testamentary usufruct could be granted over separate property, until Act 678 generally only the disposable portion of the estate could be so encumbered without impinging upon the rights of forced heirs.¹⁰ These legal usufructs are also unavailable to spouses who have judicially separated. Since the community is dissolved by a judgment of separation from bed and board,¹¹ there is no community property thereafter to which such a usufruct could attach.¹²

The legislature's enactment of Act 678 has made it possible for a spouse to grant a usufruct to his survivor over separate property as well as community property. Thus, a greater benefit may be bestowed upon a larger number of spouses than ever before. However, the usufruct over separate property must be specifically granted by testament; it does not arise merely by operation of law. Some commentators have advocated a future amendment to provide that this usufruct over separate property should arise merely by operation of

7. 1975 La. Acts, No. 680, § 1, amending LA. CIV. CODE art. 916.

8. 1976 La. Acts, No. 227, § 1, adding LA. CIV. CODE art. 916.1. The practical effect of article 916.1 is to prevent the decedent's parents and children by a prior marriage from forcing a partition and sale of the family home. This amendment may have been prompted in part by the court's analysis in *Succession of Chauvin*, 260 La. 828, 257 So. 2d 422 (1972).

9. *State Dep't of Highways v. Costello*, 158 So. 2d 850, 852 (La. App. 4th Cir. 1963). See Note, *Successions—Amendment to Article 916 Permits Confirmation of Legal Usufruct for Life of Surviving Spouse*, 50 TUL. L. REV. 973 (1976).

10. LA. CIV. CODE art. 1710; *Succession of Burgess*, 359 So. 2d 1006 (La. App. 4th Cir. 1978); *Harang v. Harang*, 317 So. 2d 289 (La. App. 1st Cir. 1975); *Jarreau v. Jarreau*, 268 So. 2d 101 (La. App. 1st Cir. 1972). Forced heirs in certain cases may choose to allow a usufruct to impinge on their legitime rather than to abandon the disposable portion in full ownership to the legatee. See LA. CIV. CODE art. 1499; *Succession of Hyde*, 292 So. 2d 693 (La. 1974).

11. LA. CIV. CODE art. 155. A judgment of divorce has this same effect. *Talley v. Employer's Mut. Liab. Ins. Co.*, 181 So. 2d 784 (La. App. 4th Cir. 1965), cert. denied, 248 La. 785, 181 So. 2d 783 (1966).

12. *Jarreau v. Jarreau*, 268 So. 2d 101 (La. App. 1st Cir.), cert. denied, 263 La. 986, 270 So. 2d 122 (1972). Of course, should the spouses reconcile, the community could be reestablished in accordance with the provisions of Civil Code article 155.

law.¹³ Certainly such an amendment would be consistent with the increasingly favorable treatment the surviving spouse has enjoyed in succession matters.¹⁴ Nonetheless, the availability of this additional usufruct offers increased flexibility in estate planning to provide adequately for a surviving spouse. If leaving all of his property in usufruct to the surviving spouse is the desire of the testator, then he need not be concerned that the nature of the property will prevent such a disposition.

Though this usufruct must be created by testament, it appears that it will be treated in the same fashion as the previous legal usufruct over community property.¹⁵ Thus, the surviving spouse will be spared the necessity of furnishing security¹⁶ and perhaps the payment of state inheritance taxes on the usufruct as well.¹⁷ Further, if the usufruct has been granted for the life of the surviving spouse, it does not terminate upon the remarriage of the survivor. Most importantly, the rights of forced heirs are subject to the usufruct which is not to be considered an impingement on their legitime. Thus, the forced heirs are restricted to the naked ownership of the property until the death of the survivor.¹⁸

While forced heirs may argue to the contrary, Act 678 does not appear violative of the state constitutional provision prohibiting the passage of laws abolishing forced heirship.¹⁹ The legislature may "regulate or restrict" the rights of forced heirs without running

13. Professor LeVan has recommended that such a usufruct be extended automatically to cover both community and separate property, regardless of whether issue of the marriage exist. LeVan, *Alternatives to Forced Heirship*, 52 TUL. L. REV. 29, 48 (1977).

14. See note 1, *supra*.

15. Act 678 provides that the usufruct over separate property "shall be treated in the same fashion as a legal usufruct." LA. CIV. CODE art. 916, *as amended by* 1979 La. Acts, No. 678, § 1.

16. See LA. CIV. CODE art. 573, *as amended by* 1976 La. Acts, No. 103, § 1.

17. The state inheritance tax is not considered to be a tax on property but upon its transmission by inheritance. Succession of Levy, 115 La. 377, 39 So. 37 (1905). It has been held then that no inheritance taxes are owed by the legal usufructuary because he does not acquire the usufruct by inheritance. Succession of Baker, 129 La. 74, 55 So. 714 (1911); Succession of Marsal, 118 La. 212, 42 So. 778 (1907); Succession of Brown, 94 So. 2d 317 (La. App. Orl. Cir. 1957). See also LA. R.S. 47:2401-23 (1950). Since a usufruct over separate property must be created by testament, it may be treated differently. However, in *Succession of Lynch*, 145 So. 42 (La. App. Orl. Cir. 1932), a usufruct confirmed for life in a testament was held to confer by will only the privilege of surviving remarriage and was not subject to inheritance tax. It could be argued that the legislature intended this new usufruct to be treated in all respects "in the same fashion as a legal usufruct" and thus not to be subject to the state inheritance tax.

18. LA. CIV. CODE art. 478, *as amended by* 1979 La. Acts, No. 180, § 1; LA. CIV. CODE art. 535.

19. LA. CONST. art. XII, § 5.

afoul of this prohibition.²⁰ Therefore, as long as the forced heirs are not denied the naked ownership of the property, their forced portions would seemingly be satisfied.²¹ It should be remembered that the usufruct only attaches to separate property inherited by issue of the marriage; thus, property inherited by children of a prior marriage or other heirs would not be so burdened.

SUCCESSION RIGHTS OF ILLEGITIMATES

Louisiana's succession laws require the classification of prospective heirs according to the circumstances of their birth in order to determine their succession rights. Prior to Act 607 of 1979, children were initially grouped into three classes—legitimate,²² illegitimate,²³ and legitimated.²⁴ Legitimate children were the favored class, taking by intestacy to the exclusion of illegitimates,²⁵ with illegitimates faring little better in testamentary successions.²⁶ The illegitimate class was further subdivided into three subclasses—adulterous bastards,²⁷ incestuous bastards,²⁸ and natural children,²⁹ depending upon whether impediments existed to the marriage of the child's

20. Succession of Earhart, 220 La. 817, 57 So. 2d 695 (1952).

21. LeVan, *supra* note 13, at 48.

22. LA. CIV. CODE art. 179 (as it appeared prior to 1979 La. Acts, No. 607) provided: "Legitimate children are those who are born during the marriage." See Lorio, *Succession Rights of Illegitimates in Louisiana*, 24 LOY. L. REV. 1 (1978) (discussion of the system prior to Act 607 of 1979).

23. LA. CIV. CODE art. 180 (as it appeared prior to 1979 La. Acts, No. 607) provided: "Illegitimate children are those who are born out of marriage. Illegitimate children may be legitimated in certain cases, in the manner prescribed by law."

24. LA. CIV. CODE art. 198 (as it appeared prior to 1979 La. Acts, No. 607) provided: "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."

25. LA. CIV. CODE art. 917.

26. See notes 48-49, *infra*, and accompanying text.

27. LA. CIV. CODE art. 182, *repealed by* 1979 La. Acts, No. 607, § 4, provided: "Adulterous bastards are 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."

28. LA. CIV. CODE art. 183, *repealed by* 1979 La. Acts, No. 607, § 4, provided: "Incestuous bastards are those who are produced by the illegal connection of two persons who are relations within the degrees prohibited by law."

29. LA. CIV. CODE art. 202, *repealed by* 1979 La. Acts, No. 607, § 4, provided:

Illegitimate children who have been acknowledged by their father, are called natural children; those who have not been acknowledged by their father, or whose father and mother were incapable of contracting marriage at the time of conception, or whose father is unknown, are contradistinguished by the appellation of bastards.

parents.³⁰ Natural children were allowed to inherit from their mother to the whole of her succession, if there were no legitimate descendants;³¹ as to their father, their chances for inheritance were less likely.³² Adulterous and incestuous bastards, however, could not enjoy any succession rights at all,³³ being relegated to an alimony.

As a result of Act 607, children are now classified as either illegitimate or legitimate,³⁴ legitimated children being placed within this latter class.³⁵ The subclasses of illegitimates have also been abandoned and references in the Civil Code to natural children, adulterous bastards, and incestuous bastards have been deleted.³⁶ The distinctions among members of the various former subclasses of illegitimates have been reduced by the repeal of Civil Code articles 202 and 204.³⁷ It now appears that any illegitimate child may be acknowledged.³⁸ The restrictions on legitimation were left basically unchanged, however; thus, certain illegitimates still cannot be elevated to the favored status of a legitimate child in this manner.³⁹

30. If the child were an incestuous bastard, the parents could never marry and the child was thus unacknowledgeable. Article 204 by its terms prevented the acknowledgment of even adulterous bastards unless "the parents should contract a legal marriage with each other." An amendment to article 200, however, permitted either parent to legitimate the child if at the time of legitimation there existed neither a legal impediment to marriage of the parents nor legitimate descendants of the parent desiring to legitimate the child. 1972 La. Acts, No. 391, *amending* LA. CIV. CODE art. 200. Because legitimation confers greater rights to a child than does mere acknowledgment, it is arguable that despite the language of article 204, adulterous bastards were acknowledgeable once the requirements of article 200 had been met.

31. LA. CIV. CODE art. 918 (separate property); LA. CIV. CODE art. 915 (community property); *Brooks v. House*, 168 La. 542, 122 So. 844 (1929) (community property); LA. CIV. CODE art. 1484 (testamentary dispositions of both separate and community property).

32. LA. CIV. CODE art. 919 (illegitimate could inherit only if there were no descendants, ascendants, collateral relations, nor surviving spouse); LA. CIV. CODE art. 1486 (illegitimate could receive by testament, only one-fourth of father's property, if he left ascendants, siblings, or their descendants; one-third if he left only more remote collaterals).

33. LA. CIV. CODE art. 920, *repealed by* 1979 La. Acts, No. 607, § 4 (intestate); LA. CIV. CODE art. 1488, *repealed by* 1978 La. Acts, No. 362, § 1 (by testament).

34. LA. CIV. CODE art. 178, *as amended by* 1979 La. Acts, No. 607, § 1.

35. LA. CIV. CODE art. 179, *as amended by* 1979 La. Acts, No. 607, § 1.

36. 1979 La. Acts, No. 607.

37. 1979 La. Acts, No. 607, § 4. See note 30, *supra*.

38. No provisions other than articles 202 and 204, now repealed, seem to restrict a parent's freedom to acknowledge his illegitimate child despite the existence of impediments to the marriage of the child's parents.

39. Article 200 allows legitimation by notarial act only if no impediment exists to the marriage of the child's father and mother at the time of conception or at the time of legitimation. See also LA. R.S. 9:391 (1950). It appears that if the parents of the illegitimate child subsequently marry and acknowledge the child, he would then be treated as a legitimate child. LA. CIV. CODE art. 198, *as amended by* 1979 La. Acts, No.

The distinctions between illegitimates and legitimates remain great, article 206 reaffirming that illegitimate children, though duly acknowledged, cannot claim the rights of legitimate children.

The succession rights of illegitimates have been changed in several respects. As to *community* property, illegitimate children can no longer inherit *intestate* from either parent.⁴⁰ As to *separate* property, the rights of the acknowledged illegitimate to inherit *intestate* from either parent were left unchanged. Thus, acknowledged illegitimate children of a deceased woman still inherit to the exclusion of all but her legitimate descendants,⁴¹ and the acknowledged illegitimate children of a deceased man inherit only to the exclusion of the state.⁴² Because all illegitimates can now be acknowledged,⁴³ and acknowledgment remains a prerequisite to inherit *intestate*,⁴⁴ some additional members of the class of illegitimates have been afforded the limited *intestate* rights discussed above. It appears that the impact of Act 607 on illegitimates' *intestate* succession rights on balance, however, is not favorable.

Act 607 makes several changes which allow a testator to treat his illegitimate children more favorably. Rather than restricting illegitimates to mere alimony when the testator is survived by legiti-

607, § 1. However, the children formerly denominated incestuous bastards could not be legitimated in this manner, as there always exists a legal impediment to the parents' marriage. LA. CIV. CODE art. 95. Nonetheless, certain offspring of marriages illegally contracted within the prohibited degree of relationship could perhaps be legitimated according to article 198 if the legislature continues to validate periodically such reprobated marriages. See, e.g., 1977 La. Acts, No. 365, § 1; 1974 La. Acts, No. 533, § 1; 1972 La. Acts, No. 230, § 1. Adoption is another method by which an illegitimate child could be elevated in status. For a discussion of the changes in the adoption provisions, see the section of this commentary entitled "Private Adoption."

40. LA. CIV. CODE art. 915, as amended by 1979 La. Acts, No. 607, § 1. Prior to Act 607, article 915 provided for the inheritance of the community property of a deceased parent by the "descendants in the manner provided for by law." The supreme court in *Brooks v. House*, 168 La. 542, 122 So. 844 (1929), interpreted this phrase to mean "descendants who, under other provisions of the Code, would inherit from the deceased, to the exclusion of the surviving spouse." *Id.* at 544, 122 So. at 844. Under Civil Code article 918, acknowledged illegitimates inherited community or separate property from their mother in the absence of legitimate descendants. Similarly, under article 919, acknowledged illegitimates inherited from their father to the exclusion of the state. The reference to the other provisions regulating the disposition of property to descendants applies now only "in the event the deceased [leaves] *legitimate* descendants." LA. CIV. CODE art. 915, as amended by 1979 La. Acts, No. 607, § 1 (emphasis added).

41. LA. CIV. CODE art. 918, as amended by 1979 La. Acts, No. 607, § 1.

42. LA. CIV. CODE art. 919, as amended by 1979 La. Acts, No. 607, § 1.

43. See notes 30 & 37-38, *supra*, and accompanying text.

44. LA. CIV. CODE art. 919, as amended by 1979 La. Acts, No. 607, § 1.

mate descendants, as was the case previously,⁴⁵ the parent may now donate up to the disposable portion of his estate to his illegitimate children.⁴⁶ When the mother leaves no legitimate descendants, or when the father leaves neither legitimate descendants nor parents, the whole estate may be acquired by illegitimate children.⁴⁷ It also should be noted that where no legitimate descendants survive, the father of an illegitimate, as well as the mother, is free to dispose of his entire interest in *community* property because parents are no longer forced heirs as to community property.⁴⁸ The prior, more restrictive provisions of this section have been revised or repealed.⁴⁹

This new legislation is in part a reaction to the recent jurisprudential developments concerning the rights of illegitimates.⁵⁰ The Louisiana Supreme Court in *Succession of Robins*⁵¹ declared that article 1488 arbitrarily discriminated among the classes of illegitimates in violation of article I, section 3 of the state constitution.⁵² Article 1483 was likewise struck down by the court in *Succession of Thompson*.⁵³ The court in *Thompson* refuted each state interest asserted to justify discrimination against illegitimates in their capacity to receive a donation mortis causa. The strong state interest in stability of land titles, according to the court, was in no way en-

45. LA. CIV. CODE art. 1483, *repealed* by 1979 La. Acts, No. 607, § 4. See Note, *All in the Family: Equal Protection and the Illegitimate Child in Louisiana Succession Law*, 38 LA. L. REV. 189, 190 (1978).

46. LA. CIV. CODE art. 1484, *as amended* by 1979 La. Acts, No. 607, § 1. Even if no legitimate descendants survive the father of an illegitimate, that child is restricted by article 1484 from receiving in excess of the disposable portion of the estate if a parent of the father survives.

47. LA. CIV. CODE art. 1484, *as amended* by 1979 La. Acts, No. 607, § 1.

48. 1979 La. Acts, No. 778, § 1, *amending* LA. CIV. CODE art. 1494. For a discussion of this new development, see the section in this commentary entitled "Parents as Forced Heirs."

49. Articles dealing with the testamentary disposition of property to illegitimates repealed by Act 607 include article 1483 (held unconstitutional in *Succession of Thompson*, 367 So. 2d 796 (La. 1979)), and articles 1486-87. Act 607 also extensively revises articles 1484-85. Article 1488 was held unconstitutional in *Succession of Robins*, 349 So. 2d 276 (La. 1977), and legislatively repealed last year. 1978 La. Acts, No. 362, § 1. Thus, this whole area has been greatly overhauled recently. For a discussion of the inheritance rights of illegitimates prior to Act 607, see Lorio, *supra* note 22.

50. Major cases by the United States Supreme Court include *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); and *Labine v. Vincent*, 401 U.S. 532 (1971). The Louisiana Supreme Court has also been active in this area recently. See, e.g., *Succession of Thompson*, 367 So. 2d 796 (La. 1979); *Succession of Robins*, 349 So. 2d 276 (La. 1977).

51. 349 So. 2d 279 (La. 1977).

52. LA. CONST. art. I, § 3 provides: "No person shall be denied the equal protection of the laws No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth"

53. 367 So. 2d 796 (La. 1979).

dangered by allowing the illegitimate to receive this donation.⁵⁴ Even in an intestate succession where stability of land titles is a valid concern, equality between legitimate and illegitimate children may be constitutionally compelled, subject to the state's freedom to provide a reasonable manner in which parentage must be proven.⁵⁵ While the level of required proof of paternity may be quite high,⁵⁶ it appears that Louisiana can no longer simply exclude illegitimates from most of the succession rights enjoyed by legitimate children. Act 607 represents only an initial legislative step toward equality for illegitimates which may well leave Louisiana's treatment of illegitimates' succession rights yet unable to pass constitutional muster.⁵⁷

ALIMONY BETWEEN ASCENDANTS AND DESCENDANTS

Civil Code article 229, prior to its 1979 amendment, provided a reciprocal obligation of support between needy direct ascendants and descendants.⁵⁸ Act 249 of 1979 amends article 229 by limiting this obligation "to life's basic necessities of food, clothing, shelter, and health care."⁵⁹ Additionally, the Act requires proof of the inability of the direct ascendant or descendant seeking alimony to obtain these necessities by other means in order for the obligation to arise.⁶⁰

The Act's limitation on the types of things that can be considered "basic necessities" does not appear to change the law.

54. *Id.* at 798.

55. Comment, *Can Louisiana's Succession Laws Survive in Light of the Supreme Court's Recent Recognition of Illegitimates' Rights?*, 39 LA. L. REV. 1132, 1141 (1979). This article would be helpful to the reader in his analysis of the constitutional problems which remain after Act 607.

56. See *Lalli v. Lalli*, 439 U.S. 259 (1978). The New York statute at issue in *Lalli* required a court order of filiation made prior to death of the father. The Court held that the statute did not unconstitutionally discriminate against the illegitimate plaintiff even though the deceased father had formally acknowledged the child prior to the father's death.

57. See Comment, *supra* note 55. See also *Work of the Appellate Courts—1976-1977—Successions and Donations*, 38 LA. L. REV. 395 (1978).

58. LA. CIV. CODE art. 229 (as it appeared prior to 1979 La. Acts, No. 249) provided: "Children are bound to maintain their father and mother and other ascendants, who are in need; and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal." This sentence is retained by Act 249.

59. Thus, the Act in effect defines the phrase "in need" found in article 229's first sentence. See note 58, *supra*. For the text of the amendment, see note 60, *infra*.

60. Act 249 added the following sentence to article 229: "This reciprocal obligation is limited to life's basic necessities of food, clothing, shelter, and health care, and arises only upon proof of inability to obtain these necessities by other means or from other sources."

Courts faced with the problem of interpreting "need" under article 229 have decided that it encompasses food, clothing, shelter,⁶¹ and health care.⁶² Further, article 230 generally defines alimony⁶³ as "what is necessary for the nourishment, lodging, and support of the person who claims it."⁶⁴ Thus, the Act's "limitation" of the obligation to food, clothing, shelter, and health care is virtually no limitation at all. Under article 230's definition of alimony, only if "support" is viewed as encompassing more than food, clothing, shelter, and health care could it be argued that the Act "limits" the obligation.⁶⁵

Additionally, the evidentiary requirement that the person claiming alimony must prove his need does not appear to represent a change in the law. The courts have consistently required proof of need prior to this amendment. Even prior to Act 249, to have been considered "in need," one would have had to allege and prove a physical or mental impairment preventing his acquisition of gainful employment.⁶⁶

However, by virtue of Act 249, the amount of need which a plaintiff must show has been increased. The specific amount of proof now demanded by article 229 as amended is very similar to that imposed upon illegitimates claiming alimony from their parents or their parents' heirs.⁶⁷ Article 242 requires that illegitimates "prove in a satisfactory manner that they stand *absolutely* in need of such alimony for support."⁶⁸ Since the person claiming alimony under arti-

61. See *Tobin v. Tobin*, 323 So. 2d 896, 899 (La. App. 2d Cir. 1975), *cert. denied*, 325 So. 2d 613 (La. 1976); *Johnson v. Johnson*, 128 So. 2d 779 (La. App. 3d Cir. 1961).

62. See *Sutton v. Rogers*, 222 So. 2d 504 (La. App. 2d Cir. 1969); *Elchinger v. Elchinger*, 135 So. 2d 347 (La. App. 4th Cir. 1961).

63. The phrase "to maintain" in article 229 is a mistranslation of the French version. It should have been translated as "to give alimony to." See 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 229 (J. Dainow ed.).

64. LA. CIV. CODE art. 230 provides: "By *alimony* we understand what is necessary for the nourishment, lodging and support of the person who claims it. It includes the education, when the person to whom the alimony is due is a minor."

65. Article 230, however, includes education within the definition of alimony, so long as the person claiming the alimony is a minor. See note 64, *supra*. Thus, an argument might be made that the Act does in fact "limit" the obligation since education is not a basic necessity within the terms of the Act. See note 60, *supra*. However, the obligation imposed upon parents by article 227 to educate their children has been left intact. Thus, the failure to include education in the article 229 alimony obligation is of little practical significance.

66. See *Demarie v. Demarie*, 295 So. 2d 229 (La. App. 3d Cir. 1974) (lack of high school diploma held not sufficient to establish proof of need); *Dubroc v. Dubroc*, 284 So. 2d 869 (La. App. 4th Cir. 1973) (merely not working held not sufficient to establish proof of need).

67. See LA. CIV. CODE arts. 239-43.

68. (Emphasis added.) As a consequence of this requirement, an illegitimate's receipt of as little as \$100 a month in social security and Veteran's Administration

cle 229 must prove that he could not obtain these necessities from other sources, he is probably required to avail himself, if eligible, of governmental programs that provide these necessities. This seems a strange requirement indeed, since one of the justifications for alimony is to prevent the needy person from becoming a ward of the state.⁶⁹ Article 229 as amended would appear to require a person to become a ward of the state in order to qualify for alimony. However, in becoming a ward of the state, the potential recipient apparently no longer qualifies for alimony. If the basic necessities of life are provided by the state in the form of welfare payments, medical care, food stamps, and the like, then the claimant is no longer "in need."⁷⁰ Arguably, then, the right to alimony is an illusory one, with the real obligation of support being shifted to the state.

PRIVATE ADOPTION

By Act 686 of 1979, the legislature has provided an additional procedure for private⁷¹ adoption of minors in Louisiana. The Act apparently reflects a general movement to encourage adoption and discourage abortion⁷² in that it attempts to offer a more attractive alternative to abortion than does the older system of private adoption.⁷³ The new procedure is designed to be quick, possibly anonymous, and reliable. If the Act achieves its aims, it may further prevent extortion of adoptive parents by natural parents, and frequent changes of child custody.⁷⁴

benefits was held to bar her from receiving alimony. *Succession of Vincent*, 229 So. 2d 449 (La. App. 3d Cir. 1969), *aff'd on other grounds sub. nom.*, *Labine v. Vincent*, 401 U.S. 532 (1971).

69. See *Loyacano v. Loyacano*, 358 So. 2d 304, 308-09 (La. 1978) (on original hearing), *vacated on other grounds*, 99 S. Ct. 1488 (1979).

70. See note 68, *supra*. Apparently, only if the courts are willing to find that the governmental aid does not provide "life's basic necessities" will a claimant be successful.

71. Private adoption, as discussed in this commentary, does not encompass either adoption by agency placement, LA. R.S. 9:434(1) (1950), or adoption by blood relatives, LA. R.S. 9:422.1 (Supp. 1958); LA. R.S. 9:434(2-5) (1950 & Supp. 1978).

72. See generally *Kirsch v. Parker*, 375 So. 2d 693 (La. App. 4th Cir. 1979).

The amendment [to Revised Statutes 40:81 to require the sealing of adoption records to insure anonymity of natural parents surrendering children for adoption] was the product of pro-adoption and anti-abortion forces. . . . [T]he amendment has the purpose of persuading pregnant women to elect adoption over abortion by promising undiscoverability not previously available

Id. at 696.

73. Act 686 did not repeal older private adoption provisions contained in Revised Statutes 9:421-34.

74. These problems occur when the adoption process is lengthy, and natural parents retain the right to bar the adoption until that process is completed. *Wadlington, Adoption of Persons Under Seventeen In Louisiana*, 36 TUL. L. REV. 201, 218 (1962).

The present agency placement procedure has been the easiest method of adoption in Louisiana. Under this system, natural parents irrevocably consent to adoption at the time they surrender the child,⁷⁵ and such adoptions can be concluded in less than one year.⁷⁶ Moreover, adoption agencies can assure the parties of anonymity by acting as intermediaries between the surrendering parents and the adopting parents.⁷⁷ By contrast, prior to Act 686, natural parents could revoke consent to private adoption at any time up until the granting of the interlocutory decree, and such revocation would absolutely nullify the adoption and require the return of the child to the natural parents.⁷⁸ The procedure for private adoption could take up to two years⁷⁹ and essentially required contact between the surrendering and adopting parents, preventing an anonymous adoption.⁸⁰

The Act may be seen as an attempt to provide a procedure of private adoption with the benefits of agency adoption. For example, it shortens the process by allowing a petition for final decree of

75. LA. R.S. 9:402 (1950).

76. Revised Statutes 9:434(1) allows adoptive parents to petition for final adoption after the child, placed with them by an adoption agency, has lived with them for six months. See also Wadlington, *supra* note 74, at 214-15.

77. Wadlington, *supra* note 74, at 213-14.

78. *Id.* at 217. See also Moreland v. Craft, 244 So. 2d 37 (La. App. 3d Cir. 1971) (application of the continuing consent requirement). Act 686 amends Revised Statutes 9:429 to remove this continuing consent requirement.

79. The older system (apparently still in force after Act 686) allows private adoption in the following steps:

1. Petition for adoption by the adopting parent(s). LA. R.S. 9:422 (Supp. 1975 & 1978).
2. Service of the petition on the Department of Health and Human Resources, and on the natural parent(s). LA. R.S. 9:425 (1950 & Supp. 1976).
3. Investigation by the Department. LA. R.S. 9:427 (1950 & Supp. 1977).
4. A judicial hearing between thirty and sixty days after completion of service. LA. R.S. 9:428 (1950). At this time or later, the court may grant an interlocutory decree of adoption. LA. R.S. 9:429 (1950 & Supp. 1960).
5. Between six months and two years after granting of the interlocutory decree (so long as the child has lived with the adopting parents for one year), a petition for a final decree of adoption. LA. R.S. 9:431 (1950 & Supp. 1960); LA. R.S. 9:432 (1950 & Supp. 1977).
6. Further investigation by the Department. LA. R.S. 9:432 (Supp. 1960 & 1977). Between the granting of the interlocutory decree and the granting of the final decree, the Department must maintain contact with the adoptive home. LA. R.S. 9:430 (1950).
7. A judicial hearing, and granting of the final decree of adoption. Again, the hearing must be held between thirty and sixty days after service of the petition. LA. R.S. 9:432 (1950 & Supp. 1977).

80. Revised Statutes 9:425 requires that the petition for interlocutory decree of adoption be served upon the natural parent(s). See also Wadlington, *supra* note 74, at 221.

adoption to be filed six months after the granting of the interlocutory decree, removing the additional requirement that a child live with his adoptive parents for one year before filing of the petition for final decree.⁸¹ The Act further significantly limits the "continuing consent" requirement⁸² by limiting the time in which surrendering parents may revoke their consent⁸³ and by allowing courts to grant adoption decrees despite such parental revocation.⁸⁴ Finally, the Act allows attorneys to act as intermediaries between the surrendering and adopting parents so as to safeguard the identities of these parties.⁸⁵

Unlike agency adoptions, Act 686 permits natural parents to revoke their consent to adoption. Any parent listed on the birth certificate and signing the original act of surrender⁸⁶ may revoke the consent indicated in the act of surrender within thirty days of the act.⁸⁷ However, this revocation does not absolutely prevent final adoption, as a court may still render an interlocutory or final decree of adoption if it finds adoption to be in the best interests of the child.⁸⁸ A natural parent not listed on the birth certificate and who has not signed the act of surrender may also oppose the adoption at any time before the rendering of the interlocutory decree,⁸⁹ so long

81. LA. R.S. 9:432(C), *added by* 1979 La. Acts, No. 686.

82. As to adoptions under the older procedure, see note 79 *supra*.

83. LA. R.S. 9:422.10, *added by* 1979 La. Acts, No. 686. This revocation must be by "clear, written declaration" and must be sent by registered mail to those to whom custody was granted.

84. LA. R.S. 9:422.11, *added by* 1979 La. Acts, No. 686.

85. LA. R.S. 9:422.9, *added by* 1979 La. Acts, No. 686.

86. The act of surrender must be executed by parents listed on the child's birth certificate. LA. R.S. 9:422.4, *added by* 1979 La. Acts, No. 686. If only the mother is listed, she may sign alone. Should any parent be a minor, the minor's parent, custodial parent, or guardian must co-sign the act.

87. LA. R.S. 9:422.10, *added by* 1979 La. Acts, No. 686.

88. LA. R.S. 9:422.11, *added by* 1979 La. Acts, No. 686.

89. LA. R.S. 9:422.11, *added by* 1979 La. Acts, No. 686, provides in pertinent part: "Should an interlocutory decree have been entered without opposition, the child shall not be removed from the custody of the prospective adoptive parents nor the final decree of adoption denied unless there is an unfavorable recommendation by the department or the prospective adoptive parents are found to be unfit." This apparently indicates that all opposition, even that by a father not indicated on the birth certificate and not executing the act of surrender, after the granting of the interlocutory decree, is to have no effect. Evidently the legislature intended to limit the non-indicated parent's period of opposition to the thirty days which must pass before granting of the interlocutory decree. However, because this parent's consent to surrender is not required, and because he may not be notified of adoption proceedings, a court may find that section 422.11 does not control the non-indicated parent's right to oppose the adoption. Instead, it may apply section 422.10 which states that "[t]he nonindicated parent may oppose the adoption only by proof of the legal and formal acknowledgment or legitimation of the child by that parent prior to the entering of a *decree of adoption*." (Emphasis added.) "A decree" may be taken to mean the final decree.

as he shows he has legitimated or formally acknowledged the child.⁹⁰ Again, such opposition does not bar a final or interlocutory decree if a court finds that adoption serves the best interests of the child.⁹¹

The legislature has attempted to reconcile the interests of natural parents with the interest in providing a quick and reliable procedure for private adoption. When those interests conflict, as when natural parents later oppose the adoption, the legislature has called upon the courts to resolve the conflict in light of the child's best interests. In *Wood v. Beard*,⁹² the Louisiana Supreme Court stated:

The best interest of the minor is not served by denying parental custody after deciding which of two qualified, competing family groups can deliver a quality of child custody more pleasing to the court. A judicial comparison of the qualified competitors for custody does violence to the rule of "parental right."

. . . .

When the parent competes with non-parents of the child, the parent's right to custody is superior, unless the parent is unable or unfit, having forfeited parental rights.⁹³

If courts now apply such a test, they will protect the "parental right," but will violate the purpose of Act 686, to allow adoptive parents to rely as much as possible upon the initial surrender.

The court in *Wood* created an exception to its rule in the case of parents who have forfeited their parental rights.⁹⁴ The act of surrender executed by parents listed on the birth certificates may evidence such a forfeiture. Natural fathers not listed and not executing the act, who only acknowledge the child, may not have parental rights to forfeit. However, the Civil Code gives those presumed to be fathers (whether or not listed on the child's birth certificate),⁹⁵ and those who have legitimated their children,⁹⁶ full "parental rights."⁹⁷ To allow the divestiture of these rights with less than a

90. LA. R.S. 9:422.10, added by 1979 La. Acts, No. 686.

91. LA. R.S. 9:422.11, added by 1979 La. Acts, No. 686. Revised Statutes 9:404 absolutely bars surrender by the mother of a child for agency adoption if the natural father has formally acknowledged or legitimated the child.

92. 290 So. 2d 675 (La. 1974) (a habeas corpus action brought by a mother against her parents with whom she had left her child, and who now refused to return the child).

93. *Id.* at 677.

94. *Id.*

95. LA. CIV. CODE arts. 184-90.

96. LA. CIV. CODE art. 179, as amended by 1979 La. Acts, No. 607, provides: "Legitimate children are those who are either born or conceived during marriage or who have been legitimated as provided hereafter."

97. LA. CIV. CODE arts. 215-38.

forfeiture or abandonment⁹⁸ may do violence to our notion of the rights of parenthood.

The Act may also run counter to the equal protection clause of the Constitution as recently interpreted by the United States Supreme Court in *Caban v. Mohammed*.⁹⁹ That case invalidated a New York statute which required that a mother of an illegitimate child consent to the child's adoption, but which permitted the child's father only to "oppose" the adoption.¹⁰⁰ The natural parents, though never married, had lived with their children as a "natural family" for several years. The appellant father had been listed on the children's birth certificates. After the parents separated, the mother married, and a state court allowed her and her new husband to adopt the children, over the natural father's objection. The court found the statute in question permitted unequal treatment according to sex.¹⁰¹ Perhaps the new Louisiana private adoption procedure will pass the constitutional test of *Caban* because under it, neither natural parent can absolutely prevent an adoption after the initial surrender. However, where the birth certificate lists only the natural mother as a parent, the procedure gives her sole discretion to initiate the process.¹⁰²

Caban recognized that states have an important interest in providing a reliable adoption procedure.¹⁰³ However, it found that this interest did not justify divesting a natural father of "a relationship with his children fully comparable to that of the mother."¹⁰⁴ Language in the opinion indicates that states may be permitted to pre-

98. *Wood v. Beard*, 290 So. 2d at 677.

99. 99 S. Ct. 1760 (1979).

100. "[A]n unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial—as in this case." *Id.* at 1765.

101. *Id.* at 1766.

102. Many hospitals permit mothers alone to fill out birth certificate forms. This procedure prevents one presumed to be the father from appearing as the father on the birth certificate.

103.

The State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which illegitimate children suffer. But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of § 111.

99 S. Ct. at 1767-68. *Accord*, *Collins v. Division of Foster Care*, No. 10,065 (La. App. 4th Cir. Sept. 11, 1979).

104. 99 S. Ct. at 1766 & 1768. The Court found no reason to believe that unwed fathers as a class were more likely to object to adoption than unwed mothers. *Id.* at 1768.

sume the absence of such a relationship in the period immediately following birth.¹⁰⁵ If so, Louisiana may constitutionally require fathers to legitimate or formally acknowledge the child during this period before being allowed the right to oppose an adoption. But *Caban's* primary question concerns the extent of that right of opposition, for the Supreme Court held unconstitutional a statutory scheme which allowed the father merely the right to oppose the adoption. If Act 686 permits a mother to surrender her child for adoption and allows the child's natural or presumed father, who has established a paternal relationship with the child by whatever method, merely to oppose the adoption, it conflicts with *Caban* and should be reconsidered in that light.

PARENTS AS FORCED HEIRS

Louisiana's succession laws reserve a portion of the estate of a decedent in favor of surviving members of certain classes of individuals regardless of the intentions of the testator.¹⁰⁶ These "forced heirs"¹⁰⁷ are the decedent's legitimate descendants¹⁰⁸ or, in their absence, his parents.¹⁰⁹ That strong societal values underlie the insti-

105.

Because the question is not before us, we express no view as to whether such difficulties [such as location of the father] would justify a statute addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment. *Id.* at 1768 n.11. The Court also stated: "In *Quilloin v. Walcott*, [434 U.S. 246 (1978)], we noted the importance in cases of this kind of the relationship that *in fact* exists between the parent and child." *Id.* at 1769 n.14 (emphasis added).

The Louisiana Fourth Circuit Court of Appeal recently upheld the constitutionality of Revised Statutes 9:404 which permits the mother of an illegitimate child to surrender that child for agency adoption on her own if the child has not been formally acknowledged or legitimated by the natural father. The natural father challenged such a surrender of a three-month old child though the father did not formally acknowledge the child until nine months after the surrender. The court ruled that the state's interest in proper identification of the natural father justified the requirement that the father formally acknowledge or legitimate the child before having rights to participate in the surrender or oppose it. *Collins v. Division of Foster Care*, No. 10,065 (La. App. 4th Cir. Sept. 11, 1979).

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

LA. CIV. CODE art. 1494 (as it appeared prior to 1979 La. Acts, No. 778) provided in pertinent part: "Donations *inter vivos* or *mortis causa* can not exceed two-thirds of the property, if the disposer, having no children, leaves a father, mother, or both"

107. For a good discussion of the history and general considerations of forced heirship, see LeVan, *Alternatives to Forced Heirship*, 52 TUL. L. REV. 29 (1977).

108. LA. CIV. CODE art. 1493.

109. LA. CIV. CODE art. 1494.

tution of forced heirship in Louisiana is evidenced by the considerable protection afforded the rights of forced heirs in both the constitution¹¹⁰ and Civil Code.¹¹¹ However, the strength of adherence to the values supporting forced heirship may be weakening.¹¹²

Act 778 of 1979 makes parents forced heirs only as to the *separate* property of their children who predecease them without legitimate descendants.¹¹³ Thus, a testator may donate his interest in community property free of any legal complaint by the parents. Article 1494 is left otherwise unchanged by the Act.

One effect of Act 778 is to give an individual more freedom to dispose of his property as he sees fit. Increased flexibility in estate planning allows the testator to provide more adequately for family members in greatest need, particularly the surviving spouse.¹¹⁴ It may be surmised that the legislature in enacting Act 778 was motivated in part by a desire to strengthen the position of the surviving spouse. This would be consistent with other recent changes favoring the surviving spouse.¹¹⁵ However, it must be remembered that the surviving spouse is not a forced heir and need not be left anything in addition to the one-half interest in the community property which the survivor independently owns. The surviving spouse benefits from this increased freedom to donate which Act 778 affords, only to the extent the predeceased spouse chooses to bequeath to the survivor this portion earlier reserved for the parents; the testator may choose instead to leave this community property to "strangers."

Removing parents as forced heirs as to community property raises potential constitutional problems. The Louisiana Constitution of 1921 explicitly stated that no law shall be passed abolishing forc-

110. LA. CONST. art. XII, § 5.

111. For example, the potent remedies of reduction, LA. CIV. CODE arts. 1502-18, and to descendant forced heirs, collation, LA. CIV. CODE arts. 1227-88, are available. See also LA. CIV. CODE art. 2239.

112. For instance, the forced portion may now be placed in trust. LA. CONST. art. XII, § 5; LA. R.S. 9:1841-47 (Supp. 1964). Also, the legal usufruct of the surviving spouse has been extended in recent years at the expense of forced heirs. *E.g.*, LA. CIV. CODE arts. 916-16.1. See the discussion of the legal usufruct in the section of this commentary entitled "Usufruct of the Surviving Spouse." See also LeVan, *supra* note 107.

113. LA. CIV. CODE art. 1494, as amended by 1979 La. Acts, No. 778, § 1, provides in pertinent part: "With respect to separate property, donations inter vivos or mortis causa can not exceed two-thirds of the property, if the disposer, having no children, leaves a father, mother, or both . . ." (Emphasis added.)

114. Because the majority of successions are relatively small, efficient allocation of assets of the estate is very important. See LeVan, *supra* note 107, at 42.

115. See particularly the 1979 amendments to Civil Code article 915, 1979 La. Acts, No. 607, § 1; and to article 916, 1979 La. Acts, No. 678, § 1; and the section in this commentary entitled "Usufruct of the Surviving Spouse."

ed heirship.¹¹⁶ In light of this constitutional protection, when a bill similar to Act 778 was introduced in 1962,¹¹⁷ a joint resolution was also introduced that would have amended the constitution.¹¹⁸ The present constitution repeats the prohibition against the abolition of forced heirs, but states further that the determination of those heirs and the amount of the forced portion shall be provided by law.¹¹⁹ It can be argued that Act 778 does not abolish forced heirship, but merely restricts or modifies the rights of one class of forced heirs as to one type of property.¹²⁰ The constitutional doubts will linger, however, until resolved by the courts.

CHILD CUSTODY

By Act 718 of 1979, the legislature amended Louisiana Civil Code articles 146 and 157 to require courts, in separation, divorce, or post-divorce proceedings, to award custody of children of the marriage "in accordance with the best interest of the child or children"¹²¹ rather than on the basis of codal or jurisprudential presumptions favoring the mother. Prior to 1979, article 146 provided that the mother should be granted custody pendente lite in the absence

116. LA. CONST. OF 1921, art. IV, § 16.

117. La. H.B. No. 310, 25th Reg. Sess. (1962). For a discussion of this bill, see Comment, *Forced Heirs, The Legitimate and Loss of the Legitimate in Louisiana*, 37 TUL. L. REV. 710, 733 (1963); Note, *Successions—Proposed Louisiana Civil Code Amendments to Favor the Surviving Spouse of a Childless Marriage When a Parent of the Deceased Also Survives*, 37 TUL. L. REV. 322, 323 (1963).

118. La. H.B. No. 1247, 25th Reg. Sess. (1962).

119. LA. CONST. art. XII, § 5.

120. Even under the 1921 constitution, the legislature was said to be able to regulate and restrict the rights of forced heirs as long as forced heirship was not wiped out or destroyed. *Succession of Earhart*, 220 La. 817, 824-25, 57 So. 2d 695, 697 (1952). See Le Van, *supra* note 107, at 48 n.82.

121. LA. CIV. CODE art. 146, as amended by 1979 La. Acts, No. 718, provides:

If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the husband or the wife, in accordance with the best interest of the children. In all cases, the court shall inquire into the fitness of both the mother and the father and shall award custody to the parent the court finds will in all respects be in accordance with the best interest of the child or children. Such custody hearing may be held in private chambers of the judge.

LA. CIV. CODE art. 157(A), as amended by 1979 La. Acts, No. 718, provides:

In all cases of separation and divorce, and changes of custody after an original award, permanent custody of the child or children shall be granted to the husband or the wife, in accordance with the best interest of the child or children, without any preference being given on the basis of sex of the parent. Such custody hearing may be held in the private chambers of the judge. The party under whose care the child or children is placed, or to whose care the child or children has been entrusted, shall of right become natural tutor or tutrix of said child or children to the same extent and with the same effect as if the other party had died.

of "strong reasons to deprive her of it." Act 718 removed this maternal preference. Article 157 included, prior to Act 718, a requirement that permanent custody be awarded according to the children's best interest, and Act 718 added to this article a clause stating that courts awarding custody should not prefer one parent over another because of the parent's sex.

Article 157, prior to amendment in 1977, provided that the parent obtaining the separation or divorce should receive permanent custody of children of the marriage. Courts could award permanent custody to the other parent "for the greater advantage of the children."¹²² However, in practice courts virtually ignored the first part of this provision and instead used the maternal preference rule to decide which parent received permanent child custody.¹²³ Finding the best interest of the children always served by an award of custody to their mother,¹²⁴ courts denied custody to mothers only in exceptional circumstances.¹²⁵ The double burden rule applied by the courts presented a considerable obstacle to parents seeking reconsideration of an earlier permanent custody decree.¹²⁶ A parent seeking a change of custody had the double burden of proving (1) that the children's present living environment was detrimental to their interests, and (2) that he or she could provide a better living environment for the children.¹²⁷ The rule, designed to promote stability of custody decrees and discourage custody litigation,¹²⁸ assured perpetuation of the article 157 maternal preference in post-divorce proceedings.

In 1977, the legislature amended article 157 to state that permanent custody "shall be granted to the husband or wife, in accordance with the best interest of the child or children."¹²⁹ With this amend-

122. LA. CIV. CODE art. 157 (as it appeared prior to 1977 La. Acts, No. 448).

123. Note, *Child Custody: Preference to the Mother*, 34 LA. L. REV. 881 (1974).

124. See text at note 132, *infra*.

125. [C]ustody should not be denied the mother unless she is morally unfit or otherwise unstable, and then only when the immorality or instability is such that these characteristics and her conduct adversely affect the child. It is only in exceptional cases that the child's best interest is served by changing custody from the mother to the father.

Nethkin v. Nethkin, 307 So. 2d 563, 567 (La. 1975), quoting *Abreo v. Abreo*, 281 So. 2d 695, 697 (La. 1973).

126. A "considered decree" of child custody is reached when evidence is taken in a judicial proceeding "in regard to the defendant's fitness to have care, custody, and control of the children." *Stevens v. Stevens*, 340 So. 2d 584, 587 (La. App. 1st Cir. 1976). A default judgment may be a considered decree if evidence is taken at a hearing prior to the judgment. *Id.* See also Note, *Maternal Preference and the Double Burden: Best Interest of Whom?*, 38 LA. L. REV. 1096, 1104-05 (1978).

127. Note, *supra* note 126, at 1102.

128. *Id.*

129. 1977 La. Acts, No. 448, amending LA. CIV. CODE art. 157.

ment, the legislature may have intended to prevent application of the maternal preference rule in determinations of permanent custody. It included the words "to the husband or wife" which perhaps required spouses to be treated equally in these determinations.¹³⁰ However, the language of the amendment tracked the language which courts had used in explaining the maternal preference rule. In *Fulco v. Fulco*,¹³¹ the supreme court stated: "The general rule is that it is in the *best interest* of the children of the marriage to grant custody to the mother"¹³² The legislature may have viewed the amendment as a codification of the maternal preference rule. The fact that the legislature did not enact a corresponding "best interest" amendment to article 146 perhaps confirms this interpretation. Arguably, removal of the maternal preference rule for permanent custody determinations but retention of it for pendente lite custody determinations would have been inconsistent, especially in light of the double burden rule designed to promote stability of environment by discouraging frequent custody changes.¹³³

Appellate court decisions immediately revealed uncertainty as to the intent of this amendment to article 157. Courts, even of the same circuits, reached inconsistent results. Panels of the second and fourth circuits held that the 1977 amendment abrogated the maternal preference rule.¹³⁴ Other panels of the same circuits held that the amendment codified the maternal preference rule, basing these decisions on the view that the maternal preference rule serves the children's best interest.¹³⁵

Some appellate courts avoided this uncertainty by basing awards of permanent custody on the double burden rule.¹³⁶ These

130. See *The Work of the Louisiana Legislature for the 1977 Regular Session—Child Custody*, 38 LA. L. REV. 51, 58-59 (1977) [hereinafter cited as *Child Custody*].

131. 259 La. 1122, 254 So. 2d 603 (1971).

132. *Id.* at 1127, 254 So. 2d at 605 (emphasis added).

133. *Child Custody*, *supra* note 130, at 58-59.

134. *Spencer v. Talabock*, 370 So. 2d 684 (La. App. 4th Cir. 1979); *Hegan v. Hegan*, 367 So. 2d 147 (La. App. 2d Cir. 1979).

135. *Doyle v. Doyle*, 371 So. 2d 344 (La. App. 4th Cir. 1979); *Coltharp v. Coltharp*, 368 So. 2d 793 (La. App. 2d Cir.) (dictum), *cert. denied*, 370 So. 2d 578 (La. 1979).

Courts may apply this argument even to article 157 as amended in 1979. In the recent case of *Arnold v. Arnold*, No. 7,103 (La. App. 3d Cir. Oct. 10, 1979), Judge Guidry, in a concurring opinion joined by another member of a three-judge panel of the Third Circuit Court of Appeal, argued that the article as amended does not overrule or supersede *Fulco*. He stated: "The guidelines set forth in *Fulco* are based upon sound sociological principles, the application of which insures, in my judgment, the desired result in all custody matters, i.e., a custody disposition which will be in the best interest of the children." *Id.*

136. *E.g.*, *Coltharp v. Coltharp*, 368 So. 2d 793 (La. App. 2d Cir.), *cert. denied*, 370 So. 2d 578 (La. 1979).

courts held *pendente lite* awards controlled permanent awards unless the non-custodial spouse could meet the double burden. Previously, neither *de facto* custody nor awards of custody *pendente lite* qualified as "considered decrees" required for application of the double burden rule.¹³⁷ These rulings effectively retained the maternal preference rule as they perpetuated decrees made under the explicit article 146 maternal preference.¹³⁸

The legislature apparently intended to eliminate the use of the maternal preference rule in child custody determinations by enacting Act 718. The Act removed the explicit maternal preference in article 146 and substituted a "best interest" test. It retained the article 157 "best interest" test but added language indicating that this test should be applied without consideration of maternity or paternity. Finally, it included post-divorce custody determinations within article 157, indicating that the best interest test, rather than the double burden rule, should govern in these determinations.

GENDER-NEUTRAL ALIMONY

In the recent case of *Orr v. Orr*,¹³⁹ the United States Supreme Court declared unconstitutional an Alabama statute which restricted the award of alimony to women only;¹⁴⁰ this result effectively impaired Louisiana's alimony laws which, as written,¹⁴¹ had provided

137. *Fulco v. Fulco*, 259 La. 1122, 254 So. 2d 603 (1971); *Decker v. Landry*, 227 La. 603, 80 So. 2d 91 (1955).

138. *E.g.*, *Coltharp v. Coltharp*, 368 So. 2d 793 (La. App. 2d Cir.), *cert. denied*, 370 So. 2d 578 (La. 1979).

139. 99 S. Ct. 1102 (1979).

140. The Court found that the statute in question violated the equal protection clause of the fourteenth amendment to the United States Constitution. The Court stated:

Where . . . the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound—if only indirectly—to the benefit of those without need for special solicitude.

Id. at 1113 (citations omitted).

141. LA. CIV. CODE art. 148 (as it appeared prior to 1979 La. Acts, No. 72) provided:

If the wife has not a sufficient income for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, whether she appears as plaintiff or defendant, a sum for her support, proportioned to her needs and to the means of her husband.

LA. CIV. CODE art. 160 (as it appeared prior to 1979 La. Acts, No. 72) provided:

When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when:

1. The wife obtains the divorce;
2. The husband obtains a divorce on the ground that he and his wife have been

that only a woman could receive alimony. In response, the legislature passed Act 72 of 1979 which amends Louisiana Civil Code article 148, dealing with alimony pendente lite,¹⁴² and article 160,¹⁴³ governing permanent alimony, to reflect the "gender-neutral" treatment required by the United States Supreme Court.

A reading of article 148 as amended reveals few textual

living separate and apart, or on the ground that there has been no reconciliation between the spouses after a judgment of separation from bed and board, for a specified period of time; or

3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person.

This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries.

The constitutionality of article 148, governing alimony pendente lite, had been upheld by the Louisiana Supreme Court in *Williams v. Williams*, 331 So. 2d 438 (1976). The court found no violation of either the equal protection clause of the fourteenth amendment or of the Louisiana constitution. LA. CONST. art. I, § 3 provides in pertinent part: "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . sex . . ." Prior to *Orr*, the Louisiana Supreme Court in *Loyacano v. Loyacano*, 358 So. 2d 304, 314 (1978) (on rehearing), had upheld the constitutionality of article 160, which governs permanent alimony. The decision was subsequently vacated by the United States Supreme Court because of possible conflict with *Orr*. *Loyacano v. LeBlanc*, 99 S. Ct. 1488 (1979). Because the husband in *Loyacano* acquiesced in the judgment of the Louisiana Supreme Court rendered on rehearing, the court felt there was no longer any controversy before it. Thus, the Louisiana Supreme Court reinstated its opinion on remand. No. 59,688, slip op. at 3 (La. Oct. 8, 1979).

142. LA. CIV. CODE art. 148, as amended by 1979 La. Acts, No. 72, provides:

If the spouse has not sufficient income for maintenance pending suit for separation from bed and board or for divorce, the judge may allow the claimant spouse, whether plaintiff or defendant, a sum for that spouse's support, proportioned to the needs of the claimant spouse and the means of the other spouse.

For the text of article 148 prior to amendment, see note 141, *supra*.

143. LA. CIV. CODE art. 160, as amended by 1979 La. Acts, No. 72, provides:

When a spouse has not been at fault and has not sufficient means for support, the court may allow that spouse, out of the property and earnings of the other spouse, alimony which shall not exceed one-third of his or her income. Alimony shall not be denied on the ground that one spouse obtained a valid divorce from the other spouse in a court of another state or country which had no jurisdiction over the person of the claimant spouse. In determining the entitlement and amount of alimony after divorce, the court shall consider the income, means, and assets of the spouses; the liquidity of such assets; the financial obligations of the spouses, including their earning capacity; the effect of custody of children of the marriage upon the spouse's earning capacity; the time necessary for the recipient to acquire appropriate education, training, or employment; the health and age of the parties and their obligations to support or care for dependent children; any other circumstances that the court deems relevant.

In determining whether the claimant spouse is entitled to alimony, the court shall consider his or her earning capability, in light of all other circumstances.

This alimony shall be revoked if it becomes unnecessary and terminates if the spouse to whom it has been awarded remarries.

For the text of article 160 prior to amendment, see note 141, *supra*.

changes: the word "spouse" or the phrase "claimant spouse" has been substituted for the words "husband" or "wife"; the word "may" has replaced the word "shall" in regard to the judge's awarding of alimony.¹⁴⁴ In contrast, article 160 has undergone more significant textual alterations. In addition to the "spouse"/"claimant spouse" substitutions, the legislature has added specific criteria to assist the trial judge in determining whether a spouse is entitled to alimony and, if so, the amount of such alimony.¹⁴⁵ These factors, which are largely codifications of prior jurisprudence interpreting the article, include:¹⁴⁶ the liquidity of the spouses' assets;¹⁴⁷ the effect of custody of children of the marriage upon the claimant spouse's earning capacity;¹⁴⁸ the time necessary for the recipient to acquire appropriate education, training, or employment;¹⁴⁹ the health and age of the parties; and their obligations to support or care for dependent children.¹⁵⁰ Notably, also included among these illustrative¹⁵¹ factors

144. See note 142, *supra*.

145. See note 143, *supra*.

146. Other factors besides those listed in the text are also to be considered by the trial judge. See note 143, *supra*.

147. The jurisprudence interpreting article 160 before its amendment had taken into consideration the liquidity of the claimant wife's assets in determining whether she had sufficient means for her support. See *Frederic v. Frederic*, 302 So. 2d 903 (La. 1974); *Smith v. Smith*, 217 La. 646, 47 So. 2d 32 (1950); *Boisfontaine v. Boisfontaine*, 357 So. 2d 90 (La. App. 4th Cir. 1978). See generally *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Persons*, 37 LA. L. REV. 305, 307-13 (1976). But see *Sonfield v. Sonfield*, No. 10,675 (La. App. 4th Cir. Oct. 4, 1979). In *Sonfield*, the fourth circuit held that ownership by claimant wife of an expensive New Orleans Garden District home, which she bought after divorce, and from which over \$90,000 could be realized by the wife from sale, was "sufficient means for her support," despite the non-liquid nature of the asset. Now, under article 160 as amended, liquidity of both spouses' assets is a factor to be considered by the trial judge before making an award. See note 143, *supra*.

148. See *La Hood v. La Hood*, 340 So. 2d 624 (La. App. 2d Cir. 1976); *Gravel v. Gravel*, 331 So. 2d 580 (La. App. 3d Cir. 1976). In both cases, a mother with custody of small children was said to be justified in failing to seek employment so that she could remain home to care for the children. However, in *Ward v. Ward*, 339 So. 2d 839 (La. 1976), and *Favrot v. Barnes*, 339 So. 2d 843 (La. 1976), the supreme court held that a wife need not supply a justifiable reason to refrain from working. She was entitled to alimony by virtue of the husband's article 120 obligation of support in spite of her refusal to work.

149. See *Gravel v. Gravel*, 331 So. 2d 580 (La. App. 3d Cir. 1976) (wife, who was registered nurse, enrolled as a full-time student in graduate school seeking a Masters Degree in Nursing Education, held not required to seek employment and discontinue her graduate course).

150. See *La Hood v. La Hood*, 340 So. 2d 624 (La. App. 2d Cir. 1976); *Ducote v. Ducote*, 339 So. 2d 835 (La. 1976); *Cox v. Cox*, 199 So. 2d 365 (La. App. 1st Cir. 1967).

151. The Act makes it clear that these factors are illustrative by directing the judge to consider "any other circumstances that the court deems relevant." 1979 La. Acts, No. 72, amending LA. CIV. CODE art. 160.

is the earning capacity of both spouses, a legislative *overruling* of prior jurisprudence which had held that the wife's potential earning capacity was not a proper basis for refusing to award alimony. In two 1976 cases, the Louisiana Supreme Court held that the wife had no legal duty to earn her own livelihood.¹⁵² The court interpreted the phrase "sufficient means for her support" in article 160 as not encompassing earning capacity.¹⁵³ As amended, the article, though it still includes that phrase, specifically requires the trial judge to consider the claimant's "earning capability"¹⁵⁴ in determining if he or she is *entitled* to alimony.¹⁵⁵ Though this consideration is to be made "in light of all other circumstances,"¹⁵⁶ it appears likely that failure of a claimant spouse to work, without a justifiable reason to refrain from doing so, will result in a denial of alimony.

Though the legislature made only minor textual changes in article 148,¹⁵⁷ the amendment of that article also may have worked a change in the law, due to a problem that the legislature apparently had not anticipated.¹⁵⁸ Under the jurisprudence interpreting article

152. *Favrot v. Barnes*, 339 So. 2d 843 (La. 1976); *Ward v. Ward*, 339 So. 2d 839 (La. 1976).

153. The court noted in *Ward* that article 160 alimony was limited to basic necessities of life. 339 So. 2d at 842. Thus, a wife who refused to work, and received alimony nonetheless, would hardly be enjoying an elegant lifestyle.

154. "Earning capacity" as a factor to be considered in determining the *amount* of alimony is mentioned twice in amended article 160. The earning capacity of *both* spouses is to be considered by the trial judge. Likewise, the effect which custody of the children of the marriage has upon the earning capacity of the spouse with custody is also to be considered by the trial judge. See note 143, *supra*. It is not clear whether or not the terms "earning capacity" and "earning capability" are synonymous.

The maximum amount of alimony that may be awarded under article 160 is still limited to one-third of the paying spouse's *income*. See notes 141 & 143, *supra*. This limitation, combined with the termination upon divorce of the obligation of support, suggests that a spouse might avoid alimony payments by refusing to work. However, after amendment, article 160 directs the trial judge to consider the earning capacities of both spouses. Thus, an argument that a spouse might avoid paying alimony by refusing to work apparently would fail.

155. See note 143, *supra*.

156. 1979 La. Acts, No. 72, *amending* LA. CIV. CODE art. 160.

157. See text at note 144, *supra*.

158. That the legislation was not drafted as carefully as it should have been is illustrated by the preamble to Act 72, which says that the amendments to articles 148 and 160 were "to permit either spouse *who is not at fault* and who is in need to obtain alimony pending suit for separation or divorce or alimony after divorce . . ." (Emphasis added.) However, pending a judgment, the issue of fault has not yet been adjudicated; thus, it cannot be taken into consideration though alimony *pendente lite* is due from the date of filing suit. Moreover, it is doubtful that fault should play a role in the awarding of alimony *pendente lite*. Though the source of the obligation to pay alimony to the claimant spouse is no longer clear, historically the obligation was based on the husband's duty to support his wife. While *Orr* forbids the enforcement of such obligations limited to one sex, an obligation to support still remains. See text at notes 160-63, *infra*.

148 prior to amendment, a wife did not need to work in order to be eligible to receive alimony pendente lite.¹⁵⁹ Previously, however, the source of the husband's obligation to support the wife with alimony pendente lite had been founded upon article 120, which provides that the husband is *obliged* to furnish the wife with "whatever is required for the convenience of life."¹⁶⁰ While article 120 has not been amended, *Orr* has in effect rendered unenforceable this non-reciprocal obligation of support by the husband.¹⁶¹

Amended article 148 requires a spouse, not just the husband, to support the other spouse, if that other spouse has insufficient income for maintenance.¹⁶² In light of the amendment to article 148, the question becomes: What is the source of the obligation to pay alimony pendente lite? Article 119 provides an obligation of mutual support between the spouses.¹⁶³ However, if article 119 is determined to be the source of the obligation to pay alimony pendente lite, it would seem that the needy spouse could not refuse to work and still be entitled to alimony pendente lite because the obligation of support is mutual.

Moreover, the obligation imposed by article 119 has been interpreted to be less onerous than that imposed by article 120; only the necessities of life are required to be provided to a spouse under article 119, while the conveniences of life had to be provided by the husband under article 120.¹⁶⁴ Thus, when article 120 served as the

159. See *Bilello v. Bilello*, 240 La. 158, 121 So. 2d 728 (1960); *Best v. Best*, 337 So. 2d 672, 674 (La. App. 3d Cir. 1976); *Gravel v. Gravel*, 331 So. 2d 580 (La. App. 3d Cir. 1976).

160. LA. CIV. CODE art. 120 provides: "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and conditions."

161. See note 140, *supra*. However, an analysis similar to that of Justice Dennis in *Loyacano* might be adopted in order to extend the article 120 obligation of support to the wife. See *Loyacano v. Loyacano*, 358 So. 2d 304 (La. 1978) (on original hearing).

162. See note 142, *supra*.

163. LA. CIV. CODE art. 119 provides: "The husband and wife owe to each other mutually, fidelity, support and assistance."

164. Professor Robert Pascal has said:

Article 120 of the Civil Code states two obligations as correlatives: that of the wife to live with her husband wherever he chooses to reside, and that of the husband to receive her and to furnish her with whatever is required for the *conveniences of life*, in proportion to his *means and condition*. This special obligation of the husband, then, it is to be noted, is greater than the simple obligation for support provided for by Article 119

R. PASCAL, LOUISIANA FAMILY LAW COURSE § 5.6 (1975) (emphasis in original). Professor Pascal, basing his view of article 119 on his interpretation of the word "support" used in that article, has said that "[s]upport refers to whatever is necessary for living—traditionally food, shelter, and clothing." *Id.* at § 5.4.

As the court in *Ward* noted, article 160 alimony is limited to life's basic necessities.

source of the obligation, the courts had held that a wife had to be maintained "in the style and under the conditions to which she is accustomed by reason of her husband's means and position in the community."¹⁶⁵ If article 119 is now the source of the obligation to pay alimony pendente lite, a needy spouse is entitled only to the necessities of life.

Yet there is reason to believe that the legislature did not intend article 119 to be the source of the obligation. Act 72 gives the trial judge discretion in determining whether a needy spouse is entitled to alimony pendente lite.¹⁶⁶ If the obligation is based on article 119, the trial judge should not have the discretion to ignore the mutual obligation of support mandated by that article.

Moreover, it can be inferred from the scant legislative history available that the legislature intended to continue in force most of the distinctions between alimony pendente lite and permanent alimony. A House proposed bill contained an almost identical set of factors that the trial judge was to consider before exercising his discretion to allow or not to allow alimony in both article 148 and article 160. The entitlement and amount of alimony before and after divorce were to be conditioned on a number of factors, including the earning capacity of *both* spouses.¹⁶⁷ But this set of factors was incorporated only into the final version of article 160.¹⁶⁸

Since the legislature did not enact the proposed version of article 148 which would have *required* the trial judge to consider the earning capacity of the claimant spouse, as well as of the paying spouse, it might be inferred that the former is not to be taken into consideration in determining the entitlement to, or amount of, alimony pendente lite. It is possible that the legislature intended

For a discussion of these "basic necessities" in conjunction with alimony reciprocally owed by ascendants to descendants, see the section entitled "Alimony Between Ascendants and Descendants."

165. *Kimble v. Kimble*, 305 So. 2d 700, 702 (La. App. 4th Cir. 1974).

166. "[T]he judge *may* allow the claimant spouse . . . a sum for that spouse's support . . ." LA. CIV. CODE art. 148, as amended by 1979 La. Acts, No. 72 (emphasis added). Revised Statutes 1:3 provides that as to statutory construction, "the word 'shall' is mandatory and the word 'may' is permissive."

167. Representative Simoneaux, who co-sponsored Senate Bill 59, which became Act 72, also introduced House Bill 901, which contained proposed amendments to articles 148 and 160. Proposed article 148 provided: "In determining the entitlement and amount of alimony before divorce, the court shall consider the income and assets of the spouses; the liquidity of such assets . . . ; the standard of living and the earning capacity of the spouses, including their education, training, work experience, marketability of skills . . ." La. H.B. 901, proposed LA. CIV. CODE art. 148, 5th Reg. Sess. (1979).

168. Compare LA. CIV. CODE art. 160, as amended by 1979 La. Acts, No. 72, with LA. CIV. CODE art. 148, as amended by 1979 La. Acts, No. 72.

that the jurisprudential rule holding that the wife need not work to be entitled to alimony pendente lite¹⁶⁹ should be extended to all needy spouses, while at the same time extending the jurisprudential rule that the trial court shall consider the earning capacity of the husband¹⁷⁰ to the paying spouse. If such was the legislative intent, the scheme will not work because, should both spouses refuse to seek employment, there is no way to determine who is to be the paying spouse or the claimant spouse. These jurisprudential rules cannot be extended because they were the logical consequence of the non-reciprocal obligation of support owed by the husband to the wife.

Similarly, because the amendments to article 148 made no reference to the standard by which the amount of alimony pendente lite is to be determined,¹⁷¹ it might be inferred that the legislature intended to expand the rule that a claimant wife be maintained "in the style to which she is accustomed"¹⁷² to claimant husbands as well. If this were the intention, it is likely the legislature has failed to achieve its purpose. Since the "in the style to which she is accustomed" standard was based on the article 120 obligation of the husband to furnish the wife with the conveniences of life, and since *Orr* has rendered this non-reciprocal obligation unenforceable, the courts will be forced to look elsewhere for the standard by which to determine the amount of alimony pendente lite due a needy spouse.

In light of the failure of the legislature to recognize the need for a new source for the obligation to pay alimony pendente lite, it remains for the courts to shape the contours of amended article 148. Whether the change of the word "shall" to "may" gives the trial judge unbridled discretion is one question the appellate courts will have to answer. Even more importantly, the courts must determine what "support" a needy spouse is entitled to under amended article 148, a determination which can no longer depend on the non-reciprocal obligation of article 120.

169. See the cases cited in note 159, *supra*.

170. The means of the husband under article 148 have been held to include his property and earning capacity. See *Johnson v. Johnson*, 317 So. 2d 691 (La. App. 2d Cir. 1975).

171. See note 142, *supra*.

172. See *Kimble v. Kimble*, 305 So. 2d 700 (La. App. 4th Cir. 1974).