Should the Legitimate Child be Forced to Pay for the Sins of Her Father?: Sudwischer v. Estate of Hoffpauir

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I. INTRODUCTION

On August 20, 1979, Paul C. Hoffpauir died intestate, leaving behind a widow, Rosemary Wright; two legitimate children, his daughter Rosemary Hoffpauir Schuh and his adopted son Paul C. Hoffpauir, Jr.; an
estate valued at two million dollars; and Alana Sudwisher, who claimed to be his illegitimate child.\textsuperscript{1} Shortly after Hoffpauir's death, Alana Sudwisher filed suit against the Succession of Paul C. Hoffpauir seeking to be recognized as Hoffpauir's biological daughter and rightful heir.\textsuperscript{2} To assist her in this filiation action, Sudwisher sought to compel the legitimate daughter, Rosemary Hoffpauir Schuh, to undergo a DNA blood test for the purpose of revealing any relationship between the two alleged half-sisters. Sudwisher's simple motion to compel blood tests from the legitimate child, as part of discovery, is the focal point of both the judgment and this note.

The district court denied Sudwisher's motion, finding that Louisiana Revised Statutes 9:396(A), the statute pertaining to who may be ordered to submit to blood tests in paternity cases, controlled and did not authorize the testing of anyone other than the mother, child, and alleged father.\textsuperscript{3} In a \textit{per curiam} decision, the supreme court reversed the district court, holding that \textquote{\textquoteright when the blood test statute [Louisiana Revised Statutes 9:396(A)] and the discovery article [Louisiana Code of Civil Procedure article 1422] are considered together, they constitute authority for granting Sudwisher's motion.}\textsuperscript{4} Rehearing was granted to reconsider this ruling.\textsuperscript{5} In \textit{Sudwischer v. Estate of Hoffpauir}, the majority of the Louisiana Supreme Court reaffirmed its prior decision sustaining Sudwisher's motion to compel the DNA testing of Schuh's blood, holding that Louisiana Code of Civil Procedure article 1422 allowed the court to compel the legitimate child to disclose this \textquote{relevant evidence.}\textsuperscript{6} Ironically, the legitimate child was forced \textquote{to pay} for the sins of her father.\textsuperscript{8}

\begin{enumerate}
\item Brief for Respondent at 3, \textit{Sudwischer v. Estate of Hoffpauir}, 589 So. 2d 474 (La. 1991) (No. 91-CC-0515). In all briefs submitted to the Louisiana Supreme Court, and as reported by the district court, the plaintiff's last name is spelled Sudwisher (no \textquote{c}). However, the Louisiana Supreme Court spelled her name Sudwischer, and that spelling is used throughout the remainder of this note whenever reference is made to an opinion of that court. All other references will be made to Sudwisher.
\item Brief for Respondent at 3, \textit{Sudwisher}, (No. 91-CC-0515).
\item \textit{Sudwisher v. Estate of Hoffpauir}, 577 So. 2d 1, 1 (La. 1991) (\textit{per curiam}).
\item \textit{Sudwisher v. Estate of Hoffpauir}, 580 So. 2d 366 (La. 1991). This casenote is primarily concerned with the opinions expressed by the court upon rehearing.
\item 589 So. 2d 474.
\item \textit{Id}. at 475. Although the court also held that the illegitimate child's \textquote{constitutional right to prove filiation to a deceased father} outweighed the legitimate child's \textquote{expectation of privacy}, a comprehensive constitutional analysis of the court's holding is beyond the scope of this article. Although certain fundamental principles will be discussed where necessary, a thorough analysis of the many constitutional issues raised by this holding is the subject of a future article.
\item Ironic because traditionally illegitimate children have been discriminated against
\end{enumerate}
Sudwischer is a classic case of content over form. The majority, in its zest to protect the interests of the illegitimate child, improperly interpreted Louisiana Code of Civil Procedure article 1422. The Louisiana Supreme Court in Sudwischer balances the constitutional rights\(^9\) of the two alleged siblings to justify an opinion that is clearly at odds with the rules of civil procedure. This note, like the case it analyzes, is not about constitutional rights, but is about statutory interpretation. The purpose of this casenote is threefold: (1) to discuss how the court in Sudwischer supports its interpretation of the pertinent statutes; (2) to analyze thoroughly Louisiana Revised Statutes 9:396(A) and Louisiana Code of Civil Procedure article 1464 in order to arrive at the possible ways these statutes may be interpreted to resolve the issue of who may be compelled to submit to a blood test in filiation actions; and (3) to discuss the various legal implications involved in the use of DNA typing to prove paternity by testing relatives of an absent parent.

II. STATUTORY INTERPRETATION

A. Does Louisiana Revised Statutes 9:396 Control?

1. The Interrelationship of Civil Code Article 209 and Louisiana Revised Statutes 9:396-398

In Sudwischer, the plaintiff sued to establish filiation to her alleged father pursuant to Louisiana Civil Code article 209(B).\(^10\) Although Sud-
wisher was a legitimate child,\(^\text{11}\) in recognizing the concept of dual paternity,\(^\text{12}\) the Louisiana jurisprudence has interpreted Article 209 to permit a child to establish filiation to a man other than the mother’s husband.\(^\text{13}\)

According to Article 209(C), the illegitimate child must bring a filiation action either before her nineteenth birthday or within one year of the death of her alleged parent.\(^\text{14}\) Because Alana Sudwisher was over 30 years old when the action was brought,\(^\text{15}\) normally she would have been barred from filing suit. However, because of a grace period in the 1980 Act that amended and reenacted Articles 208 and 209,\(^\text{16}\) Sud-

\(^\text{11.}\) Alana was born in 1951 while her mother was married to Davis Benoit, thus making her a legitimate child. La. Civ. Code art. 179. Benoit was in prison during 1950-51. Even if he could have at one time disavowed his paternity (La. Civ. Code art. 187), he lost this right to disavow 180 days after having reason to know of Alana’s existence. La. Civ. Code art. 189. Sudwischer, 589 So. 2d at 475.

\(^\text{12.}\) The concept of “dual paternity,” which allows a child to have more than one legally recognized father, was first recognized by the Louisiana Supreme Court in Warren v. Richard, 296 So. 2d 813 (La. 1974), and has been often reaffirmed, see, e.g., Smith v. Cole, 553 So. 2d 847 (La. 1989); Griffin v. Succession of Branch, 479 So. 2d 324 (La. 1985); Malek v. Yekani-Fard, 422 So. 2d 1151 (La. 1982); Succession of Mitchell, 323 So. 2d 451 (La. 1975).

\(^\text{13.}\) “[C]hildren who fall into one of the enumerated classes contained in Article 209 are not precluded from instituting a filiation action under that article, they are merely relieved of the obligation to do so by operation of law.” Griffin, 479 So. 2d at 327 (emphasis omitted); “[O]ur interpretation of the language ‘a child not entitled to legitimate filiation,’ is that it refers not to all legitimate children, but to the child not entitled to legitimate filiation to the parent to whom he is attempting to prove filiation.” Succession of Levy, 428 So. 2d 904, 913 (La. App. 1st Cir. 1983). For an argument in support of reading the language of Article 209(B) as precluding children who enjoy legitimate status from bringing a filiation action, see Katherine S. Spaht, Persons, Developments in the Law, 1980-1981, 42 La. L. Rev. 403 (1982), and Griffin v. Succession of Branch, 480 So. 2d 313, 315-17 (La. 1986) (Dennis, J., dissenting).

\(^\text{14.}\) La. Civ. Code art. 209(C) reads, in pertinent part:

The proceeding required by this article must be brought within one year of the death of the alleged parent or within nineteen years of the child’s birth, whichever first occurs. . . . If the proceeding is not timely instituted, the child may not thereafter establish his filiation, except for the sole purpose of establishing the right to recover damages under Article 2315.

This 19-or-1 year time limitation was upheld on constitutional grounds in Succession of Grice, 462 So. 2d 131 (La.), appeal dismissed, 473 U.S. 901, 105 S. Ct. 3517 (1985).

\(^\text{15.}\) Brief for Respondent at 3, Sudwischer (No. 91-CC-0515) states that plaintiff, Alana Sudwisher, was nineteen years old in 1969, some eleven years before the present suit was filed.


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

wisher's filiation action was timely. Thus, Sudwisher had the right to bring a filiation action against her alleged deceased father.

Although not expressly mentioned in Article 209, blood tests are an accepted means of proof commonly used by parties in filiation actions to determine biological parentage. Not surprisingly, "scientific test results" are included in the list of types of "proof of filiation" in comment (b) to Article 209, and the evidentiary value of such tests has long been recognized by American courts.

In paternity cases involving blood tests, Louisiana Revised Statutes 9:396-398 set forth the applicable procedures to be followed. By adopting these provisions in 1972, the Louisiana Legislature recognized the great significance of blood testing in paternity cases. Although in 1972 blood tests were primarily used only to disprove paternity (because the older tests lacked the ability to link parent to child), today these statutes facilitate the use of scientific evidence both to support and to refute paternity claims. Without the use of blood tests, illegitimate children

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17. La. Civ. Code art. 209, comment (b) further states: "Contrary evidence would include but not be limited to the types of proof outlined in the Official Comments to Civil Code Art. 187." The comment to Article 187 makes explicit reference to "blood grouping test results or any other reliable scientific test results."


[The modern status of blood tests has been described by one commentator as follows: "As far as accuracy, reliability, dependability—even infallibility—of the test are concerned, there is no longer any controversy. The result of the test is universally accepted by distinguished scientific and medical authority...[There is now...practically universal and unanimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity."


19. Found in Code Title VII—"Of Father and Child," Chapter 1—"Children," Part I-A—"Blood Tests For Determination Of Paternity," the particular sections address the following: § 396—Authority for test; § 397—Selection of expert; § 397.1—Compensation of expert witnesses and recovery of testing costs; § 397.2—Chain of custody of blood samples; § 397.3—Admissibility and effect of test results; § 398—Criminal actions.

20. La. R.S. 9:396 was added by 1972 La. Acts No. 521, and was modeled after the Uniform Act on Blood Tests to Determine Paternity, promulgated in 1952, which was superseded in 1973 by the Uniform Parentage Act, 9B U.L.A. 295 (1992). See infra note 32 for text.

21. As blood grouping tests have become increasingly sophisticated, the analyst has become able not only to exclude the possibility of paternity, but also to estimate the probability of paternity. As testing methods have evolved, so has the judicial interpretation of these statutes to allow the results to prove as well as disprove paternity.

Through the adoption of the Uniform Act on Blood Tests, the legislature has demonstrated a willingness to allow scientific data to assist the fact finder
hoping to filiate to a reluctant father would confront the often impossible task of proving paternity by circumstantial evidence. Conversely, wrongly accused "fathers" would be denied an invaluable defense.

In a typical paternity case, the blood of the alleged father, mother, and child is tested to determine the probability that the three are related.\(^2\) The great value of blood testing, when both alleged parents and the child are tested, resides in its ability to exclude the wrongly suspected father with certainty.\(^2\) Even the most sophisticated blood tests, however, cannot prove with one hundred percent certainty that the three individuals are related as child and parents.\(^2\) For this reason, uncorroborated scientific test results alone cannot prove paternity.\(^2\)

Because both of Sudwisher's alleged parents had died before she filed suit and necrotic tissue of Hoffpauir could not be tested,\(^2\) Sud-
wisher was unable to compare her blood type to that of her parents.\textsuperscript{27} To assist her in attempting to meet the more burdensome "clear and convincing" standard of proof mandated by Article 209(B), Sudwisher filed a motion to compel Schuh (Hoffpauir's only legitimate, biological child) to submit to blood tests for the purpose of DNA testing.\textsuperscript{28} Her request was novel because it sought to compel individuals other than the mother and alleged father to submit to testing. Although the type of DNA testing requested by Sudwisher would be able to produce relevant evidence regarding Hoffpauir's paternity,\textsuperscript{29} it was neither expressly sanctioned nor prohibited by Louisiana Revised Statutes 9:396-398.\textsuperscript{30}

Specifically, 9:396(A) establishes who the court may order to undergo testing. While \textit{Sudwischer} was pending, Louisiana Revised Statutes 9:396(A) provided:

\begin{quote}
Notwithstanding any provisions of law to the contrary, in any civil action in which paternity is a relevant fact, or in an action en desaveu, the court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at the time so as not to delay the proceedings unduly, shall
\end{quote}

\begin{footnotes}
\item[27] The primary issue of \textit{Sudwischer}, as well as the problems associated with the exhumation of corpses, could be avoided if a DNA print of the individual was available for analysis. Similar to fingerprinting, but a much more effective means of identification, an individual's DNA "print" can be made and recorded during an individual's life, or at death, and saved for future use. "I suggest to individuals ... who have any financial resources to have a DNA test done and put in their files. It is something to protect your estate... We do 'kidcode' at birth. We recommend 'having it done at birth ... a DNA pattern is good for life." Interview with Dr. Craig Cohen, DNA Expert, in New Orleans, La. (Dec. 30, 1992) \textit{hereinafter Cohen Interview}. See \textit{Estate of Pew}, 598 A.2d 65 (Pa. Super. Ct. 1991), \textit{appeal denied}, 607 A.2d 255 (Pa. 1992) (The medical records of an alleged deceased father, which indicated the decedent's blood type and effectively established non-paternity, were admissible at trial.).

\item[28] Although DNA testing can use human hair, semen, saliva, or scrapings of other tissue for the purpose of identification, the use of blood, when available, assures optimal results. This is not to suggest that DNA testing is impossible using hair or other tissue, but simply that as a practical reality, commercial labs that perform paternity tests primarily use blood samples. Although semen is sometimes used, given the significant invasion of privacy occasioned by such a seizure, "blood is the ideal thing." Cohen Interview, \textit{supra} note 27. \textit{See infra} note 192.

\item[29] The type of DNA testing sought in \textit{Sudwischer}, called DNA fingerprinting, is capable of determining the possibility that the two alleged siblings shared a common relative. \textit{See infra} Section III for discussion of the relevancy of DNA testing under these circumstances.

\item[30] \textit{See infra} discussion at text accompanying note 39.
\end{footnotes}
order the mother, child, and alleged father to submit to the
drawing of blood samples . . . .\textsuperscript{31}

The narrow issue regarding the interpretation of Louisiana Revised Statutes 9:396(A) concerns the scope of the statute. That is, does it only allow the testing of the mother, child and alleged father in every paternity case, or can the court order others not enumerated in the statute to submit to testing?

Louisiana Revised Statutes 9:396(A) is modeled on section one of the Uniform Act on Blood Tests to Determine Paternity.\textsuperscript{32} The primary purpose of this Uniform Act was to give defendants, usually the alleged father, the right to demand that the mother and alleged child be tested in order to prove non-paternity.\textsuperscript{33} Indeed, if the properly administered test did not exclude the defendant from being the father, then the court, depending upon the likelihood of paternity,\textsuperscript{34} could either admit or

31. La. R.S. 9:396(A) (1990) further provided:
and shall direct that inherent characteristics in the samples, including but not limited to blood and tissue type, be determined by appropriate testing procedures.
If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

See infra note 40 for amended provisions to this statute.

32. Section one of this Uniform Act provides:
§ 1. Authority For Test.—In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at the time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any parties refuse to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

Uniform Act on Blood Tests to Determine Paternity (1952) (superseded by the Uniform Parentage Act, 9B U.L.A. 295 (1992)).

33. The "Explanatory Statement" to the Uniform Act reads in part:
Scientific analysis of blood samples taken from the mother, the child, and the alleged father can determine with certainty in a large number of cases that the person charged with paternity could not be the father. . . . An analysis of blood samples will establish the fact of non-paternity but will not establish the fact of paternity.

Id. The redactors of this Act did not envision the revolutionary scientific advances that were to follow many years later.

34. If the blood tests establish the possibility of paternity, then the rarity of the alleged father's blood type is directly proportional to the likelihood of his paternity. This principle, which is based on statistical probabilities, is the same fundamental concept involved in modern blood grouping, genetic marker, and DNA testing. That is, with older blood tests, experts could only identify an individual's blood type and compute the percentage of the general populace who shared that blood type. Since the probability of paternity is directly proportional to the incidence of the individual's blood type in the
exclude the test results at trial. The original intent of this Uniform Act was not to force anyone other than the mother, child, and alleged father to submit to testing, given that in 1952 when the proposal was adopted the need or relevance of such a request was not within the purview of the then existing technology.

The following language of both the Uniform Act and Louisiana Revised Statutes 9:396(A), however, seems to suggest that it is within the court's discretion to compel nonparties to submit to testing: "[T]he court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action . . . shall order . . . ." If the phrase "any person whose blood is involved" is read to refer to those other than the mother, child, and alleged father, then it is arguable that the court possesses the authority to order almost anyone to submit to testing provided that her "blood is involved"; however, this language seems to refer only to who may request a blood test or upon whose behalf such a test may be ordered—not to who may be forced to undergo testing.

In other words, although this language suggests that the court has the authority to compel the mother, child, and alleged father to submit regardless of their party status, it does not necessarily suggest that other individuals may be forced to undergo testing simply because a request is made. For instance, in a divorce action where the wife, to prove adultery, alleges that the husband conceived a child outside of marriage, the court could apparently order the alleged mother and child, both of public at large (or within a more specific ethnic group), it follows that if the individual's unique genetic structure can be identified and then compared to another individual's genetic structure, then the resultant probability based on a "match" is drastically more precise than any estimate based on a comparison of the defendant's blood type to the percentage of individuals in the general public who share that blood type. William C. Thompson & Simon Ford, DNA Typing: Acceptance and Weight of the New Genetic Identification Tests, 75 Va. L. Rev. 45, 45 (1989).

Stated differently, every person who shared the defendant's blood type was a possible candidate for paternity. The greater this number, the more likely a coincidence rather than the defendant accounted for the "positive" test result. If no one else shares the defendant's genetic structure, then it stands to reason that a match effectively proves paternity. See infra discussion at text accompanying note 188.

35. The "Explanatory Statement" of the Uniform Act on Blood Tests to Determine Paternity contends that "Should the results of the test not eliminate the defendant as the possible father, the trial would proceed as if the test had not been made." Uniform Act on Blood Tests to Determine Paternity (1952), superseded by the Uniform Parentage Act, 9B U.L.A. 295 (1992). In comparison, section 4 of the Uniform Act provides: "If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type." Id. Despite this contradiction, clearly the redactors of the Uniform Act were skeptical of blood test results which "proved" paternity.

whom are nonparties with no direct interest in the divorce proceeding, to submit to testing "on behalf of" the father "whose blood is involved."" Similarly, in a divorce proceeding based on the wife's adultery, or in a disavowal action, this language appears to allow the court to order the child of the marriage to submit to testing, even if not technically a party to the action. Additionally, in a filiation action brought against an alleged parent by the child, if the other parent is not involved in the litigation, this provision would allow the court to force the nonparty to submit to testing in order to determine paternity. However, in any case imagined at the time the Uniform Act was enacted (1953 and 1972), the court is only given the authority to test the three individuals who are able to provide conclusive proof of non-paternity—the mother, child, and alleged father. Since proving non-paternity was the purpose of the Uniform Act, it does not follow that others besides the parents and child could have been compelled to submit to testing.

Because it appears that the mother, child, and alleged father, even if nonparties, may be ordered by the court to give a blood sample, it could be argued that this language expands the scope of those who may be compelled to submit to testing to include others than those enumerated in Louisiana Revised Statutes 9:396(A). Although somewhat suggestive, this does not mean that the court may order blood tests of a nonparty who is not an alleged parent or child, but "whose blood is involved." While the court's discretion as to who may be compelled is arguably not limited to parties, it is nevertheless limited to the mother, child, and alleged father. Thus, in Sudwischer, the plaintiff, the alleged child, could compel both of her alleged parents to submit, regardless of their party status. In no situation, however, does this language explicitly authorize the testing of relatives outside of the metaphorical triangle created by the mother, child, and alleged father.

The issue of who the court may compel to submit to blood testing is not resolved by either the Uniform Act or Louisiana Revised Statutes 9:396. Unless interpreted strictly to preclude the testing of anyone other than the mother, child or alleged father, under the circumstances present

37. In this case, the court's order would more likely follow a motion by the wife requesting as much.

38. See infra, Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955), at text accompanying note 161. In Fong Sik Leung, an Oriental child asserted his American citizenship by claiming that his father was an American citizen. Although his alleged father was available for testing, since he was not a party to his son's suit to establish citizenship, the court refused to order the alleged father to undergo blood tests pursuant to Federal Rule 35. If, however, a statute similar to the Uniform Act on Blood Tests to Determine Paternity could have been invoked, then the alleged father's nonparty status would not have precluded such a court order, since the child could have been considered "any person whose blood is involved."
in *Sudwischer*, Louisiana Revised Statutes 9:396 does not provide adequate guidance. Because no official statement of policy accompanies the legislation, any definitive statement of the legislative intent underlying the statute remains speculative. It is, however, reasonable to assume that the Louisiana Legislature, when enacting this statute, did not contemplate the factual scenario of *Sudwischer*. Although amended after the *Sudwischer* case to explicitly allow the compulsion of tissue samples in addition to blood samples, Revised Statutes 9:396 has not been modified to authorize the testing of anyone other than the mother, child, and alleged father. By not making an explicit policy statement concerning the present issue, either before or after *Sudwischer*, the Louisiana Legislature has abdicated to the courts the task of determining who may be compelled to submit to testing.

2. The Louisiana Supreme Court's Opinion

Faced with an ambiguous statute, and no prior Louisiana jurisprudence on point, the issue before the Louisiana Supreme Court concerning the applicability of Louisiana Revised Statutes 9:396 was *res nova*. The majority opinion, Justice Lemmon's concurrence, and the dissenting opinion of Justice Dennis all found that Louisiana Revised Statutes 9:396(A) neither statutorily authorized the testing sought by Sudwisher nor limited the court's discretion in cases where the testing of individuals other than the mother, child and alleged father is sought. The majority, after stating that the statute "postulates the existence of an alleged living father" and, when read in context, is "directed at establishing paternity for purposes of child support," asserts that "[t]here is no indication

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39. See Blakesley, supra note 8, at Part II, Ch. 1. Moreover, in 1972 the type of DNA testing sought by Sudwisher did not yet exist. It was not until quite recently, 1984, that science developed a technique to visually identify DNA for this purpose. See Cassandra Franklin-Barbajosa, *The New Science of Identity*, National Geographic, May 1992, at 112.


   Notwithstanding any other provision of law to the contrary, in any civil action in which paternity is a relevant fact, . . . the court . . . shall order the mother, child, and alleged father to submit to the collection of blood or tissue samples, or both, and shall direct that inherited characteristics in the samples . . . .

   (underlined portion represents modified language).


42. Sudwischer v. Estate of Hoffpauir, 589 So. 2d 474, 474-75 (La. 1991), cert. denied, 112 S. Ct. 1937 (1992). Typically, a paternity action is filed to force a reluctant parent to meet her financial responsibility of providing child support. Once the child becomes an adult, this parental duty of support ends. Thus, any filiation action brought by an adult child will be filed primarily for succession purposes. However, only if the adult is 18 years old, or like Sudwisher, filed suit within one of the grace periods provided
that the statutory language expresses a deliberate policy of limitation.\textsuperscript{43} Although there is equally no indication that public policy favors an expansive reading of the statute,\textsuperscript{44} the majority uses this insight as an analytical springboard to conclude that the general rules of discovery\textsuperscript{45} should be applied to allow testing in cases where a person not enumerated in the statute is available for testing.\textsuperscript{46}

The majority's cryptic reading of Louisiana Revised Statutes 9:396 is better explained by Justice Lemmon in his concurrence. Justice Lemmon and the majority read the imperative language of the statute as limiting the court's discretion only in those situations where the three parties named therein are available for testing.\textsuperscript{47} That is, Louisiana Revised Statutes 9:396 mandates that the court "shall" order the testing of the "mother, child, and alleged father" if possible; but if not possible, then the court, because of the general rules of discovery, may exercise its broad discretion and order the testing of other persons. Because \textit{Sudwischer} cannot possibly test her mother and alleged father, the court is not bound by Louisiana Revised Statutes 9:396.

If, however, Louisiana Revised Statutes 9:396 is read strictly, then the court's discretion is limited in all situations. That is, as discussed previously,\textsuperscript{48} given the purpose of the Uniform Act upon which 9:396 is modeled, the court only has the authority to compel the mother, child, and alleged father to undergo testing. The majority opinion, however, views the imperative "shall" of the statute as being the only check on the court's discretion, and so it finds the statute inapplicable given the facts of \textit{Sudwischer}.

Although the dissent does not explicitly address the applicability of Louisiana Revised Statutes 9:396, by primarily attacking the majority's constitutional balancing,\textsuperscript{49} it can be argued that Justice Dennis and Chief Justice Calogero tacitly agree, given the facts of \textit{Sudwischer}, that Louisi-
iana Revised Statutes 9:396(A) does not control. If the dissent had asserted that the court was bound by the mandates of the statute and could not order Schuh to submit to testing, then any discussion of the competing constitutional interests involved would be superfluous. Furthermore, by arguing that it is inappropriate, because of the intrusive nature of blood tests, to compel nonparties to submit to testing without statutory authority, the dissent inadvertently gives credence to the majority's interpretation of Louisiana Revised Statutes 9:396. Significantly, the dissent does not read the language of the statute as limiting the court's discretion to include only the mother, child, and alleged father.

By stressing Schuh's nonparty status, the dissent, in effect, says that if Schuh was a party then maybe she could be compelled to undergo testing pursuant to the applicable discovery article. According to Louisiana Revised Statutes 9:396, one's party status is not determinative of the issue; therefore, to insinuate that an individual's party status is somehow the operative fact, is to assert that the statute does not apply.

Focusing narrowly on the issue concerning the scope of the statute, only Justice Cole, in dissent, argued that "La. R.S. 9:396 is explicit and controls... It does not authorize the blood testing of an alleged sibling to prove filiation." Justice Cole assumes the legislature had good reason not to authorize the testing of any other individuals, and he reads the statute restrictively. If Justice Cole is correct, then Sudwischer becomes a very easy case involving statutory interpretation: Schuh, since she is not the mother, child or alleged father, cannot be ordered by the court to submit to blood tests.

3. Louisiana Appellate Decisions

Despite the potential gap in Louisiana Revised Statutes 9:396(A) regarding who may be ordered to submit to blood tests, only two

50. Sudwischer, 589 So. 2d at 478-79 (Dennis, J., dissenting).
51. The dissent also questions whether the majority may use La. R.S. 9:396 "to support claims of filiation for establishment of rights to a succession." Id. at 478 (Dennis, J., dissenting). Although this insight has more to do with the dissent's constitutional analysis, this criticism is unfounded, since the majority does not ultimately use La. R.S. 9:396 to support its order. Perhaps the dissent's inaccurate observation was prompted by the court's original per curiam decision, in which the majority wrote: "When the blood test statute and the discovery article are considered together, they constitute authority for granting Sudwischer's motion." Sudwisher v. Estate of Hoffpauir, 577 So. 2d 1, 1 (La. 1991) (per curiam). On rehearing, the majority retreats from this reasoning and instead bases its authority to compel blood tests exclusively on La. Code Civ. P. art. 1422.
53. Sudwischer, 589 So. 2d at 479 (Cole, J., dissenting).
54. The lower court, the Fifteenth Judicial District Court, Parish of Acadia, also found that La. R.S. 9:396(A) precluded the court from ordering Schuh to undergo tests. Id. at 474.
Louisiana appellate cases rendered before \textit{Sudwischer} considered whether the statute authorized the testing of individuals other than the mother, child, or alleged father. In \textit{Smith v. Jones},\footnote{55. 566 So. 2d 408 (La. App. 1st Cir. 1990).} a first circuit case, an unmarried man claimed to be the biological father of a married woman's child. To prove his paternity, the alleged biological father sought to compel the mother, child, and husband to submit to blood tests pursuant to Louisiana Revised Statutes 9:396.\footnote{56. The court acknowledged the unwed father's cause of action, reasoning: "[w]here a biological father has an actual relationship with his child or where he has been prevented from forming an actual relationship by the mother and he institutes an avowal action within a reasonable time of the child's birth, he may utilize R.S. 9:396 in an avowal action." \textit{Id.} at 414.} The court in \textit{Smith} concluded, with respect to the application of Louisiana Revised Statutes 9:396 in an avowal action, that

\begin{quote}
La. R.S. 9:396 does not provide for the compulsory testing of anyone other than the mother, the child and the alleged biological father. Mr. Jones [the legal father] does not fall into any of the above categories; therefore, the trial court judgment is affirmed to the extent that it refused to compel Mr. Jones to submit to testing under La. R.S. 9:396.\footnote{57. \textit{Id.}}
\end{quote}

Interestingly, the court did not characterize the husband of the mother as an "alleged father." Thus, Mr. Jones did not fall within the ambit of the statute. The court read the statute as excluding presumptive fathers from being forced by an outside "father" to undergo a blood test.\footnote{58. Other jurisdictions have also considered the status of the husband as a party to a filiation action. \textit{See}, e.g., John M. v. Paula T., 571 A.2d 1380 (Pa.), \textit{cert. denied}, 111 S. Ct. 140 (1990) (The court interpreted 42 Pa. C.S.A. § 6133 (West Supp. 1992) (repealed 1990), which mirrors La. R.S. 9:396(A) and is based on the same Uniform Act, as not affording the putative father the right to compel the "[p]resumptive' father-husband," to submit to testing.); \textit{In re Mengel}, 429 A.2d 1162, 1168 (Pa. Super. Ct. 1981) (Putative father sought to compel husband to undergo blood tests. Court denied his motion, stating: "This is an action to determine if appellant [the putative father] is the boy's father; it is not one to determine who is the father if appellant is not. . . . The Uniform Act on Blood Tests to Determine Paternity . . . provides authority only for tests on appellee [the mother], the child, and appellant [the putative father], who is the only alleged father in the present action."). \textit{But see Colorado ex rel. M.P.R.}, 723 P.2d 743 (Colo. Ct. App. 1986) (Specific Colorado statute allows testing of all "possible fathers" in a paternity action; therefore, a putative father could compel husband to undergo testing.).} The court justifies this interpretation by reasoning that Mr. Smith (plaintiff) had "no right to assert the legitimate father's right of disavowal."\footnote{59. \textit{Smith}, 566 So. 2d at 414. See La. Civ. Code arts. 184-190.} Although a blood test that excludes the husband as being the biological father of the child would have no legal effect on the
husband's status as father, practically, this determination might cause the husband to seek a divorce or otherwise act contrary to the best interests of the child. In a disavowal action, however, the legal father is considered an "alleged father," and can be compelled by the court to submit to testing.

In the other lower court case involving this issue, Cormier v. Cormier, an adult illegitimate child sought to prove biological filiation to his alleged living father. The plaintiff's mother was deceased and unavailable for blood testing. "[A]t plaintiff's insistence," not through a court order, blood samples were taken from the plaintiff, the alleged father, and from the plaintiff's maternal aunt. Recognizing that Louisiana Revised Statutes 9:396 "makes no provision for such a substitution for the blood of an unavailable mother," the third circuit, instead of either condemning or condoning this "substitution," focused on the degree of judicial error occasioned by it. Finding that the lower court committed harmless error in admitting the results of the blood test, the court dodged the difficult question, saying nothing more than: "The Uniform Act [on Blood Tests to Determine Paternity] is silent as to how a party attempting to establish filiation is to proceed where his mother is, as here, deceased or otherwise unavailable."

Smith and Cormier provide little support for either a strict or a liberal interpretation of Louisiana Revised Statutes 9:396. In Smith, because the three parties enumerated in the statute were available for

60. If 180 days had expired from the date that the husband knew or should have known of the child's existence, then the husband lost his right to disavow the child. La. Civ. Code art. 189.

61. Allowing such an action may have an adverse effect on the family unit. "I am deeply concerned about the effect that these decisions have on the stability of the established family unit." Smith, 566 So. 2d at 415 (Carter and Savoie, JJ., concurring). For a discussion of other practical effects of "dual paternity" on family relationships and succession law, see Katherine S. Spaht and William Marshall Shaw, Jr., The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell, 37 La. L. Rev. 59 (1976).


63. 479 So. 2d 1069 (La. App. 3d Cir. 1985).

64. Although the plaintiff was a legitimate child, his status did not bar his suit, because he was "illegitimate" vis-a-vis the alleged father. See discussion supra at note 13.

65. Although not discussed in the opinion, the plaintiff must have filed suit during one of the applicable grace periods accompanying the amendment of Article 209, since he was over 60 years old at the time of suit; thus, he would have been barred from bringing a filiation action under Article 209(C).

66. Cormier, 479 So. 2d at 1071.

67. Id.

68. Id. at 1071-72.

69. Id. at 1072.
testing, the blood type of the husband was rightfully considered irrelevant. The plaintiff's objective was to prove his paternity, not to prove who was the true father of the child. In other words, even if the court had the discretion to order other individuals to undergo testing, there was no need to test the husband.

Similarly in Cormier, because the court only addressed the issue of admissibility, and not whether it could order persons other than those enumerated in Louisiana Revised Statutes 9:396 to submit to testing, the opinion is easily distinguished. However, because the court assumed it was erroneous to admit the test results, as Louisiana Revised Statutes 9:396 did not expressly provide for such testing, it appears that the third circuit read the statute strictly. Simply stated, both courts decided the cases before them without resolving the present issue.

4. Other Jurisdictions

Other jurisdictions that have either adopted the Uniform Act on Blood Tests to Determine Paternity, or have statutes parallel to Louisiana Revised Statutes 9:396, have addressed this issue. In William M. v. Superior Court, a California appellate court issued a writ of mandate directing the lower court to vacate its order compelling the parents of

70. "Any conclusion relative to paternity would be highly suspect if based exclusively on results of a blood test procedure varying substantially from the procedure contemplated by the Uniform Act." Id. By considering the voluntary "substitution" of the mother's sister to constitute a "substantial" deviation from the "procedure contemplated" by the statute, the court implies that only a very restrictive reading of La. R.S. 9:396(A) is appropriate.

71. Unlike courts in other jurisdictions where specific statutes provide a separate means of proving paternity, Louisiana courts cannot distinguish between filiation actions brought for the purpose of inheritance and those brought for child support. "If the proceeding is not timely instituted, the child may not thereafter establish his filiation . . . ." La. Civ. Code art. 209(C). Louisiana Civil Code article 209 embraces, at the least, both actions. With the sole exception of an action brought to recover damages pursuant to an Article 2315 wrongful death action (see supra note 14 for text of Article 209(C)), a child seeking to filiate to an alleged father, for whatever purpose, must conform to the requirements of Article 209. Furthermore, Article 209 allows the adult child who brings a filiation action for wrongful death purposes to recover tort damages only, not to participate in the succession of the deceased. The legislature, in implementing Article 209(B) (see supra note 10 for text), which mandates the appropriate level of proof required to filiate to a deceased parent, presumptively contemplated that actions involving inheritance matters would be impacted by this statute. And according to Civil Code article 3506(8), for an illegitimate child to be considered a "child" of her alleged father, she must fulfill the requirements of Article 209; namely, she must bring a successful filiation action within the peremptive period of Article 209(C). For cases that do recognize a statutory support/inheritance distinction, see In re Sanders, 3 Cal. Rptr. 2d 536 (Ct. App. 4th 1992); In re Estate of Greenwood, 587 A.2d 749 (Pa. Super. Ct. 1991).

72. 275 Cal. Rptr. 103 (Ct. App. 3d 1990).
a deceased putative father to submit to blood tests. The alleged father, Michael, died six months after the birth of William M. Three months after Michael’s death, William’s mother filed suit against the deceased’s parents in their capacity as personal representatives of Michael’s estate. The trial court initially sustained the defendant’s demurrer upon discovering that no estate existed and that Michael’s parents were obviously not its personal representatives. Amending her complaint, the mother sued the defendants directly as “Parents of [Michael].” Eventually, after finding that a prima facie case indicating Michael’s paternity had been presented, the trial court ordered the defendants to submit to blood tests, citing its “inherent power” as authority. The alleged grandparents appealed.

Interpreting California Evidence Code section 892, which is substantially the same as Louisiana Revised Statutes 9:396, the court stated, “[G]iven the substantial invasion of privacy occasioned by a compelled submission to blood tests, we view the specific application of Evidence Code section 892 only to the mother, child and alleged father as expressing a deliberate policy of limitation.” The California court refused

73. Id. at 104.
74. Id.
75. Although not expressly stated in the opinion, the majority in Sudwischer distinguishes William M. on the basis that Michael died without leaving behind an estate. Sudwischer v. Estate of Hoffpauer, 589 So. 2d 474, 475 (La. 1991). The reasoning of William M., however, does not support this distinction. Even if an estate existed in William M., thereby making the paternity action one for succession purposes, the blood group of the grandparent, even if a party, would not be at issue. See discussion infra at text accompanying note 158. See also In re Sanders, 3 Cal. Rptr. 2d at 536 (An estate did exist, but the court still refused to compel the legitimate children of the deceased to submit to testing.).

Moreover, if indeed the illegitimate child has a “constitutional right to prove filiation,” then this distinction would make that right contingent on the existence or non-existence of an estate, thus reducing her right, which presumably includes strictly personal and psychological facets, to an economic entitlement. If the existence of an estate is the determinative factor, then the right to filiate is transformed into the right to inherit.

76. William M., 275 Cal. Rptr. at 104. The argument that courts possess the “inherent authority” to compel blood tests does not withstand scrutiny. If a court has the inherent authority to order blood tests without specific legislation, then the prerequisites of La. R.S. 9:396(A) and La. Code Civ. P. art. 1464, or any similar statute, are rendered meaningless.


In a civil action in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, and shall upon motion of any party to the action made any time so as not to delay the proceedings unduly, order the mother, child and alleged father to submit to blood tests.

78. William M., 275 Cal. Rptr. at 104-05 (citing Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966)).
to read the statute expansively, finding in it no authority to compel blood tests of the deceased’s relatives. According to the court in William M., the decision to invade the privacy of someone other than the mother, child, and alleged father is better left to the legislature.79 Following the lead of William M., the court in In re Sanders,80 a case with facts very similar to those involved in Sudwischer, refused to apply California Evidence Code § 892 to support the plaintiff’s motion to test the three legitimate children of the deceased’s alleged father and their mothers. The interpretation of Section 892 in William M. and In re Sanders supports Justice Cole’s strict interpretation of Louisiana Revised Statutes 9:396.81

In a factually similar case in Texas, Manuel v. Spector,82 the alleged paternal grandmother of a minor child sought a writ of mandamus directing the lower court to rescind its order compelling her to submit to a blood test. The alleged father, plaintiff’s son, died days after the birth of his allegedly illegitimate child, J.B.D., and the child’s mother sought to establish paternity, in part, by testing the alleged father’s parents.83 Although the court in Manuel allowed the illegitimate child to filiate after the death of her alleged father,84 the Texas appellate court rejected the mother’s contention that the lower court had authority to compel testing through the statute allowing blood tests.85 Unlike the court in William M., however, the court in Manuel did not read the

79. The court in William M. was impressed by the Minnesota legislature’s amendment to its parallel statute, Minn. Stat. Ann. § 257.62 (West 1992) (see infra note 143 for the text of the statute) which expressly provides for the testing of relatives in cases where the alleged father is deceased. Commenting on this development, the court wrote, “The amendment of the Minnesota statute to encompass grandparents is consistent with our view that the issue is one for the legislature to decide.” William M., 275 Cal. Rptr. at 106 n.5.

80. 3 Cal. Rptr. 2d 536 (Ct. App. 4th 1992).

81. Unlike Justice Cole in Sudwischer, however, the court in William M. did inquire into the applicability of the California discovery articles, even after its determination that the blood test statute reflected a deliberate policy of limitation. See infra discussion at note 130. This contrast is explained by the differences in the language of the two statutes. Cal. Evid. Code § 892 (West 1992) does not contain the “[n]otwithstanding any provision of law to the contrary” provision contained in La. R.S. 9:396. See infra discussion concerning the significance of this language at note 173.

82. 712 S.W.2d 219 (Tex. Ct. App.—San Antonio 1986).

83. Id. at 221.

84. See Texas Fam. Code § 13.01 (West 1986) (amended 1989), which read in 1986: “A suit to establish paternity ... must be brought on or before the second anniversary of the day the child becomes an adult, or the suit is barred.” But see In re George 794 S.W.2d 875, 877 (Tex. Ct. App.—Tyler 1990) (A paternity action cannot be brought after the death of the putative father.).

85. Although not based on the Uniform Act on Blood Tests to Determine Paternity, Tex. Fam. Code § 13.02(a) (West 1986) (amended 1989), provided, in pertinent part: “When the respondent appears in a paternity suit, the court shall order the mother, alleged father, and child to submit to the taking of blood ... .”
blood testing statute as expressing a deliberate policy of limitation; therefore, like the court in *Sudwischer*, it examined the pertinent discovery articles in an attempt to find authority to compel the grandparent to submit to testing. Unlike the court in *Sudwischer*, however, the court in *Manuel* found none.  

In a Minnesota case, *Voss v. Duerscherl*, the trial court initially ordered the mother, child and alleged father to undergo blood tests to determine paternity. Before the date of the scheduled test, however, the alleged father died. The mother then sought to compel the decedent's father, brother, and sister to undergo appropriate blood testing. In 1982, a lower court interpreted the then applicable statute which was similar to the present Louisiana Revised Statutes 9:396, and denied the motion, finding that the decedent's relatives were not parties to the action and therefore could not be ordered to submit to blood tests. Because the trial court did not deny the plaintiff's motion by strictly construing the statute, but instead refused to order the testing because of the nonparty status of the targeted individuals, one can infer that the court found the statute was not controlling. That is, had the court strictly construed the statute, any inquiry into the status of the parties would have been irrelevant. Like the majority, Justice Lemmon's concurrence, and Justice Dennis' dissent in *Sudwischer*, this court did not hold that the language of the blood testing statute was dispositive, but instead looked to other sources of law to resolve the issue.

B. Is *Louisiana Code of Civil Procedure Article 1422* Applicable?

1. **Article 1422 or Article 1464?**

To circumvent the problematic inference drawn from Louisiana Revised Statutes 9:396—that only the mother, child and alleged father

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86. See discussion supra at note 136.
87. 384 N.W.2d 499 (Minn. Ct. App. 1986).
88. To avoid unnecessary confusion, reference is being made to a single trial court, even though the litigation involved in this case included nine different trial courts, three referees, and two appellate courts.
89. *Voss I*, 384 N.W.2d at 500.
90. Prior to the 1983 Revision, Minn. Stat. Ann. § 257.62 (West 1992) (amended 1983) then provided: “The court may, and upon request of a party shall, require the child, mother, or alleged father to submit to blood tests or genetic tests, or both. The tests shall be performed by a qualified expert appointed by the court.” This statute is modeled on § 11 of the Uniform Parentage Act.
91. *Voss I*, 384 N.W.2d at 500.
92. For a detailed discussion of this case, concerning issues not pertinent to the present discussion of the blood testing statute, see supra text accompanying note 141.
93. Indeed, although the Minnesota statute does not contain the “on behalf of any person whose blood is involved” language as found in La. R.S. 9:396 (which arguably allows the court to compel nonparty parents and children to submit), neither does it expressly limit the court's authority to only parties to the suit. This “party” prerequisite does not arise from the statutory language.
could be compelled to submit to blood testing—the majority and Justice Lemmon gravitated to the more general evidentiary rule of Louisiana Code of Civil Procedure article 1422. In moving away from Louisiana Revised Statutes 9:396, however, the court overlooked the more appropriate, albeit less general, Code of Civil Procedure article 1464.

Chapter 3 of Title III of Book II of the Louisiana Code of Civil Procedure pertains to the discovery of evidence. The general scope of discovery is governed by Article 1422 which authorizes the discovery of any relevant, non-privileged matter. Article 1422 provides, in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.\textsuperscript{94}

The broad scope of this general article is limited by the more specific articles that follow.\textsuperscript{95}

Since an individual's blood, the matter sought to be discovered in \textit{Sudwischer}, is more related to her "mental or physical condition" than her "books, documents, or other tangible things,"\textsuperscript{96} Article 1464 is more on point and should have been considered. Entitled "Order for Physical or Mental Examination of Persons," Article 1464 then read:

When the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control, except as provided by law. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the

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94. La. Code Civ. P. art. 1422 further states: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."


96. Although the scope of discovery is certainly broader than "books, documents, or other tangible things," this list does represent the typical material subjected to discovery.
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examination and the person or persons by whom it is to be made.\(^\text{97}\)

Specifically, Article 1464 provides for the discovery of the "mental or physical condition of a party" when this condition is "in controversy" and the mover has made a preliminary showing of "good cause." These three conditions that attach when a court invades the bodily integrity of a party are not found in Article 1422, but are included in 1464 to safeguard the person's fundamental privacy interest in being free of unwanted governmental intrusions.\(^\text{98}\)

According to the general rules of statutory construction, the general article should not supersede the specific article, because such an appli-

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97. Article 1464 was amended by 1991 La. Acts No. 324, § 1, to provide: "In addition, the court may order the party to submit to an examination by a vocational rehabilitation expert who is not a physician, provided the party has given notice of intention to use such an expert." The legislature amended Article 1464 to expressly permit vocational rehabilitation experts to perform examinations. This modification has no bearing on *Sudwischer*, however, it demonstrates quite clearly that the legislature is aware of supreme court decisions and acts accordingly when in disagreement therewith. See *infra* discussion at note 99 of *Williams v. Smith*, 576 So. 2d 448 (La. 1991), the case that prompted this change.

98. In defining the legitimate heir's right of privacy, the dissent cites numerous Supreme Court decisions that recognize an individual's "constitutionally protected privacy and due process rights under both the federal and state constitutions which protect her from unreasonable invasions or intrusions of her body." *Sudwischer v. Estate of Hoffpauir*, 589 So. 2d 474, 477 (La. 1991) (Dennis, J., dissenting). Justice Dennis cites *Cruz v. Director, Missouri Dept. of Health*, 497 U.S. 261, 261, 110 S. Ct. 2841, 2843 (1990) (By a 5-4 vote, in this case involving a terminally ill patient's "right to die," the Court stated that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."). *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 1682 (1965) (The contraceptive case that began the modern debate over the right of privacy by recognizing a "penumbra" of protected freedoms emanating from the Bill of Rights. In striking down a New York statute banning the use of contraceptives, the court recognized a "zone of privacy created by several fundamental constitutional guarantees."). The other authorities cited by the dissent also recognized this constitutionally protected right in different contexts. These and other cases affirm the individual's fundamental right to be free of unwanted physical invasions.

The only Louisiana Supreme Court case cited by the dissent is *Hondroulis v. Schuhmacher*, 546 So. 2d 466 (La. 1989), a case involving the right to reject medical treatment. In *Hondroulis*, the court interpreted Article I, Section 5 of the Louisiana Constitution of 1974 as having been "intended to establish an affirmative right to privacy impacting non-criminal areas of law and establishing the principles of [those Federal] Supreme Court decisions in explicit statements instead of depending on analogical development." *Id.* at 473. For a comprehensive discussion of Art. I, § 5 of the 1974 La. Const. and *Hondroulis*, see John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State?*, 51 La. L. Rev. 686 (1991). Furthermore, it is well established that the right of privacy under the Louisiana Constitution is more encompassing than that same right as protected by the Fourth Amendment. See *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982).
cation renders the more narrow statute meaningless. The specific requirements that "good cause" be shown, that the matter be "in controversy," and that the person being tested is a party to the suit, are rendered meaningless if the mere relevancy standard of Article 1422 is applied in place of Article 1464.

Although all discovery articles invade upon the individual's right to privacy, given the traditional respect afforded the individual's right to be free of unwanted bodily intrusions, Article 1464, which is based on Federal Rule 35, marks the limit of what constitutes an acceptable "intrusion into the constitutionally protected 'sanctity' of the person." For this reason, the court order compelling physical examinations is the most restrictive of all discovery devices.

99. This principle was used by the supreme court just a few months before Sudwischer in Williams v. Smith, 576 So. 2d 448 (La. 1991). In a footnote, the court stated:

"Defendants assert that even if we should conclude that an examination by a vocational rehabilitation expert is not available under La. Code Civ. P. art. 1464, nevertheless, the trial court has the authority to appoint an expert witness pursuant to . . . the general authority under La. Code Civ. P. art. 1422 . . . . We find that neither article applies because an examination not authorized under the more restrictive discovery rules cannot be upheld under the more general discovery or evidentiary articles."

Id. at 452 n.9 (citations omitted). Therefore, the discovery issue in Sudwischer should have been whether Article 1464 applied, not Article 1422. See also McGowan v. Puche, 393 So. 2d 278 (La. App. 1st Cir. 1980) (The general La. Code Civ. P. art. 966, which allows summary judgment without first calling expert witnesses, could not be used to override the more specific language of La. R.S. 9:397 which mandates that the court consider expert testimony before dismissing a case.). See also Jones v. Thibodeaux, 445 So. 2d 44, 47 (La. App. 4th Cir.), writ denied, 448 So. 2d 112 (1984) ("By adopting the Uniform Act on Blood Tests to Determine Paternity, the legislature intended to provide a carefully regulated evidentiary procedure having precedence over laws of general applicability.").

Although La. R.S. 9:396 is more specific than La. Code Civ. P. art. 1464, it does not necessarily follow that La. R.S. 9:396 is rendered meaningless if Article 1464 is applied in certain paternity actions. As the majority in Sudwischer argues, the language of La. R.S. 9:396 does not indicate that only the mother, child, and alleged father can be tested in all paternity cases. In other words, the two statutes are not inconsistent in application.

Interestingly, Illinois courts consider all contradictory provisions of the Paternity Act as being subordinate to the general procedural rules of court. "[I]nsofar as the Blood Test Act infringes on the power of the court to order blood tests for discovery purposes, it is an invalid exercise of the legislative power. Where a statute conflicts with a supreme court rule on a matter of procedure, the supreme court rule controls." Zavaleta v. Zavaleta, 358 N.E.2d 13, 16 (Ill. App. 3d Dist. 1976). See also In re Estate of Olenick, 562 N.E.2d 293 (Ill. App. 1st Dist. 1990); People ex rel. DeVos v. Laurin, 391 N.E.2d 164 (Ill. App. 5th Dist. 1979).

100. The two articles are virtually identical except that the federal rule expressly states that the court may compel blood tests. See infra discussion concerning this difference at text accompanying note 116.

101. Dingleman, supra note 95, at 148.
For instance, according to Article 1471, any person who refuses to produce relevant evidence pursuant to a court order may be held in contempt of court and punished accordingly. However, the person who refuses to submit to a mental or physical examination cannot be held in contempt of court. Although a default judgment may be rendered against the individual, she cannot be fined or imprisoned for choosing not to cooperate. This provision, which only applies to Article 1464, clearly indicates the unique character of this discovery device.

The United States Supreme Court's analysis of Federal Rule 35 is also instructive. In *Sibbach v. Wilson & Co.*, the Court addressed the issue of whether Federal Rule 35 was primarily procedural in nature or a rule of substantive law. This distinction was crucial, because according to the Federal Rules Enabling Act the Supreme Court can only prescribe procedural laws, not substantive laws. Before Federal Rule 35 was adopted in 1938, a federal court could not compel parties to submit to physical examinations unless expressly authorized by the applicable state law. At the time, state courts were divided as to the power of a court, in the absence of a state statute, to order a physical examination of a party. By finding that Federal Rule 35, despite its impact on the substantive rights of the individual, was a procedural regulation, the Supreme Court, in a 5-4 decision, held that Rule 35 allowed federal courts to order physical examinations of parties. Moreover, the majority in *Sibbach* found that since Congress took no "adverse action" to the final version of Rule 35, its interpretation of that rule comported with legislative intent.

102. La. Code Civ. P. art. 1471 provides in pertinent part:

If a party . . . fails to obey an order to provide or permit discovery, including an order made under . . . Article 1464, the court . . . may make such orders in regard to the failure as are just, and among others the following: (1) [resolve the particular matter at issue against that party] (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses . . . . (3) An order . . . dismissing the action . . . or rendering a judgment by default against the disobedient party . . . . (4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination . . . . (emphasis added).

103. 312 U.S. 1, 61 S. Ct. 422 (1940).


107. *Id.* at 14-16, 61 S. Ct. at 426-28.
The four dissenters in *Sibbach* argued that state laws which regulated the individual litigant’s right to be free of bodily invasions, whether termed procedural or not, were substantive in nature and therefore were being abridged by this rule of "civil procedure."\textsuperscript{108} Emphasizing the individual’s right to be free of unwanted bodily intrusions,\textsuperscript{109} the dissent refused to justify the significant intrusion occasioned by such a court order in the absence of an explicit statement of congressional intent to the contrary. The dissent did not question that this policy determination was within the ambit of congressional authority; it simply questioned the majority’s procedural classification of the rule. According to the dissent, this decision was better left to Congress.\textsuperscript{110}

The sharply divided Court in *Sibbach* forcefully exposes the hybrid nature of Article 1464. Despite their fundamental disagreement, both the majority and the dissent in *Sibbach* concluded that before Federal Rule 35 was enacted, a federal court lacked the authority, in the absence of an applicable state statute, to order a party to submit to physical examinations.\textsuperscript{111} Although considered a procedural device that can be used by the court to discover relevant information, because its use directly invades the privacy rights of a litigant, the court should not use it unnecessarily.

The history of Federal Rule of Civil Procedure 35 effectively demonstrates that the court in *Sudwischer* erroneously applied Article 1422, rather than applying Article 1464. By ignoring Article 1464, the court ignored the significant tension between the court’s ability to compel the disclosure of relevant evidence and the limitations placed on the court’s ability to invade the individual’s person.\textsuperscript{112} Thus considered, the discovery

\textsuperscript{108} Id. at 16-19, 61 S. Ct. at 427-29 (Frankfurter, J., dissenting).
\textsuperscript{109} "So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts." Id. at 18, 61 S. Ct. at 428 (Frankfurter, J., dissenting).
\textsuperscript{110} Id. (Frankfurter, J., dissenting).
\textsuperscript{111} Of course, the dissent maintained that this was the case even after Rule 35.
\textsuperscript{112} The majority cites Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966), as authority for the state to compel Schuh to submit to a blood test absent a physical or religious obstacle. Although *Schmerber* does support this statement, given the facts of *Schmerber*, the majority’s cursory treatment of the case is misleading. In *Schmerber*, an individual accused of driving under the influence of alcohol objected to having a sample of blood extracted and tested to determine the degree of his intoxication. When an individual is accused of fathering a child and sufficient evidence exists to suggest this relationship, the use of blood tests to establish the biological link between parent and child is justified. In a typical paternity case involving the alleged father, mother, and child, the analogy to a criminal case is appropriate. In both instances, the individual whose privacy will be involuntarily invaded is suspected of doing an act that triggers the
issue in *Sudwischer* becomes not whether Article 1422 allowed the court order, but whether Article 1464 did. If Article 1464 had been applied, then the court in *Sudwischer* should have determined whether the three prerequisites of Article 1464 were met, namely: (1) whether Schuh was a party to the suit; (2) whether Schuh's physical condition was "in controversy;" and (3) whether Sudwisher demonstrated sufficient "good cause" to warrant such a court order. Unless all three conditions are fulfilled, the court may not compel the individual to submit to blood testing pursuant to the Louisiana Code of Civil Procedure.\(^\text{113}\)

2. Does "Physical Condition" Include Blood Type?

As a preliminary matter, even if the majority would have based its authority on Article 1464, some doubt exists concerning whether or not that article authorizes blood testing. As stated previously, Article 1464 is modeled on Federal Rule of Civil Procedure 35.\(^\text{114}\) Federal Rule 35 provides:

When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination . . . .\(^\text{115}\)

Strikingly absent from Louisiana Code of Civil Procedure article 1464 is the "(including the blood group)" provision of the federal rule. Did state's respected interests in compelling a blood test. See *Little v. Streater*, 452 U.S. 1, 10, 101 S. Ct. 2202, 2207 (1981) ("Although the State [Connecticut] characterizes such proceedings [paternity actions] as 'civil,' they have 'quasi-criminal' overtones.") (citations omitted).

In contrast, in *Sudwischer* the individual being ordered to undergo blood testing did no affirmative act that precipitated the state action. The legitimate child did nothing to compromise her privacy interest vis-à-vis the state; therefore, the majority's use of this case to justify the minimal intrusion occasioned by a blood test is disingenuous, since the privacy interest of the tested individual is undiminished.

113. Although a constitutional argument may be made that supports the court's order, given that the majority based its holding on its reading of Article 1422, this discussion is beyond the scope of this article.

114. La. R.S. 13:3783(A), which was substantially the same as present La. Code Civ. P. art. 1464, was adopted in 1952. La. R.S. 13:3783(A) was repealed in 1960 when the Louisiana Code of Civil Procedure was adopted, and was replaced by Article 1493. La. Code Civ. P. art. 1464 was adopted in 1976 and replaced Article 1493. Except for the "person in the custody or under the legal control of a party" provision of Article 1464, which is based on the 1970 amendment to Federal Rule 35, the new article restates the older ones almost *verbatim*. See Terrence C. Forstall, Note, *Civil Procedure—Necessity of Submitting to Physical Examination Before Filing Suit?*, 15 Loy. L. Rev. 77, 78-81 (1968-69).

the Louisiana Legislature consider the inclusion of this provision redundant, or did they purposefully omit it, thereby curtailing the court's authority to order blood testing? Because the legislature did not clearly express its intent and no Louisiana court has confronted this issue of interpretation, we simply do not know.

However, if the majority did interpret this omission as reflecting the legislature's intent to not allow blood testing pursuant to Article 1464, this reading in no way justifies an invocation of Article 1422. Again, the general statute cannot be used to render meaningless the more specific one. Rather than read Article 1464 restrictively, the better argument favors an interpretation that construes “physical condition” to include an individual’s blood group.

In Beach v. Beach, the court interpreted the newly adopted Federal Rule 35(a), which did not then include the parenthetical “including blood group” language, as authorizing the federal court to compel blood tests. The appellant in Beach, a mother who was ordered to undergo blood tests to determine whether her husband was the biological father of her child, argued that the lower court lacked the authority to order such testing. After rejecting her arguments that the rule was unauthorized because it modified “substantive rights,” and that the rule was only applicable in personal injury actions, the court addressed the issue of whether the word “condition” included the blood type of a particular individual. Finding the term “condition” to be a “broad word” that includes “characteristics” such as one's blood type, the court held that Federal Rule 35(a) authorized blood testing in paternity cases. In light of Beach, given that Louisiana courts often look to

116. Moreover, no Louisiana court, except for Sudwischer, has applied either Article 1422 or 1464 as its authority to compel blood testing. However, in Williams v. Williams, 87 So. 2d 707 (La. 1956), the court was prepared to order a blood test pursuant to old La. R.S. 13:3783 (which was similar to Article 1464), but was reluctant to apply the statute in a disavowal action.

117. 114 F.2d 479 (D.C. Cir. 1940).

118. Id. at 480.

119. The United States Supreme Court adopted the reasoning of Beach in Sibbach v. Wilson & Co., 312 U.S. 1, 61 S. Ct. 422 (1940), just months after Beach was decided. See supra discussion at text accompanying note 103.

120. “As its [Rule 35(a)] language is unlimited, there is no reason for limiting its effect to actions of one class.” Beach, 114 F.2d at 481.

121. “The fact that blood grouping remains the same throughout life differentiates it from some aspects of physical condition, but not from all. Blindness, for example, is as much a factor in the physical condition of a man born blind as of one who has lost his sight.” Id. at 481.

122. How far the court’s authority extended, that is, whether the court could order someone other than the parents and the child to submit, was not considered by the court.

123. The “including the blood group” language of Federal Rule 35 was added in
federal jurisprudence pertaining to the discovery articles. Article 1464 should be interpreted to authorize blood tests, even though it does not expressly so provide.

3. Was Schuh a Party?

The most problematic issue faced by the court, if Article 1464 is applied, concerns Schuh's status as a party to the paternity suit. The language of Article 1464 provides that only "a party, or ... a person in the custody or under the legal control of a party," may be compelled to submit to a physical examination. Since Schuh was neither an agent of the personal representative of her father's estate, nor under his custody, the only way for the court to apply Article 1464 is if Schuh was personally a party to the suit.

Louisiana Code of Civil Procedure article 734 then provided:

The succession representative appointed by a court of this state is the proper defendant in an action to enforce an obligation of the deceased or of his succession, while the latter is under administration. The heirs or legatees of the deceased, whether present or represented in the state or not, need not be joined as parties, whether the action is personal, real, or mixed. The official comments that accompany this article state: "This article adopts a single, simple rule in all cases: the succession representative..."

124. "Because the Louisiana statutes on discovery are derived from the federal rules and contain many similar provisions, Louisiana courts, interpreting Louisiana discovery laws, have frequently relied on federal jurisprudence under analogous federal provisions as persuasive authority." Hodges v. Southern Farm Bureau Casualty Ins. Co., 433 So. 2d 125, 129 (La. 1983). See also Williams v. Smith, 576 So. 2d 448, 450 (La. 1991); Matherne v. Hannan, 545 So. 2d 1094, 1095 (La. App. 4th Cir. 1989).

125. See also La. Code Civ. P. art. 3249, which provides: "The succession representative shall defend all actions brought against him to enforce claims against the succession, and in doing so may exercise all procedural rights available to a litigant."

126. La. Code Civ. P. art. 734 was amended in 1991, but the changes do not affect this discussion.
alone is the proper defendant. If the heirs or legatees wish to join in order to resist the plaintiff's demand individually, they may do so through intervention." Rosemary Hoffpauir Schuh was not the personal representative of her father's estate, nor did she voluntarily interpose herself as a party to the proceedings.\textsuperscript{127}

By the majority's own admission in \textit{Sudwischer}, "Rosemary Hoffpauir Schuh was not originally a party to this lawsuit, but she has been served with a rule to show cause why her blood should not be tested."\textsuperscript{128} The court further describes Schuh's financial interests, as forced heir, in her father's estate; however, the majority does not explain how Schuh's status as forced heir transforms her into a party susceptible to Article 1464. If the legitimate heir was being ordered to disclose documentary materials, records, or other tangible pieces of evidence, then the characterization of Schuh as an interested party to the suit would be less troublesome.\textsuperscript{129} However, unlike the forced disclosure of tangible material in an opposing party's possession, an order to force an individual to submit to a blood test is a direct invasion of that individual's constitutional right to be free of unwanted bodily intrusions.

An analysis of how other jurisdictions have addressed this issue supports the proposition that Schuh, as a nonparty to the suit, should not have been compelled to submit to testing pursuant to Article 1464. In \textit{William M. v. Superior Court},\textsuperscript{130} where the plaintiff sought to test the deceased's grandparents to determine paternity, the court explained that only parties can be compelled to undergo a physical examination or blood test according to California Code of Civil Procedure section 2032,\textsuperscript{131} which parallels Louisiana Code of Civil Procedure article 1464.\textsuperscript{132}


\textsuperscript{128} Id. at 475.

\textsuperscript{129} "I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation." Sibbach v. Wilson & Co., 312 U.S. 1, 18, 61 S. Ct. 422, 428 (1940) (Frankfurter, J., dissenting).

\textsuperscript{130} 275 Cal. Rptr. 103 (Ct. App. 3d 1990). For the facts of this case and a discussion of its treatment of California's blood testing statute, see supra text accompanying note 72.

\textsuperscript{131} Cal. Code Civ. P. § 2032(a) (West 1993) provides, in pertinent part:

\begin{quote}
Any party may obtain discovery, . . . by means of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party, in any action in which the mental or physical condition (including the blood group) of that party or other person is in controversy in the action.
\end{quote}

In a footnote, the court asserts that the defendant's son, since he is neither the "agent of" nor "under the control" of the defendants, is therefore not an "other person" within the meaning of this section. \textit{William M.}, 275 Cal. Rptr. at 105 n.1.

\textsuperscript{132} See supra text accompanying note 97.
After interpreting the appropriate statutes pertaining to paternity suits, which state that only the mother, child, and presumptive and/or alleged fathers can be joined as parties, the court concluded that “[p]aternal grandparents, either in their individual capacity or as parents of a deceased putative father, are not proper parties . . . to an action to establish paternity.” Concerned with the “repercussions” of ordering nonparties to submit to blood tests, the California court concluded that “the decision of who may properly be made a party to mandatory blood testing is one for the Legislature.”

In Manuel v. Spector, another case involving paternal grandparents, the court, after analyzing the appropriate civil procedure article allowing discovery of a party’s “physical condition,” refused to order the testing because of the nonparty status of the grandparents. The court’s analysis was very similar to that employed by the California court in William M., namely, that paternal grandparents were improper parties to a paternity suit. “[W]e hold,” wrote the court, “that [a grandparent] is not a party whom the trial court may order to submit to the taking of blood pursuant to either the [blood testing statute] or [discovery article].” Most significantly, the court in Manuel acknowledged that without statutory authority, the court lacked the power to compel individuals to involuntarily submit to testing.

In contrast to William M. and Manuel, which concluded that only the mother, child, and alleged father are proper parties to a paternity
suit and that the court is without authority to compel nonparties to submit to testing, other courts have concluded differently. Originally, in *Voss v. Duerscherl*, the plaintiff's motion to compel the relatives of the deceased alleged father was denied. In 1983, however, while the original paternity case was still pending, the Minnesota Legislature amended the blood testing statute to provide that in cases where the alleged father is deceased, the court may order the parents and siblings of the deceased to submit to blood testing "only to establish the right of the child to public assistance including but not limited to social security and veterans' benefits." In 1984, after the plaintiff substituted the deceased's father as a defendant in her amended complaint, another trial court granted her motion for blood testing of all three individuals.

On appeal, the motion compelling the relatives of the deceased to undergo testing was dismissed. After an analysis of the pertinent Minnesota civil procedure rules, the appellate court held that the relatives of a deceased putative father cannot be required to submit to blood tests absent adequate service. The court’s finding of improper service, however, precluded its contemplation of other, more weighty issues.

In response to this dismissal, the mother of the child initiated another action to determine paternity and again sought to compel the relatives to undergo testing. The trial court directed the relative to submit, and of course, an appeal followed. In *Voss v. Duerscherl (Voss II)*, the court addressed the issue of whether the amended statute could be applied retroactively to the relatives. In finding that the amended section could be applied retroactively, the court emphasized that the trial court, before

142. See supra note 87 for the procedural and factual history of this case.
143. Minn. Stat. Ann. § 257.62 (West 1992) was amended in 1983 to read, in pertinent part:

   If the alleged father is dead, the court may, and upon request of a party shall, require the decedent's parents or brothers and sisters or both to submit to blood tests. However, in a case involving these relatives of an alleged father, who is deceased, the court may refuse to order blood tests if the court makes an express finding that submitting to the tests presents a danger to the health of one or more of these relatives that outweighs the child's interest in having the tests performed. Unless the person gives consent to the use, the results of any blood tests of the decedent's parents, brothers, or sisters may be used only to establish the right of the child to public assistance including but not limited to social security and veterans' benefits.

144. *Voss I*, 384 N.W.2d at 501.
145. Id. at 503.
146. 408 N.W.2d 161 (Minn. Ct. App. 1987), rev'd, 425 N.W.2d 828 (Minn. 1988).

For the discussion of this reversal, see infra text accompanying notes 152-154. Although *Voss II* has been reversed and has no precedential value in Minnesota, the reasoning employed by the appellate court merits discussion, if for no other reason than to avoid similar confusion in Louisiana.
the 1983 amendment went into effect, had the authority to order the relatives to undergo blood testing pursuant to Minnesota Civil Procedure Rule 35.01. The appellate court supported its contention by citing a Minnesota Supreme Court case which held that parties to a paternity action fall within the ambit of Rule 35.01. The court maintained that the relatives were proper parties to the original suit by analyzing paternity actions to declaratory judgments brought under Minnesota law. Specifically, Minnesota statute § 555.11 then provided: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ." Since the relatives did have a financial interest in the paternity suit, the court had the authority to treat them as parties, thereby subjecting them to Rule 35.01. Thus, the court in Voss II affirmed the lower court and ordered the testing of the relatives.

The appellate court's holding in Voss II, however, was reversed on appeal. In Voss III, the Minnesota Supreme Court held that after the putative father's death, the plaintiff's paternity action only survived against the personal representative of the estate. Since the personal representative of Duerscherl's estate was discharged before an adjudication was made, the estate's liability was terminated. "[W]e hold that this paternity action did not survive against the father and siblings of the deceased putative father and that they are not proper parties to the paternity action." Thus, despite the appellate court's attempt to

147. Minn. R. Civ. P. 35.01 (West 1993) (amended 1988), which is similar to La. Code Civ. P. art. 1464, provides: "In an action in which . . . the blood relationship of a party . . . is in controversy, the court in which the action is pending may order the party to submit to . . . blood examinations by a physician." Notice that the Minnesota provision, unlike its Louisiana counterpart, explicitly provides for the testing of blood samples.

148. Voss II, 408 N.W.2d at 166 (citing State ex rel. Hastings v. Denny, 296 N.W.2d 378, 380 (Minn. 1980)).

149. Id. at 165-66.


151. Additionally, the court stated that because the relatives in Voss I argued that they were proper parties according to amended Minn. Stat. Ann. § 257.62 and, as such, were entitled to certain substantive rights, it is unacceptable for them to take a "contradictory" position on appeal. Voss II, 408 N.W.2d at 165. The court's argument seems spurious, however, since the court in Voss I did not address the appellants' alternative complaint regarding the improper retroactive application of the 1983 amendment. It is inequitable for the court in Voss II to force a successful alternative argument made in Voss I upon an unresponsive appellant.


154. Voss III, 425 N.W.2d at 831.
make the relatives of the deceased parties to the paternity action through the use of Minnesota Statute section 555.11, the relatives were not forced to submit to testing.

This suggestion of Voss II, although ultimately ineffective, proves to be very provocative, considering that Louisiana Code of Civil Procedure article 1880,155 which pertains to the parties of a declaratory judgment, is identical to its Minnesota counterpart.156 Perhaps Article 1880 is the missing procedural link that unites the legal heir to her father's estate, thereby making her a party to the suit and susceptible to Article 1464. In future cases involving the testing of others than the mother, child, and alleged father, the plaintiff should bring a declaratory action and specifically name all those who have an interest in the case as parties. This might allow the court to analogize accordingly and invoke Article 1464 to compel testing. However, given that the Minnesota Supreme Court rejected the appellate court's application of Minnesota Statute Annotated section 555.11, the better argument remains that Schuh was not a proper party defendant in an action to determine paternity.

4. Was Schuh's Physical Condition "In Controversy?"

While the analogy to declaratory judgments may enable the court to characterize the unavailable parent's relative as a "party" to the action, a question remains as to whether this purely procedural classification suffices to make Article 1464 applicable.157 In both William M. and Manuel, the courts found that only the blood group of the deceased alleged father was "in controversy" in the paternity action—not the blood group of the alleged father's parents.158 "Any testing of defendants' [the paternal grandparents'] blood is collateral to the issue before the trial court."159 Thus, a determination as to an individual's party

155. "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." La. Code Civ. P. art. 1880.
156. See also Hibbs v. Chandler, 684 S.W.2d 310 (Ky. Ct. App. 1985) (Not addressing the "in controversy" requirement of Ky. CR 35.01 (Baldwin 1987), which was identical to Federal Rule 35, the court deemed the grandparents of their deceased son's alleged child to be "parties" to the paternity suit, since all heirs are liable for the debts of the decedent, under Kentucky law, if any assets exist.).
157. Especially given Voss III. See supra text accompanying notes 152-154 for discussion. The court in Voss III, however, was concerned only with the procedural status of the deceased's relatives, and did not address the proper application of Minn. Civ. P. rule 35.01. Voss III, 425 N.W.2d at 831.
159. William M., 275 Cal. Rptr. at 105.
status is contingent on her blood type, or her DNA profile, being "in controversy."

A similar issue regarding the party status of an individual was considered in a 1955 federal appellate decision. In Fong Sik Leung v. Dulles,160 a minor Oriental child asserted his American citizenship by proclaiming that his alleged father, Fong Sik Leung (who was also his guardian ad litem), was an American citizen.161 The defendant, the Secretary of State acting on behalf of the United States, denied the child's American citizenship and filed a motion under Federal Rule of Civil Procedure 35 for the court to compel the father and son to submit to blood tests.162 Although the child was tested, the father refused to submit, and the district court dismissed the suit.

The child appealed, contending that the district court lacked authority to order his guardian, a non-party to the suit, to submit to testing and that the court therefore had erroneously dismissed the suit. The appellate court agreed and reversed the lower court's judgment. Although all three appellate judges concurred in the result, the judges differed as to the rationale behind their decision.

The Chief Judge, after finding that only the child was a party to the action,163 chastised the district court for, in effect, ordering a non-party to submit to testing and then dismissing the suit because the individual rightfully refused to comply with its order. The Chief Judge stressed that without Federal Rule 35 a federal court has no inherent authority to compel any individual, party or not, to submit to blood testing.164 Because Rule 35 only applies to "parties," which Fong Sik Leung was not, the district court lacked authority either to order him to submit or, a fortiori, to draw a negative inference from his refusal.165

The concurring judges refused to address the issue of whether the court lacked authority without Federal Rule 35 to order blood tests.166 However, and more importantly, they did conclude that Fong Sik Leung was not a party to the suit pursuant to Rule 35.167 Relying on the

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160. 226 F.2d 74 (9th Cir. 1955).
161. Id. at 75.
162. Id. at 75-80 (Boldt, J., concurring).
163. "It seems clear that there were not two parties to this . . . proceeding. The child petitioner is the only person seeking relief. . . . The fact that a guardian is subject to certain controls of the court no more makes him a party subject to the blood test than it does a party litigant's attorney, whose blood condition may be a relevant fact in the case." Id. at 76.
165. Fong Sik Leung, 226 F.2d at 77-78.
166. Id. at 81 n.4 (Boldt, J., concurring).
167. Id. at 81-82 (Boldt, J., concurring).
mandate of Rule 1 of the Federal Rules of Civil Procedure, that the rules should be given a broad and liberal construction to assure justice, the concurring judges read the word "party" to include "one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not." Despite this broad reading of "party," the concurring judges refused to classify Fong Sik Leung as a "party" as that word is specifically used in Rule 35. After studying the history and context of Rule 35, the concurring judges found "the rule makers intended that only those parties whose physical or mental condition is directly in controversy in the particular action can be required to submit to examination in so far as Rule 35 is concerned." Thus, even though the blood of Fong Sik Leung would have provided the court with relevant evidence as to the child's citizenship, since his blood type was not at issue in the suit, the court lacked the authority to order the father to undergo tests.

The concurring opinions stand for the proposition that even if "party" is read broadly to include individuals other than the mother, child, or alleged father, in order for Federal Rule 35 to apply (and by analogy Article 1464), this individual's blood type must be at issue. Thus, the party and "in controversy" requirements converge and should not be considered separately. Following this reasoning, neither an individual considered a "party" because of her status as succession representative nor the individual who has an interest in the declaratory judgment would be a "party" pursuant to Article 1464. This strict interpretation of Article 1464 effectively makes only the mother, child, and alleged father proper parties to any filiation action because the blood type of any other individual, although possibly relevant, is not strictly at issue in a paternity case.

Accepting this reading of Article 1464, even if Schuh was considered a party to the suit, her DNA profile would not be "in controversy" according to the Louisiana rules of civil procedure. In Sudwischer, only the decedent's DNA profile was at issue. Although characterized by the majority as "relevant evidence" subject to the general rules of discovery, the actual purpose of this court order was to facilitate Sudwisher's filiation action against the decedent, Paul Hoffpauir. By focusing on a desired result instead of the pertinent rules of discovery, the majority circumvents the problematic fact that Schuh would not be classified as a party whose blood type is "in controversy" in any filiation action brought by Sudwisher. In short, the majority creates a quasi-paternity suit, in which legitimate heirs are parties, in order to obtain evidence that would otherwise be inaccessible.

168. *Id.* at 81 (Boldt, J., concurring).
169. *Id.* (Boldt, J., concurring).
5. Did Sudwisher Demonstrate "Good Cause?"

Despite Justice Lemmon's concurring opinion that suggests as much, the supreme court should have explicitly stated that a preliminary showing of good cause is required before any blood tests are ordered. Good cause is shown when relevant evidence is not available from any other source. Although arguably the plaintiff in Sudwischer met this standard, because the testing of Schuh could result in unique and probative evidence concerning Hoffpauir's parentage, by not mandating such a preliminary showing the majority opinion invites fraudulent paternity claims. Without a prerequisite showing, little would prevent greedy individuals from insisting on their biological link to a wealthy decedent in the hope of proving filiation through mistake or pure chance, or from simply forcing the legitimate heirs to settle quietly.170

C. Conclusion: The Interrelation of Louisiana Revised Statutes 9:396(A) and Louisiana Code of Civil Procedure Articles 1422 and 1464

At least four possible avenues exist regarding the interrelation of the blood testing statute and the discovery articles. Some courts171 give great deference to the legislative will underlying blood testing statutes, stressing that the court should not invade the privacy interests of the individual unless the court has explicit statutory authority. Unless the blood testing statute provides for the testing sought by a petitioner, then the court has no authority to order the individual to submit to testing. These courts refuse to classify the decedent's relatives as "parties" to the suit whose blood group is "in controversy" and thereby refuse to apply the discovery article that authorizes the court to order blood tests. This strict interpretation is adopted by Justice Cole.172

The "[n]otwithstanding any provision of law to the contrary" language of Louisiana Revised Statutes 9:396(A) is not addressed in Sudwischer. Simply stated, this common provision causes the statute that uses it to preempt all other statutes that could conceivably be applied

170. These considerations caused the Louisiana Supreme Court, in In re J.M., 590 So. 2d 565, 571 (La. 1991), just two months after Sudwischer, to conclude:

    According[ly] . . . we interpret La. R.S. 9:396 so as to render it constitutional by reading into the statute a requirement for a show cause hearing. In the show cause hearing, before the statute is triggered and a court order for blood testing issued, the moving party must first show that there is a reasonable possibility of paternity.

171. See In re Estate of Sanders, 3 Cal. Rptr. 2d 536 (Ct. App. 4th 1992); William M. v. Superior Court, 275 Cal. Rptr. 103 (App. 3d 1990).

172. See supra text accompanying notes 53-54.
in its stead.173 This language of Louisiana Revised Statutes 9:396 was one of the few modifications that the Louisiana Legislature made to the Uniform Act when adopting it in 1972.174 This modification expresses the legislature's intent that "in any civil action in which paternity is a relevant fact," Louisiana Revised Statutes 9:396-398 should be applied.175 Given this legislative intent, the provisions of Louisiana Revised Statutes 9:396(A) supersede the general rules of discovery, including Articles 1422 and 1464. Thus, it can be argued that unless Louisiana Revised Statutes 9:396(A) is used to either authorize or prohibit a blood test in a filiation action, any discussion of other statutes is superfluous.

Other courts176 take a more moderate course, finding that the blood testing statute does not preclude the court from ordering relatives to undergo testing, provided they are parties to the suit. Thus, if a relative is made a party to the suit, either through analogy to a declaratory action or a broad construction of the word "party," the court can invoke its authority vested in the discovery article based on Federal Rule 35 and order such testing. Although not stated in Justice Dennis' dissent, the inference that he and Chief Justice Calogero support this course of action is fairly drawn from their emphasis of Schuh's nonparty status.

A third approach to this problem is reflected by the majority and Justice Lemmon's interpretation of Louisiana Revised Statutes 9:396 and Code of Civil Procedure article 1422. Not only did the court find 9:396 inapplicable, but it relied on the general authority found in Article 1422 to compel a nonparty to submit to testing. This decidedly innovative interpretation of judicial authority, however, improperly avoids Article 1464 and undermines the coherent structure of the Louisiana Code of Civil Procedure. Moreover, to maintain that the court has the inherent power to invade the privacy interests of nonparties is to violate an essential mandate of the Louisiana Civil Code,177 since Article 1464, if
not Louisiana Revised Statutes 9:396, clearly restricts the court's authority to compel blood tests.

A fourth possible avenue, as of yet untried, is to argue that Louisiana Revised Statutes 9:396(A) authorizes the testing of relatives when a parent is unavailable: Although a strong argument supports a restrictive reading of the statute, this strict interpretation is inextricably linked to the original purposes of the Uniform Act on Blood Tests to Determine Paternity. Since the new technology of DNA typing is capable of proving paternity with a degree of probability that approaches certainty, even when relatives of the absent parent are tested, perhaps a reliance on this outdated rationale is no longer appropriate. By stressing the recent amendments to Louisiana Revised Statutes 9:396, which clearly reflect a legislative intent to keep up with scientific progress, it could be argued that the "on behalf of any person whose blood is involved" provision of the statute authorizes the court to compel blood tests of individuals other than those expressly enumerated therein. This argument, however, does not readily comport with the language of Louisiana Revised Statutes 9:396(A) and is not overly persuasive.

Of the four possible routes, only two, although they produce contrary results, withstand careful scrutiny: (1) a strict reading of Louisiana Revised Statutes 9:396 that finds the article applicable, thereby precluding any inquiry into the discovery articles and allowing the court to compel only the mother, child, and alleged father, whether they are parties or

the facts of Sudwischer (indeed, this is argued by all of the Justices of the Louisiana Supreme Court with the exception of Justice Cole), and therefore the court, unable to look to customary practice, should have simply decided the matter equitably pursuant to La. Civ. Code art. 4: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." In a strong sense, the court's constitutional analysis of the issue (which is beyond the scope of this note) suggests that both the majority and dissent favored this equitable approach. (Although Justice Lemmon argued strongly that Article 1422 permitted the discovery of Schuh's blood, he also specifically argued that "fundamental fairness" dictated that Schuh should be forced to submit to testing. Sudwisher v. Estate of Hoffpauir, 589 So. 2d 474, 477 (La. 1991) (Lemmon, J., concurring), cert. denied, 112 S. Ct. 1937 (1992)). However, just because a specific evidentiary statute is deemed inapplicable, the court cannot ignore the legislative dictates of the more general evidentiary rules. Aware of this, the majority in Sudwischer invoked Article 1422 instead of Article 1464 to authorize its court order. It is the majority's erroneous choice that is the focus of this note.

178. In no case can paternity be established with complete certainty. See infra text accompanying note 189.

179. 1992 La. Acts No. 407, § 1, expressly provided that "tissue samples" in addition to blood samples may be tested. 1985 La. Acts No. 38, § 1, substituted "the drawing of blood samples and shall direct that inherited characteristics in the samples, including but not limited to blood and tissue type, be determined by appropriate testing procedures" for "blood tests.'
not, to undergo blood testing; or (2) reading Louisiana Revised Statutes 9:396(A) to apply only in cases where the mother, child, or alleged father are available for testing, thereby triggering Louisiana Code of Civil Procedure article 1464, which allows the court to compel testing of parties if certain prerequisites are met. Although the route taken by the Louisiana Supreme Court in *Sudwischer* is the present law in this state, any future journeys should not involve Louisiana Code of Civil Procedure article 1422.

### III. DNA Testing

The underlying theory of DNA testing, that no two individuals have the same genetic structure, is generally accepted by the scientific community. The procedural hazards involved in performing these complicated tests, however, are still susceptible to attack in the court room. Recently, commentators have also challenged the frequency of genetic similarities within certain ethnic groups which could skew the statistical data relied upon to determine the probability that a "random man," rather than the tested individual, was the child's father. Putting these

180. All the heritable information that is passed from parent to child is contained in the complex DNA (deoxyribonucleic acid) molecule. These long, chain-like molecules, which consist of millions of pairs of nucleotide base pairs, are found in the nucleus of most cells (excluding red blood cells, which do not have a nucleus) of all living organisms. Within a particular individual, however, this extremely long DNA sequence is the same in every cell of her body. The individualized nature of the person's DNA coupled with statistical data showing the incidence of particular genes within an ethnic group accounts for the heightened degree of probability with which experts can determine the alleged father's paternity. This is the basis of DNA typing. Jeffrey A. Norman, *Note, DNA Fingerprinting: Is it Ready for Trial?*, 45 U. Miami L. Rev. 243 (1990).


183. For a thorough discussion of the many procedural problems associated with this complex scientific process, see Blakesley, *supra* note 8, at Part II, Ch. 6.

184. In contrast to procedural problems concerning DNA testing, which revolve around mechanical or human error, this criticism is directed at the method of determining the statistical probabilities that are crucial to an accurate "probability" figure.

General population statistics may . . . be highly misleading, critics say, in criminal cases involving inferences of paternity and cases where a missing person's DNA
significant issues aside, and assuming for the purposes of this casenote that when properly conducted DNA testing is an accurate means of revealing a common relative, the purpose of this section is to discuss a number of legal issues raised by using DNA typing to determine paternity when an alleged parent is unavailable for testing.185

A. Is DNA Typing an Effective Legal Means of Establishing Paternity When an Alleged Parent is Unavailable for Testing?

1. DNA Typing

The type of DNA testing sought in Sudwischer is called RFLP186 analysis. Also known as DNA typing, or DNA fingerprinting, this procedure allows the analyst to create a "print" of a person's genetic pattern as found in DNA extracted from the person's blood or tissue sample.187 This "print," which resembles a bar code, can be compared to other individuals' prints for purposes of determining whether the parties are related. Given that each person's genetic structure is appar-
ently unique and the role that DNA plays in heredity, such a comparison can establish family blood lines with extreme precision when
the mother, child, and alleged father are tested. Although sophisticated blood grouping tests arguably may also prove paternity, modern DNA testing makes even the most advanced blood tests obsolete because DNA testing is capable of revealing the individual's unique genetic structure. Significantly, with the advent of DNA testing came the ability of experts to prove paternity by testing relatives of an unavailable parent. This article does not attempt to refute the scientific capabilities of DNA fingerprinting; instead, it focuses on the legal ramifications of this new technology which were not adequately addressed in the Sudwischer opinion.

188. "The probability that any individual will have a particular DNA fingerprint is the product of the probabilities of the occurrence of a specific allele at each locus. It is very slight; the figure most often cited is 1 in 30 billion." Harry D. Krause, Family Law: Cases, Comments, and Questions, 980 (3d ed. 1990) (quoting Beverly Merz, DNA Fingerprints Come to Court, 259 J.A.M.A. 2139 (1988)).
189. Thompson & Ford, supra note 181, at 45. In no case, however, can DNA testing establish paternity with 100% certainty.
190. Richards, supra note 185, at 613. The individualized nature of the person's DNA coupled with statistical data showing the incidence of particular genes within a ethnic group accounts for the heightened degree of probability with which experts can determine the alleged father's paternity. It is worth noting, however, that the operative principle of traditional blood testing is the same as that used in DNA fingerprinting—the primary difference being the discriminating power of DNA testing.
191. Although certain types of blood tests are also capable of establishing paternity by testing relatives of the missing parent, these tests lack the ability to establish paternity with as high a degree of probability as the new DNA tests. Even with DNA testing, however, an analyst can only establish a "probability" of paternity—not the fact of paternity. See Richards, supra note 185, at 613-20, for other advantages associated with DNA typing.
192. Another test, Polymerase Chain Reaction, or PCR Amplification, can be used to compare the genetic makeup of two individuals. PCR analysis replicates the DNA found in a tissue sample to determine if a specific "allele" is present. Because relatively small samples of DNA can be used in PCR analysis, it is well suited for forensic use. The extreme sensitivity of PCR testing, however, makes it more susceptible to procedural attacks at trial. See Thompson & Ford, supra note 181, at 76-79; Petrovich, supra note 185, at 679-703.

If necrotic tissue is available, PCR testing can be used to determine the probability of paternity, but "the discriminating power of that test is not the equivalent of RFLP." Furthermore, Dr. Cohen advises that forensic and parentage testing should not be readily equated.

A problem is that they equate forensic testing with parentage testing. They really aren't related. They use the same technology, but the difference is with a forensic test you start off with a minimal sample . . . so only one person can do the test. . . . You usually use up the whole [sample]. In parentage testing, samples are available for reexamination . . . for confirmation.

Cohen Interview, supra note 27.
2. How Relevant are DNA Test Results When Relatives are Tested?

In his concurring opinion in Sudwischer, Justice Lemmon writes, "[w]hile the information, depending upon the results, may not be admissible at trial, the present issue is discoverability and not admissibility." In order for this assertion to be correct the evidence sought must at least be probative; however, some debate exists concerning the probative value of comparing the DNA fingerprints of two alleged relatives to determine the paternity of a missing parent. When an alleged parent is unavailable, DNA testing resembles a fishing expedition; that is, in contrast to a criminal case or a typical paternity case where both parents and the child are tested, when alleged relatives are tested, the analyst is not looking for a positive identification of specific genes, but rather reels in whatever "matches" she happens to catch. By comparing the prints of two alleged relatives, the analyst hopes to discover any shared genes that may have been contributed by a common relative; she does not simply compare two prints to see if they match.

Stated differently, unlike a typical paternity suit where the results are directly relevant to the issue of paternity, here the results of the DNA tests are only conditionally relevant. If a match is found, then the tests may be relevant. The ability of the DNA analyst to assert the probability that the tested individuals are or are not related is dependent, to some degree, on luck. When the mother, child, and alleged father are tested, the results will either exclude the father with certainty, or include the father with a degree of certainty dependent only on the type of test used. With the testing of a relative of the unavailable parent,


194. Indeed, some debate still exists concerning the ability of DNA typing to prove paternity when both parents and the child are tested. See Blakesley, supra note 8, at Part II, Ch. 6.

195. "Not having the missing parent makes it . . . more difficult, so what happens is, when you look at a case like this [Sudwischer], that's why I say it could be as low as one in five and as high as one in a hundred thousand [Sudwischer, 589 So. 2d at 475.]; it has a little to do with luck . . . ." Cohen Interview, supra note 27.

196. Again, the ability of DNA tests to prove paternity is still the subject of debate. See generally Thompson & Ford, supra note 181. See also Tim Beardsley, DNA Fingerprinting Reconsidered (Again), 267 Scientific American 26 (July 1992):

[Defense lawyers are using some of the [National] [R]esearch Council's less well-publicized conclusions to try to overturn convictions won on the basis of DNA fingerprinting evidence. . . . One of the recommendations of the panel that has attracted the attention . . . is that fingerprinting tests showing a phenomenon called band shifting be declared "inconclusive" until laboratories have performed adequate studies on the effect.

But see supra note 192, where Dr. Cohen suggests that the problems which hamper forensic testing are not identical to those involved in paternity testing.

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however, a finding that the two individuals do not share any common genes fails to exclude the possibility that the alleged father is the illegitimate child's biological parent. At least five rational explanations account for this inability to exclude the possibility of paternity, all of which have legal implications.

First, an important aspect of DNA typing when an alleged parent is unavailable for testing concerns the number of relatives tested to prove paternity. That is, the more relatives of the alleged parent who are tested, the greater the ability of analysts to estimate the probability of paternity. By analyzing the blood of the decedent's parents, siblings, and children, an analyst can compare the various DNA fingerprints and, in effect, better evaluate the missing person's genetic profile.\(^9\) If, for instance, only two suspected relatives are tested, the test results are not as likely to produce probative evidence as when three or more relatives are tested.

Analogously, every individual's DNA fingerprint represents another piece of the family puzzle. While it is possible for experts to determine paternity by testing only two pieces, the more pieces available for examination, the more accurate the determination. Following this reasoning, and accepting the applicability of Louisiana Code of Civil Procedure article 1422, not only could relatives with a financial interest in the litigation be compelled to undergo blood tests, but all relatives capable of providing relevant evidence could be ordered by the court to submit.

Does the majority in \(\text{Sudwischer}\) intend to suggest that the court may compel these disinterested nonparties to submit to testing, especially when they have nothing personally at stake in the litigation? By using a "relevancy" standard, the scope of who may be compelled to submit to blood testing is quite broad, and in any case, remains undefined.\(^9\)

Although in \(\text{Sudwischer}\) relatives of the plaintiff were willing to submit voluntarily to blood testing, this fortuitous fact has no bearing

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197. [With] a deceased relative, the ideal thing is to have his mother and father. From his mother and father I can establish it [paternity], just like that, no problem. From his mother and father I have all of his constituent genes, and I know what could have been passed. Now, once his mother and father are gone, at that point you have to start building up a large number of people to really insure success. So ideally, you have to have multiple sisters, multiple [relatives].

Cohen Interview, supra note 27.

198. The court could adopt an ad hoc standard based on the availability of a requisite number of relatives. That is, only in cases where there are at least two blood relatives available for testing, in addition to the parties themselves, will the court order anyone to submit to testing. Or the court could limit DNA testing to only the parents of the alleged mother or father. Cf. Minn. Stat. Ann. § 257.62 supra at note 143.

on future cases. In the next case involving this issue, perhaps no relatives will even exist, or, more likely, relatives of the reluctant party will refuse to submit voluntarily to testing. Will the court then order these relatives to submit? Where should the court draw the line on its authority to compel "relevant evidence?"

The second explanation belying the inability of DNA testing to exclude the chance of paternity concerns the possibility that the legitimate child was fathered by someone other than her legal father. If this is the case, then the DNA test would prove nothing directly and could instead, if admitted at trial, implicitly prove a falsehood. That is, if no matches between the two alleged half-sisters are found, it is logical to assume that the alleged father is not the father of the illegitimate child, even though he may be. The illegitimate child, by assuming that most legitimate children are conceived by a union of their legal parents, bears the risk of this negative implication.

In this case, could the illegitimate child present evidence showing that the legitimate child was born of an adulterous union, or was adopted, or that her mother was artificially inseminated? Such evidence, despite its personal nature, would tend to explain why the DNA tests did not prove that the two are related and, hence, would constitute relevant evidence. Thus considered, individuals other than the relatives directly involved in the litigation could become embroiled in a paternity suit that only indirectly affects them—if at all.

The problem of assuming a biological link to the unavailable parent is not isolated to parent-child relationships. In cases where the individual's siblings or parents undergo testing, the presumption that the legal relatives are in fact biologically related is just that—a presumption. Although DNA testing is able to verify a relationship if one exists, if the tested individuals are not biologically related, a strong chance of drawing negative inferences from inconclusive test results persists.

200. The availability of Sudwisher's relatives, however, does not drastically increase the analyst's ability to prove paternity. Although the DNA fingerprint of Sudwisher can be compared to her siblings' to isolate better her mother's genes and to prove or disprove that she and her siblings shared a common father, the only way to link Hoffpauir to both Sudwisher and Schuh is to compare the DNA fingerprints of the two alleged half-sisters. For this purpose, more relatives of Schuh, who were presumably unavailable, would have been more helpful.

201. "The problem with descendants is that . . . you're assuming that he is the father of those children. In something like five thousand parentage tests over the last four years, my rule of thumb is that I'm not going to make presumptions." Cohen Interview, supra note 27.

202. For this reason, DNA experts, like Dr. Cohen, do not presume that the relatives are related, but instead prove it. "When I test grandparents, I don't assume that the grandfather is the father . . . is the true [biological] father—I prove this in my analysis. . . . I never assume fatherhood in the lab." Id.
Third, it is theoretically possible for DNA testing to fail to reveal any relationship, not because the two are unrelated, but because the alleged father contributed his genes in such a way as to conceal his paternity. Every individual, viewed as a prospective parent, resembles a binary creature; that is, when reproducing, every person contributes to her offspring genes that were inherited either from her mother or her father. Thus, stated simply, the parent, at any given gene locus, has a fifty percent chance of contributing a gene she inherited from her mother, and a fifty percent chance of contributing a gene she received from her father. When both biological parents and the child are tested, all constituent genes are accounted for; therefore, at every locus tested, the child will possess genes that can be traced to her biological parents. If at one site the child possesses a gene that is not found in either tested parent, then at least one of the parents is necessarily excluded from being the child's biological parent.

But when an alleged parent is unavailable for testing, all the constituent genes are not accounted for, and it therefore becomes more difficult to determine paternity. To compensate for this, more gene sites are tested, since the likelihood of discovering a match increases with every additional gene analyzed. Conceivably, however, when distant relatives are tested without the benefit of having the missing relative's genetic profile, if at every locus examined the alleged parent contributed the opposite gene to the tested siblings, then no biological link will be revealed—even though the child and alleged parent are in fact related. Because of this remote chance, DNA testing is unable to exclude the alleged parent with certainty.

This contingency also accounts for the inability of the expert to predict the level of probability that may result even if a match is found.

203. This does not present a significant problem when several relatives are tested.

204. "What one does in that case [where a parent is missing], is you do more genes. So with a man and his child, I would only do three or four. If I have a spouse . . . a sibling and a child, then I might have to do five, six, seven, eight genes to see if there is any relationship." Cohen Interview, supra note 27.

205. For instance, if two half-siblings are tested (as in Sudwischer) who allegedly share a common parent, the genes contributed by the missing parent who possesses genes A and B, could be contributed as follows: To child 1 at locus 1, the parent contributed gene A. To child 2 at locus 1, the parent contributed gene B. If at every locus tested, the alleged parent contributed the opposite gene to each child, and only these two half-siblings are tested, then DNA typing will at least be inconclusive.

206. For example, a child with gene A at a tested locus seeks to prove relation to an unavailable alleged father. The biological mother is tested and has genes B and C at that same locus. Other presumed relatives are tested and have genes D, E, F and G. No one who is tested possesses gene A. Nevertheless, such results do not inevitably lead to the conclusion that the alleged father did not possess gene A. The only sure way to disprove the alleged father's paternity in this case is to test both of his biological parents and find that neither of them possesses gene A.
In *Sudwischer*, for instance, the DNA expert was only able to state that "[t]he probability index could be as low as one in five or as high as one in a hundred thousand." 207 In contrast, when both parents are tested, the probability of paternity, as expressed in a percentage, will either approach one hundred percent or zero percent. 208 Again, given the uniqueness of every individual's genetic makeup and the unlikelihood that two unrelated individuals would just happen to share a common gene, once one match is found, it becomes probable that the two share a common relative. But if no match is found, then the converse, that the two are not related, does not necessarily follow.

Fourth, the two individuals could be related, not because they share a parent, but because they share a distant common relative. If the tested individuals are distantly related, then the statistics used to calculate the probability of paternity will be misleading, since the likelihood of two relatives sharing a common gene is significantly higher than the probability of two unrelated individuals sharing the same gene. 209 For instance, if two biological cousins are tested, who are erroneously thought to be related only through the alleged parent if at all, the likelihood of discovering a match is increased, since the two share common genes contributed from distant relatives—genes that would not be present in two unrelated individuals. This is particularly problematic in smaller communities where the incidence of intermarriage is common. 210

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208. Test results proclaiming a 99+ percent probability of paternity are prone to misinterpretation. This percentage does not exactly mean that there exists a 99+ percent chance that the alleged father is the child's parent. Rather, this percentage represents a comparison of how well the father and child "matched" and the incidence of the gene allegedly contributed by the father within the father's ethnic group. For a helpful analysis of this often confusing concept, see *Blakesley*, supra note 8, at Part II, Ch. 6.

209. "[Statistics] are based on random frequencies in the population.... That is one thing that you must rule out, that all these people are unrelated. I eliminate 99 percent of all males unrelated to the absent parent." Cohen Interview, *supra* note 27.

210. For instance, in Iota, Louisiana, scientists contend that the small community's history of intermarriage accounts for the high percentage of children born there with Tay-Sachs, a rare and deadly genetic disease traceable to Ashkenazi Jews. In the eighteenth century, according to one theory, two families of Ashkenazi Jews who carried the Tay-Sachs gene settled in Louisiana and proliferated the deadly gene among their French-Canadian neighbors through intermarriage:

"In these little communities you find people stayed and intermarried for generations," leading to a higher prevalence of other rare genetic disorders, he [Dr. Emmanuel Shapira, a geneticist at Tulane Medical Center] said. Throughout southwest Louisiana unusual disorders can be found, particularly among the Cajuns. . . .

"It's very difficult to find any family in Iota who wasn't traceable back to intermarriage back there," Fabacher [a physician and local genealogist] said.
Fifth, although a remote possibility, the common gene discovered through DNA testing could have been contributed by someone other than the alleged father. For instance, it is possible for the alleged child and the tested relative to share common genes, not because they share a common relative, but because their genetic structures coincidentally resemble one another at the tested locus. The probability of this random matching is reflected in the figure used to estimate the likelihood that two individuals are related. That is, if it is stated that there is a 99.8% probability of relationship, then there is a 0.2% chance that someone other than the suspected father contributed the common gene. This slight possibility prevents DNA analysis from proving paternity with one hundred percent certainty.

B. Legal Implications

Although the majority recognized that DNA tests, given the facts of Sudwischer, would not be able to prove paternity with certainty, the various difficulties of using DNA testing under the circumstances were not fully appreciated. Besides being incapable of excluding or including the alleged parent with certainty, the assurance that relevant evidence will be produced, which exists when both parents are tested, is lost. To force an individual, perhaps even a disinterested nonparty, to submit to blood tests in order to obtain evidence that may or may not be relevant, offends the most basic notions of individual liberty. This consideration, more than any other, should be weighed when making such policy decisions.

By holding that Louisiana Code of Civil Procedure article 1422 authorizes the testing sought by the plaintiff in Sudwischer, the Louisiana Supreme Court engages in judicial legislation. Louisiana Revised Statutes 9:396 and Code of Civil Procedure article 1464 are legislative exceptions to the fundamental rule that the individual has the right to be secure in her person. Any judicial attempt to broaden the scope of these two articles should be made only after a thorough debate of the issues involved. Given the limitations of DNA typing to establish paternity when relatives of an alleged parent are tested, the court should exercise

"They're all at some point connected to that [the Ashkenazi Jew] pedigree."
Laurie Garrett, A Hidden Killer in Cajun Country, Newsday, Nov. 26, 1990, at 4. See also Deborah L. Grant, Tay-Sachs: Genetic Disease Has Louisiana Link, 21 Tulane Medicine 8, 11 (1990). In this article, Dr. Shapira reports, "There's a high frequency of intermarriage in the Cajun population and a high probability for people to share a rare gene by descent in Louisiana."

211. Only if the statistical data that belies this figure is accurate, however, are such determinations trustworthy.

caution when ordering individuals other than the mother, child, and alleged father to submit to testing.

IV. Conclusion

Technology often outstrips legal practice. And when this occurs, as is the case with DNA typing, courts should neither ignore reality by adhering to old doctrines, nor unthinkingly abandon the old for the untested new. Instead, as encouraged by the civilian tradition, courts should creatively interpret existing laws to comport with the new technology to assure justice. The court in *Sudwischer*, however, improperly relied on Louisiana Code of Civil Procedure article 1422 to compel a nonparty, who was not the alleged mother, child, or alleged father, to undergo blood tests. The scope of those who may be compelled to submit to testing should at least be restricted to interested parties. For this purpose, the court could have invoked Louisiana Code of Civil Procedure article 1464. Moreover, given the various implications surrounding the use of DNA testing to establish paternity when an

213. For example, in Berry v. Chaplin, 169 P.2d 442 (Cal. Ct. App. 2d Dist. 1946), the infamous paternity suit against Charlie Chaplin, the appellate court, bound by precedent, affirmed the trial court’s finding that Chaplin was the father of the child, despite blood test results that established non-paternity. Even though little scientific debate surrounded the validity of such tests, California law did not then accept negative blood tests as conclusive proof of non-paternity. “Whatever claims the medical profession may make for blood tests to determine parentage,” read the jury instructions which were upheld on appeal, “this state does not declare that this type of expert testimony is conclusive or unanswerable, therefore, you are not bound by such medical opinions.” *Id.* at 452.

214. For instance, in the late 1970s another genetic identification technique, known as protein gel electrophoresis, was adopted by forensic laboratories and used in thousands of cases. The judicial acceptance of this test was premature, however, since shortly after its use became routine, serious doubts regarding its reliability arose. The test was later ruled inadmissible in California and Michigan. Thompson & Ford, *supra* note 181, at 46-48. “The electrophoresis debacle teaches the importance of anticipating questions that may arise with respect to the reliability of a forensic technique and of being prepared to respond to those questions before the technique is placed into routine use.” Thompson & Ford, *supra* note 181, at 48.

215. Problems non-existent and unforeseeable multiply constantly at an increasing rate, and must be decided by the court as the litigants press for their rights. The exegetical approach “paralyzed the judge” and prevented him from determining the legal rights of man in a world unknown to the lawmakers who framed the Code. Following the lead of Gény, the French judiciary moved to the “free scientific research” approach. While we may not in Louisiana be permitted the free rein Gény calls for, we certainly can use the techniques of Gény and the French jurists to determine our law when it is doubtful in language and dubious in meaning. We are a civilian jurisdiction, and we should as a court follow that tradition.

alleged parent is unavailable for testing, either the judiciary or the legislature should reconsider the scope of and set, deliberately, the limits of both Louisiana Revised Statutes 9:396(A) and Article 1464.

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