Roman Sources and Constitutional Mandates: The Alpha and Omega of Louisiana Laws on Concubinage and Natural Children

Kathryn Venturatos Lorio

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol56/iss2/3

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
Roman Sources and Constitutional Mandates: The Alpha and Omega of Louisiana Laws on Concubinage and Natural Children

Kathryn Venturatos Lorio

The Louisiana Civil Code of 1870 contained many laws regulating the extramarital family composed of a concubine and her natural children—the "other" family. In addition to an elaborate hierarchy of classification of illegitimate children, the Code of 1870 contained restrictions regulating donations between certain unmarried cohabitants and further limitations applying to gifts from such individuals to their children. The Roman sources of those laws and the ultimate fate of the Code articles due to constitutional challenges and social realities are the subject of this article.

In classical Rome, the concubina was different from a mere meretrix. She was not just any mistress, but a special one. The relationship between a man and his concubina was somewhere between a casual affair and a marriage. During the republican period, a man could have both a wife and a concubine. There was no apparent stigma attached to the relationship which had purely social recognition in classical time. Likewise, there were no restrictions on men bestowing gifts on their concubines.

Concubinage became more common, gaining the status of a recognized institution, during Augustus's time, when restrictive Augustan legislation, Lex Julia et Papia Pappaea, disqualified many persons from marrying each other. For example, senators and their descendants for three generations were banned from marrying certain categories of people such as freedmen and freedwomen, actors and actresses and their children, prostitutes, procurers, procurresses and their ex-slaves, convicted adulterers, and persons convicted in public prosecutions. Except for freed persons, all of these were considered probrosi,
morally reprehensible.\textsuperscript{7} Soldiers were forbidden to be married during the time of service.\textsuperscript{8} If marriages preceded entry into the service, the marriages were dissolved on entry.\textsuperscript{9} A freedman was barred from marrying his patroness, or the widow or daughter of his patron.\textsuperscript{10} Tutors could not marry their wards,\textsuperscript{11} and provincials could not marry women of their provinces.\textsuperscript{12} An exception was made for the latter if the province was his home province.\textsuperscript{13} Although concubinage was not expressly mentioned in the Augustan laws on matrimony,\textsuperscript{14} which were motivated to reform public morals, concubinage as an institution became a by-product of it.\textsuperscript{15} People who wanted to establish a stable union, but were denied the legal opportunity to marry because they lacked the legal capacity or conubium,\textsuperscript{16} often established themselves in a concubinage relationship. Knowing they could not legally marry, they lacked the "animus" or intention to legally marry.\textsuperscript{17} If not forbidden by nature to marry because of consanguinity,\textsuperscript{18} age limitation, or inability to consent,\textsuperscript{19} but only prohibited by the ius civile to marry, people often entered into concubinage relationships.\textsuperscript{20} Concubinage thus became a sort of shadow marriage, a union of lesser stature than marriage, especially for the woman in the relationship,\textsuperscript{21} who was somewhere "below the honours of a wife, [yet] above the infamy of a prostitute."\textsuperscript{22} In many other respects, concubinage so resembled marriage that the only way to clearly distinguish the two was that a dowry or dos offered the best evidence that the parties intended a marriage and not merely concubinage.\textsuperscript{23} Sometimes the position of concubine was actually preferred by the woman,

\textsuperscript{7} Jane F. Gardner, Women in Roman Law and Society 32 (1986).
\textsuperscript{8} Id. at 33.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} Id. See also Buckland, supra note 6, at 128.
\textsuperscript{12} Gardner, supra note 7, at 33.
\textsuperscript{13} Id. See also Dig. 25.7.5 (Paul, Views 2).
\textsuperscript{14} Pal Csillag, The Augustan Laws on Family Relations 144 (1976).
\textsuperscript{15} Gardner, supra note 7, at 145. See generally Beryl Rawson, Roman Concubinage and Other De Facto Marriages, 104 Transactions of the Am. Philological Ass'n 279 (Douglas E. Gerber ed., 1974).
\textsuperscript{16} Gardner, supra note 7, at 31.
\textsuperscript{17} Ferdinand Mackeldy, Handbook of the Roman Law 410 (Moses A. Dropsie ed. & trans., 1883). The author notes in more specific terms that concubines and their paramours lacked animus matrimonii. Id.
\textsuperscript{18} Buckland, supra note 6, at 128.
\textsuperscript{19} Id. (citing Dig. 25.7.1.4). This portion of the Digest explains that "[i]t is clear that anyone can keep a concubine of any age unless [the concubine] is less than twelve years old." Dig. 25.7.1.4 (Ulpian, Lex Julia et Papia 2).
\textsuperscript{21} Charles P. Sherman, Roman Law in the Modern World 73 (1922).
\textsuperscript{22} The Roman Law Reader 31 (F.H. Lawson ed. 1969).
\textsuperscript{23} Gardner, supra note 7, at 56. See also Watson, supra note 2, at 6.
KATHRYN VENTURATOS LORIO

whose property was protected from loss as a dowry.\textsuperscript{24} This was often the case when a patron, or \textit{patronus}, established a stable relationship with his freedwoman, or \textit{liberta}.\textsuperscript{25} Because people of equal rank were permitted to marry, the usual participants in concubinage were a man of higher status and a woman of lower status.\textsuperscript{26} Although the union did not elevate the woman to the man’s rank,\textsuperscript{27} she supposedly obtained a sort of security and a higher standard of living than she would otherwise enjoy. The man, on the other hand, was afforded more options in selecting partners\textsuperscript{28} and could establish a stable relationship with a partner who would have no legal claim to his property and was not expected to bear him children. If she did bear him children, the children would be illegitimate, having no legal claim to his property.\textsuperscript{29}

In an effort to ensure that Roman women stayed pure and eligible for marriage, Augustan legislation discouraged \textit{stuprum}, the sexual union outside marriage between free persons. Special courts were established to deal with offenders.\textsuperscript{30} The laws on \textit{stuprum} did not apply to prostitutes; likewise, prosecution was often avoided in instances of concubinage when the concubine was of a lower status than the man and, thus, not a potential marital partner.\textsuperscript{31}

Although it was unclear which of the Augustan laws applied to concubinage, it was understood that the \textit{Lex Iulia et Papia Pappaea} permitted the practice, and the participants were not guilty of adultery,\textsuperscript{32} thus relieving the parties from the penalties associated with \textit{stuprum}, as long as their union did not violate principles of monogamy, incest or puberty.\textsuperscript{33} Thus, in the post-classical period, concubinage became a monogamous arrangement,\textsuperscript{34} in contrast to the practice during the time of Cicero when a man could have both a wife and a concubine,\textsuperscript{35} or for that matter, two concubines at the same time.\textsuperscript{36} Certainly, during the Empire, it was clear that a man could not have both a wife and a

\begin{itemize}
  \item \textsuperscript{24} Hunter, \textit{supra} note 20, at 695.
  \item \textsuperscript{25} \textit{Id.} at 694-95.
  \item \textsuperscript{26} Borkowski, \textit{supra} note 6, at 123. \textit{See also} Rawson, \textit{supra} note 15, at 288; Buckland, \textit{supra} note 6, at 128; Watson, \textit{supra} note 2, at 7; Dig. 25.7.3 (Marcian, Institutes 12). \textit{But see} John Crook, \textit{Law and Life of Rome} 102 (1967) (explaining that a striking feature of the institution of concubinage was the relationship between women of high status and men of a humbler rank).
  \item \textsuperscript{27} Sherman, \textit{supra} note 21, at 73.
  \item \textsuperscript{28} Susan Treggiari, \textit{Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian} 52 (1991). The author points out that men often had women of a lower social status as their concubines before entering a legal marriage or after a wife died. \textit{Id.}
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} Borkowski, \textit{supra} note 6, at 123.
  \item \textsuperscript{31} Treggiari, \textit{supra} note 28, at 311. \textit{See also} Dig. 25.7.1.1 (Ulpian, \textit{Lex Julia et Papia} 2).
  \item \textsuperscript{32} Csillag, \textit{supra} note 14, at 146.
  \item \textsuperscript{34} Crook, \textit{supra} note 26, at 102.
  \item \textsuperscript{35} Watson, \textit{supra} note 2, at 9. \textit{See also} Code J. 5.26.1.
\end{itemize}
concubine at the same time. For then, the participants would be guilty of *stuprum.*

Children of these relationships were considered illegitimate and belonged only to the mother. When the principle of cognation developed, these children were able to claim succession rights through their mothers. These children, however, were legally fatherless. The only way a father of such children could get *potestas* over the children would be by adopting them (*adrogatio*).

Major changes in the legal treatment of the “other” family occurred during the period of the Christian Emperor Constantine the Great. Not favoring concubinage, but wishing to encourage marriage, Constantine in his Edict of A.D. 335, introduced the possibility of legitimation of illegitimate children by the subsequent marriage of their parents. The reform, meant to promote marriage, was not generally available but was limited to those persons who were already living in a stable relationship of concubinage. In addition, Constantine imposed an incapacity on concubines and their natural children to take any property from the father. This rule was mitigated by the Constitutions of Valentinian, Valens, and Gratian in A.D. 371 which limited gifts to natural children to one-twelfth if a man died leaving legitimate children or grandchildren, or a father or mother. If no such relations survived, the man could leave to his concubine or children up to one-fourth of this property. In 476 A.D., Zeno abrogated the law of Constantine as to legitimation by marriage, except for freeborn concubines who already had children. However, Justinian in A.D. 529 revived and expanded the policies of Constantine. Legitimation by

42. Mackelday, *supra* note 17, at 444.
43. Being under the potestas of the father, in addition to giving the child a right to inherit from the father, also gave the father significant control over the child. For example, the father had the power to put his child to death for just cause, sell the child into slavery, sanction the child’s marriage of the child, and force the child to divorce. Alan Watson, *The Spirit of Roman Law* 11 (1995).
44. Although during this classical period, it was not possible to adopt female children in this way, later, both males and females could be adrogated by imperial rescript. Gardner, *supra* note 7, at 144.
45. Buckland, *supra* note 33, at 79.
46. *Id.*
49. Code Th. 4.6.1. These provisions correspond to the later Constitution of Arcadius and Honorius in A.D. 403. *See also* Code J. 5.27.2 as noted in Hunter, *supra* note 20, at 322.
subsequent marriage of the parents was permitted even if the father already had legitimate children although the possibility of such a legitimation was still restricted to *liberti naturales*, or natural children who were the children of concubines, as opposed to *spurtii* or *vulgo concepiti*, who were children born of more casual affairs, and legitimation was definitely not available to *adulterini* or *incestuosi*, the children born of adultery or incest. Legitimation by subsequent marriage of the parents was later established in the Canon Law by two Constitutions of Pope Alexander III and was preserved in the decretals of Gregory. The Canon law extended the possibility of legitimation to children born of fornication if the father and mother were capable of contracting marriage at the time of the sexual intercourse. Legitimation by later marriage in Justinian’s time required an *instrumenta dotalia*, or document regulating marriage settlement accompanied by proof that the concubinage was transformed into a marriage. Also, the partners needed to demonstrate that they were free to marry at the time of conception and, if possible, that the children consented to the legitimation. The latter was desirable since the result of the process would render the children subject to the *potestas* of the father. As with any other marriage, the dowry served as best evidence of the marriage. Justinian also introduced the concept of legitimation by imperial rescript or *per rescriptum principis*. In instances in which a marriage was impossible such as where the concubine had either died or was unfit to marry, a man could petition the emperor or enter a request in his will for a rescript legitimizing the children he had with his concubine. This could only be done if the father had no legitimate issue and, if possible, the assent of the children was obtained.

A third method of legitimation, *legitimation oblacio curiae*, was also introduced in the late Empire. First established by Theodosius II in A.D. 443, the process allowed a *liberi naturale* or natural child to become legitimate by enrollment as a member of the *curia* or municipal council, a local administrative body which attracted few recruits due to the many burdens associated with the position. By this process, a son could be legitimated by

---

51. Sherman, *supra* 21, at 81. *See also* Code J. 5.27.5; Const. of J., Nov. 89.8.
54. *Id.* at 127. *See also* Reynolds, *supra* note 3, at 212.
57. Borkowski, *supra* note 6, at 109. *See also* Const. of J., Nov. 89.9.
59. Sherman, *supra* note 21, at 82.
60. Thomas, *supra* note 52, at 138.
64. Buckland, *supra* note 33, at 80.
becoming a decurio or a daughter, by marrying a decurio. Although the procedure, which was extended by Justinian even to fathers with legitimate children, created potestas, the process was not sufficient to create agnation with the father’s relatives.

In addition to recognizing these possible ways to legitimate illegitimate children, Justinian’s legislation expanded rights of those illegitimate children who were the products of a concubinage relationship. Thus, these “natural children” were given the right to claim support from their fathers. Also, Justinian expanded the rights of these children to receive gifts from their father. When the father also had legitimate children, the share permitted to be given to the natural children remained at one-twelfth as it had been previously. However, if there were no legitimate children, but only ascendants of the father, the ascendants received the legitima portio, and the natural children and concubine were permitted to receive the rest. Without ascendants, the father could leave all of his property to his concubine and natural children. These liberalities were not bestowed on other illegitimates such as those of an incestuous union, who were not even recognized as being due support from their mothers.

Concubinage was thus tolerated even by the Christian emperors and was not abolished until 887 A.D. when Emperor Leo the Wise eliminated the legal recognition of concubinage, as well as the distinctions between “natural children” and all other illegitimates. Yet, despite Leo’s edict, the practice of concubinage survived in Western Europe, was practiced by the Teutonic people, and was recognized in the Middle Ages.

Concubinage as an institution is still recognized in Louisiana, although it has undergone many social and legal changes over the years. References to concubinage appear in all the Louisiana Codes. Similar to the Roman concept, it “describes a status, and not mere acts of fornication or adultery, however frequent or even habitual.” Quoting with approval from The Grand Dictionnaire de Larousse, the Louisiana Supreme Court noted, “We must not confound the concubine with the courtesan, or even with what is ordinarily called a mistress. The concubine is an entirely different thing. It is the wife without the title; it is marriage without the sanction of the law.” It differs from common law marriage, because, as the Romans would say, the parties lacked animus matrimonii. They have not

---

65. Id.
66. Id. See also Const. of J., Nov. 89.4; In. 1.10.13; Code J. 5.27.9.
67. Mackeldey, supra note 17, at 445 n.1 (citing Const. of J., Nov. 89).
68. Hunter, supra note 20, at 802. See also Const. of J., Nov. 89.12.2.
69. Hunter, supra note 20, at 802. See also Const. of J., Nov. 89.12.3.
70. Mackeldey, supra note 17, at 445 n.1. See also Const. of J., Nov. 89.15.
71. Consts. of the Emperor Leo, 91.
73. Sherman, supra note 21, at 73-74.
75. Jahraus, 114 La. at 459, 38 So. at 418.
consented, either formally or informally, to marriage. In a concubinage relationship, neither party has any notion of being married to the other. Thus, it differs from a putative marriage in which at least one of the parties is in good faith, believing that he or she is married to the other.

The ramifications of the two concepts also differ since the putative spouse is afforded civil effects of marriage, whereas legal rights and duties do not flow to the concubine.

Concubinage in Louisiana, however, differs from the concubinage in the Roman empire. For, in Louisiana, it is not necessarily a monogamous relationship. Although the Civil Code of 1825 afforded a wife the right to claim a separation on the grounds of adultery if the husband kept his concubine in the common family dwelling, it was possible for a man to have a legal wife in one residence and a concubine in another. Also, when divorce was a much more difficult process than it is today, people who were unable to divorce often established new relationships in concubinage in the interim. Thus, technically, these individuals had both a legal spouse and a partner in concubinage at the same time.

Like the Romans, Louisianians often entered into concubinage because the Louisiana civil law prohibited some partners from legally marrying. Concubinage

76 In fact, until 1975, common law marriage was a criminal offense in Louisiana, punishable by a fine of up to one thousand dollars or imprisonment with or without hard labor for not more than one year or both. La. R.S. 14:79.1, enacted by 1960 La. Acts No. 73, § 1, repealed by 1975 La. Acts No. 638, § 3. Before it was repealed, section 14:79.1 provided:

Entering into a common law marriage as herein defined is hereby declared to be a crime.
For the purposes of this section a common law marriage is an agreement, either written, oral, or tacitly entered into, between a man and a woman to then and there become husband and wife, without a ceremonial marriage solemnized pursuant to a license obtained in accordance with the laws of this state, followed by cohabitation. The living together openly by a man and a woman as man and wife shall be considered as prima facie evidence that a common law marriage has been entered into by them.

Whoever commits the crime of entering into a common law marriage with another shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than one year, or both.

77 La. Civ. Code art. 96:

An absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith.
When the cause of the nullity is one party’s prior undissolved marriage, the civil effects continue in favor of the other party, regardless of whether the latter remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage.

A marriage contracted by a party in good faith produces civil effects in favor of a child of the parties.

A purported marriage between parties of the same sex does not produce any civil effects.

78 See Texada v. Spence, 166 La. 1020, 118 So. 120 (1928).

was, for example, a viable alternative to interracial couples who, until 1972, were prohibited by the Civil Code from marrying.\textsuperscript{80} Also, a person who was divorced from his spouse on the grounds of having committed adultery was forbidden by the Code to marry his or her accomplice in adultery.\textsuperscript{81} Again, concubinage was a possible alternative.

The Civil Code of 1870 in Article 209, as did its predecessor Code in 1825\textsuperscript{82} and the Digest of 1808,\textsuperscript{83} recognized, as proof acceptable in the proving of paternal descent, the fact that a mother was known to be living in a state of concubinage with a man at the time of a child's conception. Although current Article 209, which addresses methods of proof of filiation, does not mention concubinage, the comments following the article list as possible evidence of filiation, "proof that the alleged parents lived in a state of concubinage at the time of conception.\textsuperscript{84}"

\textsuperscript{80} La. R.S. 9:201, repealed by 1975 Acts No. 638, § 3. Before it was repealed in 1975, section 9:201 provided that "[m]arriage between persons of the Indian race and persons of the colored and black race is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect, and is null and void." \textit{Id.}

Following the United States Supreme Court's decision in Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967), declaring antimiscegenation statutes unconstitutional on the basis of the equal protection and due process clauses of the United States Constitution, Louisiana repealed this law. 1975 La. Acts No. 638, § 3.

\textsuperscript{81} La. Civ. Code art. 161 (1870), repealed by 1972 La. Acts No. 625, § 1. Article 161 provided that "[i]n case of divorce, on account of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage." \textit{Id.}

\textsuperscript{82} La. Civ. Code art. 227 (1825). Article 227 of the Code of 1825 provided:

In the case where the proof of natural paternal descent is authorized by the preceding article, the proof may be made in either of the following ways:
1. By all kinds of private writings, in which the father may have acknowledged the bastard as his child, or may have called him so;
2. When the father, either in public or in private, has acknowledged him as his child, or has called him so in conversation, or has caused him to be educated as such;
3. When the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived.

\textit{Id.}

\textsuperscript{83} La. Civ. Code art. 31 (1808). Article 31 of the Code of 1808 provided:

In the case where the proof of natural paternal descent is authorized, under and by the preceding article, this proof may be made in either of the following ways:
1. By all kinds of private writings in which the father may have acknowledged the bastard as his child, or may have called him so;
2. When the father, either in public or in private, has acknowledged him as his child, or has called him so in conversation, or has caused him to be educated as such;
3. When the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived.

\textit{Id.}

\textsuperscript{84} La. Civ. Code art. 209 cmt. b: "Proof of filiation may include, but is not limited to: 'Informal' acknowledgment; scientific test results; acknowledgment in a testament; and proof that the alleged parents lived in a state of concubinage at the time of conception." \textit{Id.}
The most litigated article of the Civil Code or 1870 which dealt with concubinage was by far Article 1481 which limited donations between persons who lived in concubinage. The article incapacitated those who had lived together in open concubinage from making to each other any donations of immovables, whether by donation \textit{inter vivos} or \textit{mortis causa}. Donations of movables could not exceed one-tenth of the whole value of the donor's estate. In an effort to encourage marriage, the article provided that those who later married were exempt from this restriction.\textsuperscript{85} The article may be traced back to French sources which prohibited all donations between concubines.\textsuperscript{86} Apparently this prohibition resulted in numerous unsavory law suits which generated rumors, uncovered secret liaisons, and were generally regarded as distasteful. Consequently, the Projet of the Code Napoleon qualified the prohibition on such donations by only incapacitating those who were notorious about their living arrangement.\textsuperscript{87} After much debate, and fearful of promoting the negative type of inquiry which had previously found its way to the courts, the framers of the Code Napoleon completely omitted from their code any restriction on gift-giving by those living in concubinage. Louisiana, however, incorporated a restriction, but limited its applicability. Article 10 of the Digest of 1808 only disqualified those who had lived in "open" concubinage and the restriction applied to any universal donation or donation by universal title. It was the Civil Code of 1825 which, while retaining the limitation as to only "open" concubinage, further restricted the disqualification to any immovables and to movables only to the extent of one-tenth of the donor's whole estate. Additionally, it was at the time of the Civil Code of 1825 that the exemption for those who later marry was introduced.\textsuperscript{88}

Much of the litigation involving this article dealt with the issue of whether or not the concubinage was indeed "open." Concealment of the relationship made the

\begin{itemize}
\item \textsuperscript{85} La. Civ. Code art. 1481 (1870), \textit{repealed by} 1987 La. Acts No. 468, \textsection 1. Before it was repealed, Article 1481 provided:
  - Those who have lived together in open concubinage are respectively incapable of making to each other, \textit{whether \textit{inter vivos} or \textit{mortis causa}}, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.
  - Those who afterwards marry are excepted from this rule.
\end{itemize}

\begin{itemize}
\item \textsuperscript{86} The concept that "[d]on de concubin à concubine ne vaut" was affirmed by the Royal Ordinance of 1629, article 132, which nullified any such attempt to donate. \textit{See} Succession of Jahraus, 114 La. 456, 38 So. 417, 419 (1905).
\item \textsuperscript{87} "Ce qui ont vecu ensemble dans un concubinage notoire sont respectivement incapables de se donner." Projet du Gouvernement, Book III, Title IX, \textsection 11 (1808).
\item \textsuperscript{88} La. Civ. Code art. 1468 (1825). Article 1468 of the Code of 1825 provided:
  - Those who have lived together in open concubinage are respectively incapable of making to each other, \textit{whether \textit{inter vivos} or \textit{mortis causa}}, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.
  - Those who afterwards marry, are excepted from this rule.
\end{itemize}
article inapplicable.89 Attempts to disguise the living arrangement as anything other than blatant concubinage saved the parties from this prohibition. Thus, even where the concubinage was disguised as a marital arrangement, the concubinage was not deemed open.90

The proper remedy for donations which did fall under the limitation was to nullify any donations of immovables91 and to reduce the donations of movables to one-tenth of the estate.92 The treatment of illegitimate children by the Civil Code of 1870 greatly resembled Roman law on the subject. Children were classified as either legitimate, illegitimate, or legitimated.93 Legitimates were those born during a marriage.94 Illegitimates were those born out of marriage;95 illegitimates were further sub-classified, as in Roman law, according to the degree of guilt of their parents with regard to the children’s conception. The more favored were those “born from two persons, who, at the moment when such children were conceived might have legally contracted marriage with each other.”96 The less favored were those who were “born from persons to whose marriage there existed at the time some legal impediment.”97 Included within this inferior category were adulterous98 and incestuous bastards.99

92. See Succession of Payne v. Pigott, 459 So. 2d 1231 (La. App. 1st Cir. 1984); Succession of Landry, 114 La. 829, 38 So. 575 (1905); Succession of Moore, 232 La. 556, 94 So. 2d 666 (1957); Succession of Glynn, 167 So. 2d 533 (La. App. 4th Cir.), writ ref., 168 So. 2d 823 (1964).
The original version of Article 179 provided that “[l]egitimate children are those who are born during the marriage.”
Before its amendment, Article 180 stated that, “[i]llegitimate children are those who are conceived and born out of marriage. Illegitimate children may be legitimated in certain cases in the manner prescribed by law.”
Before its amendment, Article 181 provided that “[t]here are two sorts of illegitimate children: Those who are born from two persons, who, at the moment when such children were conceived might have legally contracted marriage with each other; and those who are born from persons to whose marriage there existed at the time some legal impediment.”
97. Id.
Before it was repealed, Article 182, entitled “Adulterous Bastards,” provided that “[a]dulterous bastards are those produced by an unlawful connection between two persons, who, at the time when the child was conceived, were, either of them or both, connected by marriage with some other person.”
Before it was repealed, Article 183, entitled “Incestuous Bastards,” provided that “[i]ncestuous
Those children whose parents were able to contract a marriage at the time of the child’s conception had the further possibility of being acknowledged by their father and becoming “natural children.” Those whose parents were incapable of marrying at the time of conception were deemed bastards. The Code of 1870 specifically provided for a procedure for formally acknowledging eligible children. A parent could appear before a notary public in the presence of two witnesses and execute a declaration of acknowledgment or the parent could register the child as such on birth or baptismal records. An informal acknowledgment was later recognized by the cases and involved a parent treating the child as his own by such outward manifestations as supporting the child and allowing the child to be recognized by the community as the parent’s. These “natural children” were analogous to the liberi naturales born of concubinage in Roman times. They were the favored illegitimates and were able to claim support from their mother and were able to succeed to their natural mother to the exclusion of all others as long as the mother had no legitimate children or descendants. Although they were granted a right to

**bastards are those who are produced by the illegal connection of two persons who are relations within the degree prohibited by law.”**


Before it was repealed, Article 202 provided:

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

101. See Leonard Oppenheim, Acknowledgment And Legitimation in Louisiana—Louisiana Act 50 of 1944, 19 Tul. L. Rev. 325, 328 (1945). Professor Leonard Oppenheim defined acknowledgment “as a conscious effort on the part of the parent or parents to raise the status of the child.” Id.


Before it was amended by the legislature in 1979, Article 203 provided:

The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it shall not have been made in the registering of the birth or baptism of such child.

103. See Minor v. Young, 149 La. 583, 89 So. 757 (1921); Taylor v. Allen, 151 La. 82, 91 So. 635 (1921).

104. La. Civ. Code art. 240. Article 240 is still in the Code today, although constitutional interpretations have modified its applicability, as well as the applicability of other articles which still remain in Book I, Title VII, Section 2, “Of the Duties of Parents Toward Their Illegitimate Children, and of the Duties of Illegitimate Children Toward Their Parents.” It provides that “[f]athers and mothers owe alimony to their illegitimate children, when they are in need; Illegitimate children owe likewise alimony to their father and mother, if they are in need, and if they themselves have the means of providing it.” Id.


Before it was amended in 1979, Article 918 provided:

Natural children are called to the legal succession of their natural mother, when they have
support when in need from their father and his heirs after his death, their succession rights to their father were limited in that they could only inherit from the father if no legitimate descendants, ascendants, collaterals nor a wife survived the father. Additionally, as was true of all illegitimate children, they were not deemed to be subject to paternal authority, the Louisiana analogy to the Roman potestas.

An advantage afforded natural children, which was not available to adulterous or incestuous children, was the possibility of receiving donations inter vivos and mortis causa. A mother could leave her entire estate to her natural children, provided she was not survived by any legitimate descendants. However,
natural children were not forced heirs and could not claim more than a mere alimony if the mother chose to leave her property to others.\footnote{111} If a natural father was not survived by any legitimate descendants, he could leave up to one-fourth of his property to his natural children if he were survived by only legitimate ascendants or brothers or sisters or their descendants. He could leave his natural children up to one-third if he left only more remote collaterals.\footnote{112} If the father did donate the maximum allowable amount to his natural children, he was required to give the rest of his property to his legitimate relations.\footnote{113} In contrast, natural fathers and mothers were prohibited from giving more than a mere sustenance, or enough to procure an occupation or profession, to their adulterous or incestuous children.\footnote{114}

\footnote{§ 5 of Act 1180 provided that the Act was to become effective on January 1, 1996, "but only if the proposed amendment of Article XII, Section 5 of the Constitution of Louisiana contained in the Act which originated as House Bill No. 9 or Senate Bill No. 43 of this 1995 Regular Session of the Legislature is adopted at the gubernatorial primary election to be held in 1995 and becomes effective." The proposed amendment was adopted.}

\footnote{111. La. Civ. Code art. 1485 (1870), amended by 1979 La. Acts No. 607, § 1.}

\footnote{Article 1485, as it appeared in the Code of 1870, provided:
But if she left them only a part, and has disposed of the rest in favor of other persons, her natural children have no action against her heirs for any thing more than so much as is wanting to supply the maintenance that is secured to them by law in case what she has left them be not sufficient for their support.}

\footnote{Article 1485, amended by 1979 La. Acts No. 607, § 1, repealed by 1995 La. Acts. No. 1180, § 3, provided:
When a parent has left to illegitimate children only a part of the succession and has disposed of the rest in favor of other persons, the illegitimate children have no action against the succession for anything more than so much as is wanting to supply the maintenance that is secured to them by law, in case what has been left to them is not sufficient for their support.}

\footnote{As with Article 1484, there was an attempt to repeal Article 1485 by 1990 La. Acts No. 147, § 3. For the validity of this repeal, see supra note 110. Similarly, 1995 La. Acts No. 1180 § 3 provided for the repeal of Article 1485, contingent on the passage of the proposed amendment to Article XII, § 5 of the Louisiana Constitution protecting forced heirship.}


\footnote{Before it was repealed, Article 1486 provided:
When the natural father has not left legitimate children or descendants, the natural child or children acknowledged by him may receive from him, by donation inter vivos or mortis causa to the amount of the following proportions, to wit:
One-fourth of his property, if he leaves legitimate ascendants or legitimate brothers or sisters or descendants from such brothers and sisters; and one-third, if he leaves only more remote collateral relations.}


\footnote{Before it was repealed, Article 1487 provided:
In all cases in which the father disposes, in favor of his natural children, of the portion permitted him by law to dispose of, he is bound to dispose of the rest of his property in favor of his legitimate relations; every other disposition shall be null, except those which he may make in favor of some public institution.}


\footnote{Before it was repealed, Article 1988 provided that "[n]atural fathers and mothers can, in no case, dispose of property in favor of their adulterous or incestuous children, unless to the mere amount of..."}
Bastards included children whose parents could have acknowledged them but never did, as well as the adulterous and incestuous children who were deprived of the possibility of acknowledgment. All such children were able to claim alimony from their mothers and her descendants.115

Similar to the Roman system, the Louisiana system provided methods of legitimation which would elevate the child to the status of a legitimate child. Originally, legitimation by subsequent marriage, as in Justinian's time, was limited to only those children whose parents were capable of contracting marriage at the time of the children's conception. Thus, as it was also in the Code Napoleon,116 incestuous and adulterous children were not eligible for legitimation by subsequent marriage of the parents.117 A 1948 amendment to the Louisiana Civil Code of 1870 liberalized the article, affording this possibility to adulterous children.118

In addition to mandating marriage by the parents, the original provision in the Code of 1870 required that the parents legally acknowledge the children, "either before their marriage by an act passed before a notary and two witnesses, or by their contract of marriage itself." This was amended in 1944 to allow for legitimation by subsequent marriage of the parents when the parents had "formally or informally acknowledged them for their children either before or after the marriage."119 It was deemed necessary to make that change in order to afford

what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves."

115. La. Civ. Code art. 245 (1870), repealed by 1979 La. Acts No. 607, § 4. Before its repeal in 1979, Article 245 provided that, "[a]limony is due to bastards, though they be adulterous and incestuous, by the mother and her ascendants."

116. Code Napoleon art. 331. Article 331 provided:

Children born out of marriage except those who are born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before their marriage or in the act of celebration itself.

Id. (emphasis added).


Children born out of marriage, except those who are born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever, the latter have legally acknowledged them for their children, either before their marriage by an act passed before a notary and two witnesses, or by their contract of marriage itself.

La. Civ. Code art. 198 (1870) (emphasis added). Article 198 was further amended in 1979. For the text of the current version of Article 198 following its third amendment in 1979, see infra note 154 and accompanying text.

118. La. Civ. Code art. 198 (1870), amended and reenacted by 1944 La. Acts No. 50; 1948 La. Acts No. 482, § 1. After the 1948 revision, Article 198 provided that "[c]hildren born out of marriage, except those who are born from an incestuous connection, are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them for their children, either before or after the marriage."

children who had been informally acknowledged to be legitimated by the marriage of their parents and also to provide a mechanism for legitimation of a natural child in cases in which the parent married without legitimating the child and later had legitimate children.\textsuperscript{120} This was a concern since the second form of legitimation, which bears some resemblance to the Roman legitimation by imperial rescript was, as the Roman procedure, only afforded to fathers who had no legitimate ascendants or descendants.\textsuperscript{121} This second process of legitimation by notarial act was also limited to children whose parents could have contracted marriage at the time of conception. Further amendment to the Code in 1972 allowed for the possibility of adulterous bastards to be legitimated if the impediment to the marriage of the parents was removed by the time of the execution of the notarial act of legitimation.\textsuperscript{122}

Few remnants remain of the laws of concubinage and illegitimate children in Louisiana. The restriction on donations to concubines is no longer a part of Louisiana law. In 1979, more than likely prompted by the interesting case of Succession of Bacot,\textsuperscript{123} the Louisiana legislature repealed Article 1481 of the Civil Code of 1870.\textsuperscript{124} In Bacot, the sole legatee of the testator's will was his alleged homosexual lover with whom he had lived in a long-term relationship. The

\begin{itemize}
\item \textsuperscript{120} See generally Harriet S. Daggett, Suggestions for the Consideration of the Council of the Louisiana State Law Institute, 5 La. L. Rev. 377 (1943).
\item Before it was amended, Article 200 provided:
\begin{quote}
A natural father or mother shall have the power to legitimate his or her natural children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children. But only those natural children can be legitimated who are the offspring of parents who, at the time of conception, could have contracted marriage. Nor can a parent legitimate his or her natural offspring in the manner prescribed in this article, when there exists on the part of such parent legitimate ascendants or descendants.
\end{quote}
\item \textsuperscript{122} See 1972 La. Acts No. 391, § 1, amending La. Civ. Code art. 200 (1870). As amended in 1972, Article 200 provided:
\begin{quote}
A natural father or mother shall have the power to legitimate his or her natural children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children; provided, there exists at the time of the conception or at the time of the legitimation of such children no legal impediment to the marriage of the natural father and natural mother. Nor can a parent legitimate his or her natural offspring in the manner prescribed in this article, when there exists on the part of such parent legitimate descendants at the time of the legitimation.
\end{quote}
\item \textsuperscript{123} 502 So. 2d 1118 (La. App. 4th Cir. 1987).
\item \textsuperscript{124} La. Civ. Code art. 1481 (1870), repealed by 1987 La. Acts No. 468, § 1.
\item Before it was repealed, Article 1481 provided:
\begin{quote}
Those who have lived together in open concubinage are respectively incapable of making to each other, whether inter vivos or mortis causa, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.
\end{quote}
\item Those who afterwards marry are excepted from this rule.
\end{itemize}
decedent had one forced heir, an adult male whom he had adopted almost three years prior to his death. The trial court reduced the legatee's portion to one-tenth of the testator's estate, payable only in movables on the rationale that the decedent had lived in open concubinage with the legatee.125

On appeal, the Louisiana Fourth Circuit disagreed with the trial court, reasoning that Article 1481 limiting donations between persons who lived in open concubinage could not apply in a same-sex relationship.126 Although concubinage was not defined in the Code, the court observed that it has “traditionally been viewed as a union between a man and a woman, living together as husband and wife but outside of marriage.”127 Additionally, the article exempts those who later marry from the restrictions. Because “[t]here is not now, nor has there ever been in our law a legal mechanism for recognizing marriage between persons of the same sex,”128 such persons could not marry and could not therefore be concubines. Thus, the provisions of Article 1481 were inapplicable. The repeal of Article 1481 followed shortly after the Bacot decision.129 Thus, as the Romans limited gifts between concubines so as not to favor their position over that of married persons who were not free to donate to each other, the Louisiana legislature now permits gifts between those living in concubinage so as not to disfavor them over partners in same-sex unions who are free to donate to each other.

Another area in which Louisiana currently analogizes concubinage to marriage relates to the payment of alimony after divorce. The obligation to support a needy ex-spouse ceases when that ex-spouse remarries.130 In 1982,131 the legislature expanded that concept relieving the payor from any obligation to support an ex-spouse who lived in “open concubinage.” “Open concubinage” in the alimony article has been interpreted to mean the same as “open concubinage” meant in previous Article 1481 relating to donations.132

125. Bacot, 502 So. 2d at 1121.
126. Id. at 1129-30.
127. Id. at 1128.
129. See supra note 85 and accompanying text.
   Article 112 provides in pertinent part that “[p]ermanent periodic alimony shall be revoked if it becomes unnecessary and terminates if the spouse to whom it has been awarded remarries or enters into open concubinage.” La. Civ. Code art. 112 (emphasis added).
Distinctions among illegitimate children who have timely proved their filiation no longer exist in the Louisiana Civil Code. The tide began to turn for illegitimates in 1968 with the landmark case of *Levy v. Louisiana.* In that case, the United States Supreme Court recognized the right of five illegitimate children to recover wrongful death benefits on the death of their mother. Using an equal protection analysis, the Court found no rational basis for treating illegitimate children different from legitimate children in such a situation. Yet, shortly thereafter in 1971 in the case of *Labine v. Vincent,* the United States Supreme Court distinguished the area of succession law in upholding the constitutionality of Article 919 of the Louisiana Civil Code of 1870, which allowed natural children to inherit from their intestate father only if he had other surviving relatives or wife.

In the years that followed, the United States Supreme Court entertained many challenges to state statutes which distinguished illegitimate children from other children. One by one, areas of distinction were eliminated. As to workmen's compensation benefits, Social Security benefits, support form a natural father, welfare benefits, and disability benefits relating to a disabled parent, the United States Supreme Court recognized rights of illegitimate children.

In 1976, although not labelling illegitimate children as a "suspect class" requiring strict scrutiny of any statute discriminating against them, the United States Supreme Court afforded illegitimate children a middle level of scrutiny, above mere rational basis. Stating that the scrutiny required must not be "toothless," the Court in *Mathews v. Lucas* provided the new test to be applied when analyzing the rights of illegitimate children.

Another challenge to intestate succession laws followed. In 1977, in the pivotal case of *Trimble v. Gordon,* the United States Supreme Court declared a portion of the Illinois Probate Act unconstitutional as a denial of equal protection to illegitimate children who were not included as heirs of their intestate father.
intestate father. Applying the middle level of scrutiny outlined in *Mathews*, the Court noted that it had examined the Illinois statute "more critically" than it had examined the Louisiana article in *Labine*.

The first area relating to successions and donations which was changed in Louisiana was the code article prohibiting natural parents from donating to their adulterous or incestuous children. In *Succession of Robins*, the Louisiana Supreme Court held Article 1488 of the Louisiana Civil Code of 1870 to be violative of the equal protection clause of the Louisiana Constitution of 1974. The prohibition of donations by parents to illegitimate children when legitimate children existed was successfully challenged the very next year.

In 1979, the Louisiana legislature repealed the articles restricting donations by a father to his natural children. It recognized the right of a mother to leave her natural children up to the disposable portion of her estate if she were survived by legitimate descendants. The classifications of bastards according to the guilt of their parents in conceiving them was eliminated. All references to "natural children" were changed to the new term "acknowledged illegitimates."

The major case eliminating distinctions of illegitimate children as to inheritance was the *Succession of Brown* in which the Louisiana Supreme Court re-examined Article 919 of the Civil Code of 1870 which had been upheld in *Labine*. Using a higher standard of scrutiny, the court analyzed the code article in terms of the equal protection clause of both the United States and Louisiana Constitutions, finding the article violative of both.

Finally, the legislation of 1981 removed distinctions between legitimate children and illegitimate children as to inheritance rights, including the right to claim a forced portion in the parent's estate. Today any child may be

---

146. 349 So. 2d 276 (La. 1977).
147. *Id.* at 280. See also La. Const. art. 1, § 3, which provides in pertinent part:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.

legitimated\textsuperscript{154} or formally acknowledged,\textsuperscript{155} regardless of the circumstances of his birth or conception. The difference between formal acknowledgment and legitimation as to inheritance rights has been blurred since they each afford the child essentially the same rights. Informal acknowledgment alone is now insufficient for a child to claim rights. Informal acknowledgment may be submitted, however, as proof of filiation. An illegitimate child who has not been formally acknowledged has the right to bring a filiation proceeding to establish his relationship to the parent. The action must be brought within one year of the parent’s death or nineteen years of the child’s birth whichever comes first.\textsuperscript{156}

Although the laws of Rome and Louisiana concerning the “other” family were strikingly similar for most of Louisiana’s history, today little similarity remains. As the concept of family changes daily and as constitutional mandates prohibit distinctions among children, the “other” family, the one of concubines and natural children, is no longer a distinct entity subject to clearly defined rules reminiscent of a bygone era.

\begin{itemize}
\end{itemize}

\begin{itemize}
\item The current version of Article 198 provides “[i]llegitimate children are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them as their children, either before or after the marriage.”
\end{itemize}

\begin{itemize}
\item Article 200 provides that “[a] father or mother shall have the power to legitimate his or her illegitimate children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children.”
\end{itemize}

\begin{itemize}
\item \textsuperscript{155} La. Civ. Code art. 203:
\end{itemize}

\begin{itemize}
\item The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of such child.
\end{itemize}

\begin{itemize}
\item \textsuperscript{156} La. Civ. Code art. 209(C). Article 209 provides:
\end{itemize}

\begin{itemize}
\item 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. This time limitation shall run against all persons, including minors and interdicts. 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. A proceeding for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages.
\end{itemize}