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I. INTRODUCTION

Bastardy proceedings[1] result, potentially, in a support order[2] compelling a putative father to pay a fixed sum[3] for the upbringing of his bastard child. These proceedings, however, result also in community stigma following judicial acknowledgment that the parents have engaged in distinctly unsocial conduct. They have committed fornication and have imposed their impropriety upon an innocent child.[4]

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1 See 7 Am. Jur., *Bastards* § 4 (1937) where various euphemisms are suggested substitutes for the unpleasant implications of "bastard." These substitutes are "child born out of wedlock" or "illegitimate." The present study will use all three terms. Also, the terms "bastardy," "filiation" and "paternity" proceedings will be used interchangeably.

2 UNIFORM ILLEGITIMACY ACT § 22 (1922).

3 Often the "fixed sum" amounts to $15,000 or more before the child becomes 16 or an age at which the child is considered capable of self-support. Schatkin, *The Scandal of Our Paternity Courts*, The Reader's Digest, May 1960, p. 71. In addition, the father is most frequently liable for the expenses connected with the pregnancy and childbirth. See *e.g.*, State *ex rel.* Raydel v. Raible, 117 N.E.2d 480 (Ohio App. 1954). In the usual case the court has no statutory criteria for determining the amount of support for the child. The only criteria available are the "child's welfare" or the "best interests of the state". Thus, support orders often are issued "as shall to the court seem best". Fuller v. United States, 65 A.2d 589 (D.C.Mun. App. 1949).

4 See State v. Taylor, 39 Wash.2d 751, 238 P.2d 1189 (1951) (dictum) where the nature of the subject now under inquiry is well discussed by the court. The decision affirmed a finding of the trial court that the defendant was the putative father of the prosecuting witness' unborn child. The following remarks are included because it will be contended in this study that the severely emotional issues involved in bastardy proceedings provide a significant clue to desirable judicial procedure. The court said at 752, 238 P.2d at 1189-90:

> This is a bastardy proceeding under Rem. Rev. Stat. § 1970 et seq. The word "bastardy" is not a pretty one. While the meaning it usually connotes is a bit jarring, to say the least,

In paternity actions the courts in most cases do not punish the father for his misconduct, but impose upon him the duty to support his child so that society may be relieved of that responsibility.[5] The procedure generally employed for these purposes is summary: sworn complaint of the mother naming the alleged father, issuance of a warrant for his arrest, bodily apprehension by a sheriff, preliminary hearing, requirement of recognizance or jail until trial, and threat of prison upon the failure to fulfill the terms of the support order.[6]

Because of the stringencies[7] connected with bastardy proced-

> the word, when given a fuller or expanded import, even then hardly denotes the emotions, the conduct, and the human factors jam-packed and brimming in the muddled human-relations situation it describes. All individuals are entitled to their legal rights and their day in court. But it would seem that legally trained minds could normally find a solution to the problems involved in bastardy proceedings short of a full-fledged public airing in court of the often sensational and sometimes pornographic details, which details, even considering the *mores* of our times, most often can hardly be said to be complimentary to the parties concerned or in the best interests of society. Admittedly, such situations are difficult and delicate in the extreme, with at least some feelings usually at fever pitch and emotions all over the place, and with the principal litigants usually litigious minded in no small degree.
>
> This case presents an outstanding example of an unncessary public airing of the lurid details of the sex conduct of two adolescents—not so strangely, or incidentally, a male and a female. While the matter might have been settled out of court with credit to all counsel concerned, the trial judge deserves credit for limiting the "trial by battle" and the activities of the "champions" of the litigants within those boundaries permitted to him by law. The ambit of those boundaries, of course, might have been more narrowly defined by generally accepted ethical and moral considerations, by greater emphasis upon and observance of such considerations by the litigants and their families.

[5] State *ex rel.* Gill v. Volz, 156 Ohio St. 60, 100 N.E.2d 203 (1951), 25 TEMP. L. Q. 364 (1952).

[6] UNIFORM ILLEGITIMACY ACT §§ 8-30 (1922). A civil action involving none of these summary procedures is alternately available in many states. See, *e.g.*, NEB. REV. STAT. § 13-111 (1954). In many cases the summary procedure can be instituted either by the state or by the mother. NEB. REV. STAT. § 13-113 (Supp.1960). Nebraska does not require a probable cause finding at the preliminary hearing in order to bind the defendant over for trial. NEB. REV. STAT. § 13-114 (1954).

[7] Problems of support in the entire matrimonial area commonly involve statutes authorizing the summary disposition of the defendant. See,

ures the courts disagree as to the exact nature of the proceeding.[8] Most courts label the proceeding "civil."[9] Others label bastardy proceedings "criminal."[10] Still others call the action "statutory" or "quasi criminal."[11] What follows now are examples of evidentiary and procedural questions judicially resolved under either criminal or civil law through the magic of labels at the sacrifice of thought.[12]

HARPER, PROBLEMS OF THE FAMILY 422-568 *passim* (1952). Usually both criminal and civil actions are available for purposes of compelling matrimonial support. In the UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9C U.L.A. § 15 (1952), the Commissioners' Note under the section dealing with "Jurisdiction by Arrest" describes the need for summary procedures such as arrest: "Section 15 is new. 'A bird in the hand is worth two in the bush.' When the defendant is served with process he is apt to flee to another state instead of awaiting trial."

[8] See 7 Am. Jur., *Bastards* § 81 (1937); Schatkin, *Should Paternity Cases be Tried in a Civil or Criminal Court,* 1 CRIM. L. REV. (N.Y.) 18 (1954).

[9] *E.g.,* People v. Vaughn, 235 Ill. App. 308, 313 (1925):

> It is well settled by the decisions of this State that a prosecution under the Bastardy Act, though criminal in form, is a civil action, and is not for the purpose of imposing a penalty upon the putative father for an immoral act, but merely to compel him to contribute to the support of his illegitimate child.

[10] *E.g.,* State v. Brewer, 38 S.C. 263, 16 S.E. 1001 (1893).

[11] *E.g.,* State v. Rowe, 99 Fla. 972, 974, 128 So. 7, 8 (1930):

> This court has repeatedly held that proceedings in bastardy, though quasi-criminal in their inception, become civil when they reach the Circuit Court, and, being statutory, they must be conducted in substantial requirement with the statute providing for them.

[12] It is not suggested that bastardy proceedings alone raise the basic question whether criminal or civil law should be invoked. There are other branches of the law inviting similar inquiry. See, *e.g.,* Comment, 5 VILL. L. REV. 107, 113 (1959) (whether juvenile courts are criminal in nature); Comment, 54 MICH. L. REV. 1000, 1001-02 (1956) (juvenile delinquency as a crime); Annot., 100 L. Ed. 156 (1956) (exaction of federal tax penalties as a criminal proceeding); Comment, 1 VAND. L. REV. 262 (1947) (violation of a municipal ordinance as a crime).

II. INITIATING PROCEEDINGS AND ESTABLISHING JURISDICTION

Rozgall v. Dorrance[13] described part of the Nebraska procedure for initiating bastardy proceedings. Included within this description was the holding that a finding of probable cause was not essential in a preliminary hearing prior to binding defendant over for trial.[14] Reasoning: no probable cause is required in non-criminal proceedings.

Georgia requires the putative father to give bond for the maintenance of his illegitimate child until it reaches the age of 14 years.[15] If he refuses to give bond he is subject to criminal prosecution, and is fined upon conviction.[16]

A recent Connecticut case[17] sets forth part of the preliminary procedure prescribed in that state:

> Under our procedure, the defendant is accorded a preliminary hearing. If probable cause is found, he is bound over under bond

[13] 147 Neb. 260, 268, 23 N.W.2d 85, 90-91 (1946):

> The preliminary proceedings before a justice or judge are in no sense a trial of the merits. His duties as examining magistrate are for the most part ministerial. He may receive the complaint, docket the case, issue his warrant, and cause the arrest of the accused who is forthwith brought before him to answer the complaint. Unless the party charged then pays or secures to be paid complainant such sum of money or property as complainant may agree to receive in full satisfaction and shall further give bond to the county board in which such complainant resides, conditioned to save such county from all charges toward the maintenance of the child, it is mandatory that the justice or judge by order bind the accused in a recognizance with sufficient security to appear at the next term of the district court to answer the complaint and abide the order of the court thereon, or upon failure by defendant to find such security to cause the accused to be committed to the county jail, there to be held to answer such complaint in the district court.

See Holmes v. Clegg, 131 W.Va. 449, 48 S.E.2d 438 (1948).

[14] Rozgall v. Dorrance, 147 Neb. 260, 269, 23 N.W.2d 85, 91 (1946):

> It is elementary that one charged with a felony is entitled to a preliminary hearing and a finding of probable cause. And such a hearing and finding are jurisdictional only where such a statutory crime has been charged. A preliminary hearing with a finding of probable cause is not necessary or required in a filiation proceeding because it does not come within that category.

[15] See Washington v. Martin, 75 Ga. App. 466, 43 S.E.2d 590 (1947).

[16] *Ibid.* The fine is used for the maintenance of the child.

[17] Pelak v. Karpa, 146 Conn. 370, 151 A.2d 333, 335 (1959).

to await trial. If probable cause is not found, and the plaintiff appeals, the defendant is also placed under bond. (§ 52-435).

The arrest aspect of paternity actions is recognized as an extraordinary remedy in an essentially civil action simply for the purpose of enforcing a judgment rendered in the case.[18] Thus it has been held[19] that the arrest mechanism does not confer jurisdiction on the court and that a defendant who escapes from jail and is not present at trial does not deprive the court of its jurisdiction over an adjudication of the defendant's paternity.

The question of jurisdiction also arises when filiation proceedings are considered civil in the state where the illegitimate child is conceived and when criminal enforcement is attempted in a different state. A Massachusetts court reversed[20] a conviction on a charge of begetting an illegitimate because the begetting occurred in Rhode Island and is a civil offense there. The court reasoned that Massachusetts had no power to enforce its laws relative to acts committed in another sovereignty.[21]

[18] *Ibid.*

[19] *In re* Application of Walker, 61 Neb. 803, 808-09, 86 N.W. 510, 511-12 (1901):

> The process by which the court acquired jurisdiction on the defendant was the warrant issued for his arrest, and its execution serves the same office as the service of a summons in an ordinary civil action; and the court thereby acquired jurisdiction over the person of the defendant. . . . The action being civil in character, there would seem to be no pressing necessity for the defendant's presence if he voluntarily absents himself from the court at the time of the hearing had in that tribunal. The object of the statute providing for the detention of the defendant in confinement, or his recognizance for his appearance in the district court, is manifestly for the purpose of enforcing summarily the judgment rendered in the action, and not to confer jurisdiction on the court. . . .

[20] Commonwealth v. Lanoue, 326 Mass. 559, 95 N.E.2d 925 (1950).

[21] *Ibid;* see Note, The Status of Illegitimates in New England, 38 B. U. L. REV. 299, 307 (1958):

> In Massachusetts . . . the act of begetting an illegitimate child is a misdemeanor. Prior to 1913 the bastardy proceeding in Massachusetts was by statute a civil action having as its main purpose the assistance of the mother in the maintenance of her child. Today in order for the court to have jurisdiction, the act of begetting the child must occur within the state. In addition to the bastardy proceeding, Massachusetts has a criminal action for nonsupport. If the question of the paternity of the illegitimate child has not been adjudicated under the Bastardy Act, the paternity of the child will be determined under this section.

Related to the question of jurisdiction is the determination whether bastardy actions are transitory. Where the purpose of the bastardy statute is merely to save the public from the expense of caring for the child the action is not considered transitory.[22] Conversely it has been held that where the statute converts into a legal duty the father's moral duty to support his illegitimate child a nonresident mother and child may institute a paternity proceeding.[23] It is impossible to understand how the courts determine when a paternity statute purports merely to aid the public or the child, or both.

In Connecticut it has been held[24] that a nonresident mother can maintain an action for support of an illegitimate child against even a nonresident father to the extent that he has assets in the state. The court was fearful that Connecticut otherwise would become a refuge for fathers seeking to avoid assisting in the support of their illegitimate children.[25]

New Jersey, however, does not give relief to a mother bringing an action on a foreign bastardy statute. In *Kowalski v. Wojtkowski*[26] a mother had conceived twins while she was married to a man who was not their father. The mother was a domiciliary of Florida where the twins are considered legitimate because they were conceived in lawful wedlock. The mother, however, gave birth to them shortly after her husband divorced her. She then brought[27] a bastardy action in New Jersey against her adulterer who was the father of the children. The court said:[28]

> Whether the [bastardy] proceeding be deemed civil or criminal in nature, or one having the characteristics of both, the generally accepted rule is that no action is maintainable on a foreign bastardy statute. Such is ordinarily an exercise of the police power to denounce misconduct or to shift the burden of support from society to the child's natural parent. . . . Cases of this class are within the general rule that there cannot be extraterritorial enforcement of a right created by the law of a foreign state as a means of furthering its own governmental interests, of which a statute placing the burden of maintenance of a potential pauper on an individual to the relief of the public, is also an example.

[22] Moore v. State *ex rel.* Vernon, 47 Kan. 772, 28 Pac. 1072 (1892).

[23] Dicks v. United States, 72 A.2d 34 (D.C. Mun. App. 1950).

[24] Pelak v. Karpa, 146 Conn. 370, 151 A.2d 333 (1959).

[25] *Id.* 151 A.2d at 335.

[26] 19 N.J. 247, 116 A.2d 6 (1955).

[27] *Ibid.*

[28] *Id.* at 252-53, 116 A.2d at 9.

The court concluded:[29]

> New Jersey's interest in the support of children within its borders cannot be made to override the status of legitimacy accorded children born in lawful wedlock by laws of the domicile of origin.

A dissent[30] by Justice William J. Brennan concluded that New Jersey had a sufficient interest in the welfare of these children so that it could compel the resident father to support his illegitimate children even when born of his adultery with a married woman in Florida. Also pertinent here, it might be added, is the risk that New Jersey might become the sanctuary of errant fathers evading the duty of support to their illegitimate progeny.

Included in the scope of bastardy jurisdiction is the problem of venue and the selection of either a criminal or civil court in which to try the case. Regardless of the label (criminal - civil) attached to bastardy proceedings, the courts generally hold that the defendant may not demand a change in venue as he might do in an ordinary civil case.[31] The rule as to choice of criminal or civil courts, however, is not quite so fixed.

Yeager v. People[32] clarified for a Colorado trial court whether it was a criminal or civil court. An unwed mother swore a complaint; the alleged father was arrested, arraigned and subjected to bond; the case was set over for hearing in the trial court. Three months later the district attorney filed a criminal information against the putative father and accused him not only of being the father, but also of violating the peace and dignity of the State of Colorado. At the trial, after all evidence was introduced, the court announced that the case was brought in the name of the People *ex rel.* the mother. The Colorado Supreme Court held[33] that the trial court was both late and inaccurate in its announcement. Not until just prior to instructing the jury did the trial court say anything to indicate that the case was other than as appeared from the criminal information, namely the People against the defendant. Further, the action was brought not on the relation of the mother but exclusively in the name of the People. The

[29] *Id.* at 262, 116 A.2d at 14.

[30] *Id.* at 269, 116 A.2d at 19 (dissenting opinion).

[31] Francken v. State *ex rel.* Fuerst, 190 Wis. 424, 209 N.W. 766 (1926); State *ex rel.* Simon v. District Court, 138 Minn. 77, 163 N.W. 797 (1917).

[32] 116 Colo. 379, 181 P.2d 442 (1947).

[33] *Id.* at 386, 181 P.2d at 446.

sole plaintiff was identified by an examination of the pleadings, and only one had been filed, namely, the criminal information.

Lastly, the court held[34] that the Colorado bastardy statute contemplates merely a civil action without the intervention of the district attorney or the inclusion of the name of the People as plaintiff. The judgment of the trial court was reversed because "the procedure followed in the district court was so impregnated with damaging [criminal] implications that throughout the trial plaintiff in error was handicapped to his material prejudice."[35]

Choice of a proper court was also the question in *In re El*,[36] a New Jersey decision. The courts involved in the choice were either the juvenile or civil court. The issue in the *El* case was whether a youth under eighteen years of age, who had been adjudged the father in a filiation proceeding, is guilty of juvenile delinquency.[37] Delinquency is criminal conduct committed by a youth. Thus the court was asked to determine whether bastardy was criminal conduct requiring the jurisdiction of the juvenile court. The opinion stated:[38]

> In Dally v. Overseers of Woodbridge, 21 N.J.L. 491, the question was whether character evidence, admissible only in a criminal case, was proper under a charge of bastardy. Such evidence had been excluded at the trial on the ground that it is allowable only in a criminal case. The Supreme Court reversed and declared the case to be "not strictly civil" so as to exclude character testimony. . . . So, there is nothing to be gained by attempts at classification. . . .
>
> Now what are some of the things by which a bastardy proceeding may be said "to partake of a criminal action"? They are readily multiplied. To begin with, the bastardy law provides for suit in the criminal court of the city or other municipality and for appeals to the Quarter Sessions by trial de novo with a jury. . . . Its initial process is a warrant of arrest executed by a police officer. . . . For the release of the accused pending trial bail is

[34] *Ibid.*

[35] The court declared that it was error for the trial judge to have instructed the jury that defendant's conviction would constitute an offense against the peace and good order of society. *Id.* at 387, 181 P.2d at 446.

[36] 26 N.J. Misc. 285, 60 A.2d 893 (Hudson Co. Ct. Quart. Sess. 1948).

[37] The statutory definition of juvenile delinquency is "any act . . . partaking of the nature of a criminal action or proceeding when committed by one under eighteen years of age." N.J. REV. STAT. 2A: 4-14 (Supp.1959).

[38] *In re* El, 26 N.J. Misc. 285, 287, 60 A.2d 893, 895 (Hudson Co. Ct. Quart. Sess. 1948).

> required. . . . In default of surety, commitment may be to the common jail of the county . . . and there are the like provisions in the event of conviction and default of performance bond for the commitment of the accused. Nothing more than this sequence of *penal features* in a bastardy case should be required to show a "method partaking of the nature of a criminal action or proceeding."

The court decided[39] that bastardy actions were sufficiently criminal in procedure to require that the offense be tried in the juvenile court. However, the holding would have been more defensible if it had been based on the simple recognition that a conviction of illicit juvenile paternity involves grave social and financial consequences. This recognition logically would imply that the court is conscious of the protection and assistance which juvenile courts are created to provide for a youth faced with such consequences. A stubborn judicial reliance on the nomenclature of "civil" or "criminal" may result in decisions which, unlike the *E1* case, do not accord with the important values suggested by the facts.

III. PLEADINGS

Special problems arise at the pleading stage of litigation in a paternity case. It has already been noted[40] that choice of a proper plaintiff to be identified in the initial papers is often difficult. In New Jersey, for example, the court requires the mother's name to be substituted for the name of the State as plaintiff[41] on the ground that the proceeding is civil and therefore the State was not a proper party.

In the District of Columbia principles of criminal law were the basis for reversing a trial court's denial of an alleged father's motion to withdraw a guilty plea.[42] The appellate court recognized that the consequences of a bastardy proceeding were serious enough to require the application of criminal jurisprudence.[43] These consequences involved payments for sixteen years to support the child and the risk of a one year jail sentence in the event of default. The court was nevertheless fully conscious of the con-

[39] *Id.* (Emphasis added.)

[40] See text at note 32 *supra.*

[41] State v. Arbus, 54 N.J.Super. 76, 148 A.2d 184 (App. Div. 1959).

[42] Coleman v. District of Columbia, 83 A.2d 873 (D.C.Mun. App. 1951).

[43] The reason back of the defendant's guilty plea most probably was his inability to estimate the seriousness of the consequences attendant upon a paternity adjudication.

ventional symbols attached to an examination of what makes a proceeding "criminal". It sought these symbols without success:[44]

> The bastardy proceeding is instituted to establish the paternity and provide for the support of a child born out of wedlock. No accusation of crime is made and no punishment is sought. Although the statute provides that the "prosecution" shall be upon information in the name of the District, it does not use the terms guilt or guilty of conviction or sentence; we have used the term "plea of guilty" because that expression is used in the statement of proceedings and evidence before us. . . .

The court, despite building this pyramid of labels suggesting that the criminal law does not apply, made the point that only criminal law would make sense in a proceeding where the defendant risked punishment in the form of supporting a bastard or going to jail. Implicit in this thinking is the idea that defendants convicted of bastardy suffer consequences which most people associate with punishment even though the State has no *intent* to impose punishment.

The statute of limitations is another problem often related to the pleading stage of litigation.[45] A South Dakota decision illustrates the limitations problem in a paternity case. The court refused[46] to apply the criminal statute of limitations on the ground that bastardy is a civil action:[47]

> It is true that the method of procedure partakes, especially in connection with the inception of the action, very much of the nature of proceeding in a criminal action. This is not because the action is in any sense criminal in its nature, but rather because, from the very necessity of the situation, it is necessary to secure the person of the defendant and compel the giving of security in order to insure the value of any judgment that may eventually be found against the defendant. The proceedings under our statute are, outside of the original arrest, no more criminal in their nature than are those under our statute providing for arrest and bail in a civil action.

The defendant adjudged an illegitimate father risks jail.[48] Also he bears the community brand of "sex criminal".[49] Yet the court

[44] Coleman v. District of Columbia, 83 A.2d 873 (D.C.Mun. App. 1951).

[45] See Atkinson, *Re-examination of the Procedural Aspects of the Statute of Limitations,* 16 OHIO ST. L. J. 157 (1955).

[46] State *ex rel.* Patterson v. Pickering, 29 S.D. 207, 136 N.W. 105 (1912).

[47] *Id.* at 213-14, 136 N.W. at 106.

[48] S.D. CODE § 37:2125 (1939).

[49] Presumably the same conduct is socially tolerable when there is no issue and defendant's indiscretion remains intangible. See Schatkin, *The Scandal of Our Paternity Courts,* The Reader's Digest, May 1960, p. 72.

perceives nothing criminal in the nature of a bastardy conviction. The court's reasoning may be analogous to an examination of a porpoise. A porpoise has the general appearance of a fish. It swims like a fish and like most fish, it inhabits the ocean. Therefore, under this remarkable theory a porpoise is a fish. This reasoning adds the sum of the characteristics or attributes of an object and proceeds to classify that object. Absent is the penetrating inquiry requiring answers to questions concerning purpose, function, significant behavior and prime consequences.

Because a porpoise suckles its young, takes its oxygen from the air and is warm-blooded like other mammals its nature is more like a mammal than a fish. Thus by analogy, because the father of an illegitimate child suffers the social stigma imposed upon the commission of a crime bastardy is more criminal than civil. It is the State which exhibits the public's interest in the father's conviction. It is the public which reacts in outrage against the defendant's callousness to the mother and his indifference to the child. Nevertheless, these considerations are not key-numbered in the digest systems and accordingly play little part in judicial analysis. The South Dakota court saw merely the arrest procedure as a possible indication of the criminal nature of the action and thus labeled paternity proceedings "civil."

The problem posed by the South Dakota decision raises the question whether a criminal statute of limitations makes better sense than a corresponding civil statute in bastardy cases. Although the civil statute is more frequently applied, the criminal statute generally gives more protection to defendants.[50] The reason back of this greater protection owes is origin to basic, historical, constitutional mandates[51] which suggest that the State does not have as great a litigious interest as a civil plaintiff against a given defendant.

Of probable relevance here, moreover, is the theory that a civil defendant may be required to redress a wrong only against an individual; a criminal defendant upon conviction submits to punishment exacted by all individuals in the society.[52] For reasons already suggested the bastardy defendant should enjoy the same safeguards as any other non-capital criminal defendant.[53]

[50] See 1 WHARTON, CRIMINAL EVIDENCE 64 (12th ed. 1955).

[51] *E.g.*, U.S. CONST. amend. V, VI, VIII.

[52] GELDART, ELEMENTS OF ENGLISH LAW 8-9 (1911).

[53] See Lane, *Statutes of Limitation in Criminal Law*, 16 OHIO ST. L. J. 219, 225-26 (1955).

As a result, the criminal statute of limitations should be applicable to bastardy cases but not because of the conventional objectives underlying the statute.[54] Bastardy claims do not grow "stale" more rapidly than most civil claims. Neither does evidence in bastardy cases "fade in the memory of witnesses" more rapidly. On the contrary, as the illegitimate matures it may take on some of the father's physical features, as children often do, relating it to the defendant. Therefore, the applicability of the criminal statute of limitations to paternity actions must be rooted in the greater protection traditionally accorded criminal defendants confronted with the power of the State.

IV. EVIDENCE

Questions about corroboration, admissibility of an alibi and the degree of proof required in paternity actions help demonstrate the confusion in the courts over the amount of protection which the alleged father deserves. Sidney B. Schatkin has been closely associated with the study of paternity proceedings in New York[55] and has pointed up the dangers encountered by the bastardy defendant. Schatkin says[56] that innocent defendants are often victims of extortion or shakedowns by women seeking a respectable or wealthy father for their illegitimate children.

To implement the protection of the innocent defendant it has been held[57] that the character and quality of proof of corroboration is the same in filiation proceedings as in criminal cases such as rape or assault with intent to commit rape where corroboration of the testimony of the prosecutrix is also required. Although civil in nature bastardy cases are often treated by the legislature as if they were criminal. In this manner, corroboration is statutorily established to protect innocent persons wrongfully accused.[58]

On the other hand, it has been held[59] that the general rule requires no corroboration in civil cases. Accordingly, no corrobora-

[54] See Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L. J. 130 (1955).

[55] See SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (3rd ed. 1953).

[56] Schatkin, *Should Paternity Cases Be Tried in a Civil or Criminal Court?*, 1 CRIM. L. REV. (N.Y.) 18, 22-24, 26-27 (1954).

[57] Lockman v. Fulton, 162 Neb. 439, 76 N.W.2d 452 (1956).

[58] NEB. REV. STAT. § 13-112 (1954).

[59] McGuire v. State, 84 Ariz. 242, 326 P.2d 362 (1958); Roberts v. State, 205 Okla. 632, 240 P.2d 104 (1951).

tion of the testimony of the child's mother as to the defendant's paternity is necessary.

It would seem superfluous to develop the point that innocent men are too easily victimized by mothers in need of a father for their child. It has been suggested,[60] however, that husbandless women in their maternal crisis should receive every aid at trial to convict the irresponsible men who customarily flee from their family obligation. This suggestion is endorsed by local government[61] which must often pay for the care of the child when a father is not found. The fallacy is that the greater the need for a conviction, the more easily should a defendant be found guilty. This fallacy fortunately may be countered by the tradition which provides for greater certainty of the criminal defendant's guilt because of the graver consequences attached to a conviction.[62]

The consequences of a bastardy proceeding also have puzzled courts when confronted with the degree of proof required to establish a *prima facie* case. Wisconsin has long held that proof beyond a reasonable doubt is essential even though bastardy is civil.[63] However, the Wisconsin Supreme Court recently applied[64] a statute changing the burden of proof in paternity cases from evidence "beyond a reasonable doubt" to "clear and satisfactory." The court held[65] that this statutory change does not violate the rule against *ex post facto* laws merely because it applies to pending proceedings. The court reasoned that *ex post facto* applies to criminal laws, while bastardy actions are civil because the father is neither tried nor punished for any crime.

The decision illustrates two critical problems connected with paternity cases:

1. The statutory change in degree of proof required in these cases reflects legislative uncertainty and concern over the unusual trial difficulties faced by both alleged father and complaining mother.

2. The inapplicability of the *ex post facto* principle because bastardy is not strictly "criminal" displays the judicial tend-

[60] See HARPER, PROBLEMS OF THE FAMILY 125-26 (1952).

[61] See *Id.* at 120.

[62] See, *e.g.*, U.S. CONST. amend. V, VI, VIII.

[63] Timm v. State, 262 Wis. 162, 54 N.W.2d 46 (1952).

[64] State v. Brittich, 7 Wis.2d 353, 96 N.W.2d 337 (1959).

[65] *Ibid.*

ency to "package" the defendant's rights and to reach conclusions based on labels.

The court itself articulated its confusion:[66]

> [At] one time it was held that such a proceeding could be brought before the supreme court for review by writ of error only and that the accused must be proved guilty beyond a reasonable doubt. . . . In State ex rel. Mohnke v. Koblitz, 1935, 217 Wis. 231, 258 N.W. 840, this court pointed out that the hybrid characteristics of the proceeding had created confusion and difficulty and in some respects the proceeding was governed by procedural rules more favorable than those applicable in civil actions. However, these criminal procedural rules did not make the proceeding a criminal action and the term quasi criminal applied to a paternity proceeding was misleading unless considered merely descriptive of the procedure. The court then stated that the code which defined civil and criminal actions made a paternity proceeding a civil action. . . . [The] judgment sought rather than the procedure applicable therein afforded the basis for determining the nature thereof. . . .

The courts span the proof spectrum in moulding bastardy procedure and use labels freely in the process. For example it has been held[67] that an alibi is an admissible defense in a bastardy proceeding because of the "quasi criminal" nature of the action. Rooted in the same reasoning is the idea that a more liberal view concerning what constitutes reversible error can be applied in bastardy cases.[68]

V. BASTARDY AND CONSTITUTIONAL ISSUES

Constitutional questions hinge with little complication on the determination whether paternity proceedings are civil or criminal. Thus the contention that a bastardy support order of $360 per year for ten years is cruel and unusual punishment was rejected[69] on the ground that such support merely relieves the county of a burden and is not intended to punish the father.

Also it has been held[70] that the liability of a father to support his bastard child is not a debt. Therefore, imprisonment for failure to provide this support could not be imprisonment for debt in

[66] *Id.* 96 N.W.2d at 340; see also State *ex rel.* Woolems v. Davis, 178 Ark. 692, 11 S.W.2d 479 (1928).

[67] Bolich v. Robinson, 106 Neb. 449, 184 N.W. 218 (1921).

[68] Keel v. State, 160 Ala. 476, 49 So.2d 320 (App. 1950).

[69] Waters v. Riley, 87 W.Va. 250, 104 S.E. 559 (1920).

[70] Acker v. Adamson, 67 S.D. 341, 293 N.W. 83 (1940).

violation of the Constitution.[71] The rationale behind this conclusion rests in the analysis that debt arises out of contract, while the father's obligation is more elemental than that upon which a contract is based.

Similarly the North Dakota Supreme Court held[72] that in bastardy cases there could be no imprisonment for debt because the state's only purpose in imprisoning the father is to force him to perform his moral obligation. Furthermore, a defendant convicted of bastardy suffers imprisonment in most cases only if he fails to obey the support order.[73] This procedure is generally known as civil contempt, *e.g.*, the failure to obey a court order in an action for specific performance.[74]

One of the most informative examples of constitutional objections raised in paternity actions is the privilege against self-incrimination. This question was probed in depth by the Michigan Supreme Court in *People v. Stoeckl*,[75] a case involving the prohibition against a prosecutor's comment upon the defendant's failure to testify.

The majority opinion relied heavily upon *People v. Martin*[76] which held[77] that the right to waive a jury trial in criminal cases is likewise available in bastardy cases. The court in *Martin* believed that juries in bastardy cases are likely to be swayed by emotions and sympathies so as to overlook the important testimony bearing upon the main issue, *i.e.*, the paternity of the defendant. The *Martin* case thus construed the statute[78] providing this right to waive a jury trial in "criminal cases" so that "quasi criminal cases" were included within the term "criminal cases".

Following these views the court in *Stoeckl* concluded:[79]

> If bastardy proceedings are criminal to that point where the statutory provisions in regard to the right to waive a jury in criminal cases prevail, then the proceedings should be criminal to that point where the prohibition against commentary on defendant's failure to testify should apply.

[71] *Ibid.*

[72] State v. Hollinger, 69 N.D. 363, 287 N.W. 225 (1939).

[73] State v. Jeffry, 188 Minn. 476, 247 N.W. 692 (1933).

[74] See *Id.*

[75] 347 Mich. 1, 78 N.W.2d 640 (1956).

[76] 256 Mich. 33, 239 N.W. 341 (1931).

[77] *Ibid.*

[78] MICH. COMP. LAWS § 763.3 (1948).

[79] People v. Stoeckl, 347 Mich. 1, 17, 78 N.W.2d 640, 643 (1956).

> [The dissent] on this question could be accepted if this Court would adopt the principle that once the criminal procedural phases of bastardy, such as warrant, bail, *et cetera,* have served their purpose and the trial commenced, then all criminal aspects disappear and the case should be tried as civil in its nature.

The dissent, however, did *not* advocate the abandonment of all criminal aspects of bastardy after the initial procedural phases:[80]

> And so it is, *for reasons having to do with the purpose of the action* that we hold a questioned civil (or criminal) procedure to be applicable, or inapplicable, as the various cases come before us. Our ruling thereon does not mean that thereafter, in all respects, the bastardy action will be deemed either purely civil (or criminal). Thus we held in In re Cannon . . . that extradition could not be had; thus, for such purpose, emphasizing the civil aspect. Yet we very properly held in Cady v. St. Clair Circuit Judge . . . that the defendant could be arrested and jailed even when he would be entitled to immunity from service in a civil action. Likewise we held in People v. Martin . . . that . . . the defendant might waive a jury as may the defendant in a criminal case. But we did not thereby hold that the action was thereafter to be deemed "criminal," to the extent that the prosecution could not comment on the defendant's failure to testify, anymore than we held that it became "civil" following In re Cannon's case, supra, to the extent that the defendant would have the same immunity from service as a defendant in a civil action.

The majority, therefore, seeks stability in the law of paternity. Procedural problems would be solved by giving the defendant the protections of the criminal law in all cases. In this way alleged fathers always could be certain of what rights were available to them. The dissent, however, espouses virtually an *ad hoc* approach. Almost painfully analytical, the dissent probes the reasons back of a procedure and evaluates its applicability to the defendant at bar. Where there is no good purpose to be served in employing the processes of the criminal law, the dissent would not employ them.

Following this method the dissent[81] stated that there was no cause to protect the policy behind the privilege against self-incrimination in bastardy cases and, therefore, no cause to proscribe inferences arising from the claim of such privilege. The dissent viewed the privilege as necessary only where the state is likely to require evidence from the defendant and where the evidence otherwise might not be available as is the complaining mother's testimony in a paternity proceeding. In such case the privilege deters the application of official force to extract the

[80] *Id.* at 11, 78 N.W.2d at 648 (dissenting opinion). (Emphasis added.)

[81] *Id.* (dissenting opinion).

evidence. Moreover, the dissent acknowledged that the proscription against inferences would guard against indirect compulsion to surrender the privilege in such cases.

However, it should be noted that the desire for evidence is not the only reason why official authority would coerce a defendant. Absent the privilege against compulsory self-disclosure the police authorities would be tempted to coerce a confession even if other evidence were available. There is minor difference between the defendant accused of bastardy and one accused of statutory rape. Both defendants face the accusation of a woman who, presumably, can supply the evidence necessary for a conviction. Yet it cannot be argued that the statutory rape defendant needs no protection against a forced confession.

Examination of the dissent's arguments, therefore, points up the need for a simpler and more uniform treatment of defendants accused of illicit paternity. The majority opinion suggests a workable solution by giving the defendant all of the procedural benefits of the criminal law without the often misleading dissection of the civil and criminal elements inextricably mixed in bastardy proceedings.

VI. THE RIGHT OF APPEAL

State v. Sax,[82] a Minnesota case, decided that, although the state originally instituted the action, the mother in a paternity proceeding has sufficient interest in the outcome of the case to bring an appeal from a support order. The court said that the legislature, by making the state a party to the action, evinced a clear intent that the mother should have every opportunity to impose upon the father his proper responsibility even to the extent of an appeal in her own name. The court said further that other states usually confer the right of appeal upon the mother.

The dissent countered with the observation that there can be no jurisdiction for an appeal by the mother where there is no corresponding statutory authorization. The dissent amplified by stating that only parties of record are entitled to an appeal and that the statute should be strictly construed because it is in derogation of common law. Finally the dissent argued that the majority erroneously invoked the decisions of other jurisdictions in determining the right of appeal:[83]

> Without reference to the statutes of the state involved, it is difficult to apply decisions of foreign courts in the construction

[82] 231 Minn. 1, 42 N.W.2d 680 (1950).

[83] *Id.* at 26, 42 N.W.2d at 694 (dissenting opinion).

> of our own statutes. Furthermore, it is almost entirely a matter of determining what the intention of our legislature was in enacting the statutes which we now have.

Nowhere does the majority or dissenting opinion discuss the good or bad effects on mother or father if an appeal is awarded. One bad effect on the father is the possibility that the support order will be doubled; that he will be paying $30 per week instead of $15 per week for 16 years to support his child. One good effect on the mother is the possibility that newly discovered evidence will reveal hidden resources of the irresponsible father and enable the mother to care for the child more adequately. Whether an appeal is awarded is not of greatest importance. Of ultimate importance is the awareness that a human problem is involved: the support of an unwelcome infant to adulthood. This awareness is *not* generated by the use of such judicial clichés as "legislative intent," "statutory analogy," "strict construction" or "derogation of common law." This awareness is generated by an analysis of the grave consequences resulting from a paternity determination and an examination of the distinctions between civil damages and a bastardy support order. The defendant father paying a support order is similar to the civil damages defendant with one exception: he is also subjected to the scorn of the community for not marrying the mother of his child. This community attitude toward the defendant is demonstrated by a long list of cases where innocent men accused of bastardy have preferred extortion to notoriety.[84] Yet perhaps this disgrace remains the same regardless of what amount the court may award for support of the child. In this connecton, an appeal by the mother in the *Sax* case does not place the father "twice in jeopardy" of suffering this disgrace. As a result the criminal overtones of a bastardy proceeding are muted in the fact that the mother's appeal does not expose the defendant to any risk against which the criminal law traditionally has afforded protection.

The method of deciding the applicability of double jeopardy protection in filiation actions is, for the most part, uniform among the states. Thus in Maryland where the action is criminal the protection is guaranteed.[85] Similarly, in West Virginia where

[84] See Schatkin, *The Scandal of Our Paternity Courts*, Reader's Digest, May 1960, p. 71 (*passim*).

[85] See Lank v. State, 219 Md. 433, 436, 149 A.2d 367, 368 (App. 1959):

> Since a prosecution for bastardy, although civil in purpose, is a criminal proceeding in Maryland it is subject to the same constitutional guarantees as affect and control the trial of other criminal cases.

bastardy is civil, double jeopardy protection is denied.[86] Sometimes, however, the court attempts subtlety and arrives at its decision by invoking the will of the legislature. Thus in Delaware the Supreme Court reasoned[87] that, since paternity actions were created by statute, they are totally regulated by statute. Therefore, if no right of appeal by the state is designated in the statute, the right is nonexistent. A like conclusion was reached in Oregon[88] where the court said:[89] "The right of appeal given by the statute is, by express terms, restricted to the defendant." However, the statute actually provided that "The defendant shall be entitled to the right of trial by jury, and appeal, as provided in civil actions."[90]

The decisions dealing with appeals up to this point disclose limited thought. This limitation is not universal in the courts and a Kentucky decision, *White v. Commonwealth*,[91] suspended a rule of civil procedure even though Kentucky bastardy statutes are fully civil. The rule involved required the alleged father desiring an appeal to post a bond sufficient to satisfy the potential liability of the judgment rendered upon appeal. Since the defendant was ordered to support his bastard child for 18 years the potential liability amounted to $9,000. The court held[92] that even if the defendant was not a pauper (which he was) there was an obvious difficulty or impossibility of obtaining a bond for such a substantial amount over a long period of time. The rule requiring the bond was not applied to bastardy proceedings despite the clear indication which the traffic in labels would have produced. This kind of thinking is not impossible, merely infrequent.

VII. THE NEW YORK PROBLEM

New York is singled out here for examination because its paternity proceedings epitomize the incapacity displayed by both courts and legislatures to handle intelligently the problems of paternity. In upper New York State bastardy proceedings are

[86] State v. Easley, 129 W.Va. 410, 40 S.E.2d 827 (1946).

[87] State *ex rel.* Johnson v. Wright, 39 Del. 552, 3 A.2d 74 (1938).

[88] State *ex rel.* Borland v. Yates, 104 Ore. 667, 209 Pac. 231 (1922).

[89] *Id.* at 670, 209 Pac. at 232.

[90] Ore. Laws c. 48, §§ 2550-63 (1917).

[91] 299 S.W.2d 619 (Ky. App. 1957).

[92] *Ibid.*

civil, while in New York City they are criminal.[93] Furthermore, even in New York City the courts still are hesitant whether civil or criminal procedure prevails in filiation actions.[94]

New York, moreover, refocuses the old inquiry into the egg-chicken dilemma of which came first. This inquiry (cast into

[93] See People v. Bowers, 9 Misc.2d 873, 170 N.Y.S.2d 546 (Child. Ct. Broome Co. 1958). The court said at 876-77, 170 N.Y.S.2d 550-51:

> Formerly filiation proceedings were held to be of a quasi criminal nature and the right to appeal was governed by the sections of the Code of Criminal Procedure . . . .
>
> In 1925 the law governing filiation proceedings was set forth in the Code of Criminal Procedure, but in that year a new law was enacted which became Article 8 of the Domestic Relations Law of the State of New York. Section 122 of the Domestic Relations Law states, "For the purpose of this article jurisdiction is conferred upon the children's court in the counties where such courts have been established under the children's court act of the state of New York; . . . and the courts heretofore exercising jurisdiction in bastardy cases of the city of New York."
>
> Section 139 of the Domestic Relations Law states, "All provisions of the penal law or code of criminal procedure or other statutes inconsistent with or repugnant to the provisions of this article shall be considered as inapplicable to the cases arising under this article."
>
> By special act certain counties of the State had established Children's Courts, but the general act establishing Children's Courts in each county of upstate New York became effective in 1924. Section 6 of the Children's Court Act, Sub-division 3, states, "The court shall have exclusive original jurisdiction in the hearing and determination of the cases of children born out of wedlock in accordance with the provisions of article eight of the domestic relations law."
>
> Section 45 of the Children's Court Act states, "All provisions of the penal law or code of criminal procedure or other statutes inconsistent with or repugnant to any of the provisions of the act shall be considered inapplicable to cases arising under this act."
>
> It is clear that a filiation proceeding in upstate New York is a civil proceeding and in New York City is treated as criminal in nature, depending upon the court in which the proceeding is initiated. . . .
>
> Cases arising in the City of New York are still held to be bound by sections of the Code of Criminal Procedure. . . .

[94] See, *e.g.*, Hodson *ex rel.* Hoff v. Hoff, 266 App.Div. 228, 42 N.Y.S.2d 1 (Sup.Ct.) *aff'd* 291 N.Y. 518, 50 N.E.2d 648 (1943) ("A paternity proceeding is essentially 'civil' in nature, although partly 'criminal' in form"); Fowler v. Rizzuto, 205 Misc. 1088, 132 N.Y.S.2d 29 (Ct.Spec. Sess.N.Y. Co. 1954) ("A supplementary proceeding examination is a purely civil remedy and is not available in a paternity action").

the reference of the present subject) normally asks first what procedure should be used in paternity cases and *then* determines the corresponding tribunal for trial under the procedure selected. New York, however, as might be guessed, has reversed the sequence of this inquiry so that, depending on the court assigned jurisdiction over the action in question, the procedure customary to the court is applicable to the action:[95]

> A filiation proceeding initiated . . . in a children's court, pursuant to the Domestic Relations Law, is civil and non-criminal in nature. Confirmation is furnished by the definition of a "crime" as well as by the inherent character of a criminal prosecution . . . . Although we have held that a paternity suit is criminal in form . . . it must be observed, that such statements were made, such rulings announced, in cases brought in the Court of Special Sessions of the City of New York under the . . . New York City Criminal Courts Act . . . and were regulated by the Code of Criminal Procedure. Civil in essence, the proceeding assumes a "criminal" form from its surroundings—from the fact that it is tried in a court of criminal jurisdiction.

Under this disposition nothing has been solved; rather, the question becomes what court instead of what procedure for paternity. The more significant question is: why, within one state, should bastardy be criminal in one city and civil in all other cities? Why should the defendant's rights be determined by the geographical accident of the city in which the proceeding is instituted?

An analysis of the statutes pertaining to the New York City courts reveals the legislative turmoil occasioned by filiation actions. As an example, the double jeopardy problem is useful because new trials generally are available in criminal cases only to defendants.[96] Accordingly, section 465 of the Code of Criminal Procedure[97] gives the right to move for a new trial to defendant only. Yet section 78 of the New York City Criminal Courts Act[98] repeals all provisions of the Code of Criminal Procedure inconsistent with the City Act's provisions dealing with paternity proceedings.[99] In addition, section 76[100] of the City Act allows an appeal, as of right, to a complainant as well as to a defendant in a filiation proceeding.

[95] *In re* Clausi, 296 N.Y. 354, 355-56, 73 N.E.2d 548, 549 (1947).

[96] See MORELAND, MODERN CRIMINAL PROCEDURE 273 (1959).

[97] N.Y. CODE CRIM. PROC. § 465.

[98] N.Y.C. CRIM. CTS. ACT. § 78. This act will be referred to as the City Act.

[99] The City Act's provisions dealing with paternity are found in N.Y.C. CRIM. CTS. ACT art. V.

[100] N.Y.C. CRIM. CTS. ACT § 76.

On the other hand, section 31[101] of the New York City Criminal Courts Act (which sets forth the jurisdiction of the Court of Special Sessions) is silent on the power to grant a new trial to other than a defendant. Also, while section 76[102] of this act authorizes an *appeal* by the complainant in a filiation case, it is silent on the subject of a *motion* for a new trial by the complainant. Nevertheless, it has been held[103] that a claim of double jeopardy in a bastardy case cannot prevent a new trial in the city courts. In that event, since the appeal mechanism is available and sufficient to achieve a new trial, there is no reason why a new trial should not be available on motion also. A New York decision reached the same conclusion,[104] but not without three separate opinions reflecting the statutory tangle in that state.

That decision, furthermore, was not insensitive to the special problem surrounding a paternity defendant:[105]

> This standard [of proof] is not that in civil actions where a mere preponderance of the credible evidence is sufficient. Nor is the standard as rigorous as that in criminal actions, where proof of guilt beyond a reasonable doubt is demanded. The evidence in an affiliation case must be entirely satisfactory. An order of filiation will not be granted unless the complainant sustains the burden of proof "which goes beyond a mere preponderance of the evidence to the point of entire satisfaction.". . . The evidence of defendant's paternity must be clear and convincing. . . . If the evidence adduced in behalf of the complainant fails to measure up to that standard, the complainant will be dismissed.

Paternity in New York City cannot be readily classified even though the action is brought in the criminal courts.[106] In *Duerr v. Wittmann*[107] the New York Supreme Court was required to

101 N.Y.C. CRIM. CTS. ACT § 31.

102 See note 100 *supra.*

103 See Hodson *ex rel.* Hoff v. Hoff, 266 App. Div. 228, 42 N.Y.S.2d 1 (Sup.Ct.), *aff'd* 291 N.Y. 518, 50 N.E.2d 648 (1943).

104 Anonymous v. Anonymous, 13 Misc.2d 718, 180 N.Y.S.2d 183 (Ct.Spec. Sess. N.Y. Co. 1958), *aff'd sub nom.* Dep't of Pub. Welfare *ex rel.* Morgan v. Jarcho, 7 App.Div.2d 979, 184 N.Y.S.2d 565 (1st Dep't. 1959) (mem.).

105 Anonymous v. Anonymous, 13 Misc.2d 718, 725, 180 N.Y.S.2d 183, 187 (Ct.Spec.Sess. N.Y. Co. 1958), *aff'd sub nom.*, Dep't. of Pub. Welfare *ex rel.* Morgan v. Jarcho, 7 App.Div.2d 979, 184 N.Y.S.2d 565 (1st Dep't. 1959) (mem.).

106 See Duerr v. Wittmann, 5 App.Div.2d 326, 171 N.Y.S.2d 444 (1st Dep't. 1958).

107 *Ibid.*

decide whether a paternity case was instituted within the period of the statute of limitations. Specifically the problem involved both a warrant and a summons which, under the act in question, a judge may issue at his discretion.[108] In the *Duerr* case the trial court initially issued a summons when the mother filed her complaint. Because the summons could not be served the court then issued a warrant for the defendant's arrest. The summons was within, and the warrant was outside the statutory period limiting filiation actions. The lower court had reasoned that bastardy is criminal, criminal actions commence with a warrant,[109] and the warrant was issued beyond the statutory period.

The New York Supreme Court rejected on two grounds the conclusion that bastardy is criminal:

1. Crime implies punishment and in bastardy actions there is no punishment.
2. Procedural rules peculiar to criminal cases are held inapplicable to paternity cases. (No requirement for proof beyond a reasonable doubt;[110] corroboration of mother's testimony unnecessary;[111] judgment may be rendered in the absence of defendant.)[112]

However, the court continued:

> Nor can the paternity proceeding properly be deemed a civil action. . . . While it is in a sense a dispute between private litigants for the enforcement of rights and the prevention of wrongs with regard to obligations of financial support it is a dispute in which the state has an interest, in which it may participate on behalf of the mother, and in which the machinery of the criminal courts is invoked. In fact, it was not until comparatively recently that private parties as well as governmental bodies were given the right to initiate a paternity proceeding. . . . [U]nlike the private litigant in a common law action, [the mother] must bring her suit in a criminal court by presenting her complaint to the court, in much the same way as an information is presented in a criminal proceeding. A warrant of arrest can be issued for the defendant forthwith, evidence of good character is admissible and confessions and admissions must be corroborated by other proof.

The conclusion was inescapable: bastardy actions are *sui generis*—neither civil nor criminal rules apply. Therefore, the court

[108] N.Y.C. CRIM. CTS. ACT § 64.

[109] N.Y. CODE CRIM. PROC. § 144.

[110] Commissioner v. Ryan, 238 App.Div. 607, 265 N.Y.Supp. 286 (1st Dep't. 1933).

[111] Commissioner v. Vassie, 167 App.Div. 74, 152 N.Y.Supp. 496 (2d Dep't. 1915).

[112] N.Y.C. CRIM. CTS. ACT § 67.

looked to the statute which stated that the "proceeding is brought by the mother."[113] The court held that a "proceeding" can be "brought" only through the instrumentality of the complaint and that, therefore, the time of filing the complaint was critical in determining whether the action was brought within the statute of limitations. Since the complaint was filed at the same time that the summons was issued, the statute did not bar the action.

The clear fact remains, however, that the act does not purport to establish the *time* at which a paternity case is instituted in New York City. The statute to which the court referred merely sets forth one of the *parties* who can institute the proceeding, *i.e.*, the mother. This case illustrates the problem of statutory silence on the subject of bastardy procedure coupled with occasional judicial reluctance to apply either criminal or civil rules to fill the void. At a deeper level the problem is the courts' lack of understanding of a social status: illicit fatherhood. Recourse by the courts to statutory crystal-gazing in order to answer a question never in the cognizance of the legislature is a poor substitute for an investigation of the reasons why a putative father may need certain protections which the courts have a duty to provide.

VIII. ANATOMY OF LABELS

We have followed alleged fathers, convicted fathers, husbandless mothers, bastards and the courts through the wonderland of paternity proceedings from their institution to their appeal. At this point, it is submitted, a brief examination of the formulas and ingredients frequently used by the courts in deciding bastardy cases may point up "the better way" to solve the paternity problem.

This "better way" implies that the jurisprudence of labels is unacceptable as too mechanical and too unthinking an approach. The suggestion is, therefore, that a test can be devised which identifies the meaningful criminal (or civil) elements of bastardy so that jurisprudence by the labels "criminal" or "civil" may implement reflective conduct by judges. There is nothing wrong with labels if they accurately represent their classification. We can either discard labels or make the labels meaningful. There is no difference between these alternatives.

In Vermont both the purpose and the procedure involved in bastardy proceedings were the elements which were identified in labeling the action "civil".[114]

[113] N.Y.C. CRIM. CTS. ACT § 64.

[114] Bielowski v. Burke, 121 Vt. 62, 147 A.2d 674, 676 (1959).

> The object of the proceeding is not for punishment. It is to ascertain the father and compel him to contribute to the support of the child if he is adjudged to be the father. The whole proceedings cease [*sic*] if the woman dies or is married before the child is born or should miscarry. All this shows that it is a civil suit and subject to amendment like other civil suits.

In South Carolina the court looked to: (1) the tribunal which was vested with bastardy jurisdiction, and (2) certain statutory uses of words, in order to determine the correct label.[115]

> [Because] our statutes . . . expressly require that this issue in [bastardy] cases shall be tried in the [criminal] court, it would seem to be conclusive that the legislature intended to make the offense of bastardy a criminal offense; . . . and the use of the words "accused", "acquitted", and "convicted" . . . points to the same conclusion.

The Supreme Court of Kansas has noted[116] that bastardy proceedings were never embodied in any of the codes of civil and criminal procedure in that state and traditionally operated under a procedure of its own. The court then announced with contented illogic:[117]

> We, therefore, look to the law relating to civil actions for procedure only on such points or questions where the bastardy act itself is silent, or for which it makes no provision.

How bastardy proceedings admittedly set off alone and apart from civil or criminal procedures ultimately can be identified with civil procedure remains unexplainable. Even more unexplainable is the fact that the bastardy act, as compiled in the 1923 revision of all Kansas statutes, was given a place under the classification of criminal procedure.[118]

Another formula was suggested when the Michigan Supreme Court affirmed a decision requiring the defendant to give notice of his intent to use an alibi as prescribed by a criminal statute:[119]

> In the cases cited it is patent that the statutory provisions relating to criminal cases were applied in each instance for the benefit and protection of the defendant. The situation is in practical effect that one against whom a proceeding is instituted under the statutory provisions applicable to a case of this nature may invoke the protection afforded in matters of procedure to one on

[115] State v. Brewer, 38 S.C. 263, 16 S.E. 1001 (1893).

[116] State v. Pinkerton, 185 Kan. 68, 340 P.2d 393 (1959).

[117] *Id.* 340 P.2d at 394.

[118] KAN. REV. STAT. c. 21, § 442 (1923). The present statute is KAN. GEN. STAT. ANN. § 62-2303 (1949).

[119] People v. McFadden, 347 Mich. 357, 362, 79 N.W.2d 869, 871-72 (1956).

> trial for a criminal offense. If the defendant is entitled to such right, the conclusion logically follows that he may not avoid compliance with a requirement, imposed by statute with reference to such procedure, prescribed, not for the benefit of the defendant but for the benefit and protection of the public. The trial judge in the instant case was not in error in denying defendant the right to introduce testimony for the purpose of establishing an alibi on the ground that notice of such defense had not been given to the people.

The concurring opinion by Justice Smith[120] rejected the "theory of epithetical jurisprudence, that anything was solved by calling this action 'civil' or 'criminal'." Justice Smith suggested[121] rather that the court in each instance "must look to the purpose to be served by the statute under consideration and equate such purpose against the intendment of the bastardy act." Justice Smith, furthermore, argued that bastardy held criminal for one purpose need not be so for another. Also, because the defendant had the protection of certain statutes is no reason, in Justice Smith's mind, why the defendant should be required to comply with other statutes prescribed "not for the benefit of the defendant but for the benefit and protection of the public."

Justice Smith continued:[122]

> It is impossible thus to classify statutory safeguards and requirements, particularly those relating to trials and procedures in causes criminal in nature, saying this one is for the benefit of the defendant, that one for the benefit of the public. Is not, in truth, the public welfare equally on trial with the prisoner in the dock? Do we not degrade our society as well as him if we deny him due process? What, indeed, is to his benefit that is not to ours, what goes to his protection that protects not us? . . . To me the distinction made is verbal only, not of substance. It is completely unworkable as a matter of practice and can serve only to further confuse a situation already badly muddled.
>
> Notice of alibi should be given, however, because this action is peculiarly susceptible to the evil sought to be cured through the adoption of such statute.

A formula similar to the one denounced by Justice Smith was explained in the District of Columbia.[123] Under this formula only criminal procedures should be applied to bastardy cases when the procedure in question is relevant not to the child but to the defendant alone. The decision further explained[124] that "while the

120 *Id.* at 363, 79 N.W.2d at 872 (concurring opinion).

121 *Ibid.*

122 *Ibid.*

123 District of Columbia v. Turner, 154 A.2d 925 (D.C. Mun. App. 1959).

124 *Ibid.*

court may sympathize with the parents, it is concerned with the infant."

Applying this formula the court held[125] that the defendant could be convicted merely by a preponderance of the evidence and without corroboration of the mother's testimony. It could be contended that questions dealing with burden of proof and corroboration are relevant "not to the child but to the defendant alone." Yet civil not criminal procedure was applied to this defendant. Doubtless these holdings evinced more "concern for the infant than sympathy for the parent."

As a contrast to jurisdictions requiring formulas and labels to solve problems raised in paternity cases, Maryland has a statute which without equivocation establishes bastardy as an entirely criminal offense.[126] Yet it was held[127] that the statute is distinctly in the interest of the mother, and she is the beneficiary of the statute. As a result the court decided[128] that a contract by a putative father to provide for an illegitimate's support upon the condition that bastardy proceedings will not be instituted is not a contract to compound a criminal prosecution. By this decision the court has weakened the effectiveness of a crisp legislative determination calling for a criminal disposition of all questions raised in paternity cases.

IX. CONCLUSION

> The difference between civil law and criminal law turns on the difference between two different objects which the law seeks to pursue—redress or punishment.[129]

In bastardy the law *seeks* redress, while punishment *is* imposed by the social stigma of a conviction. Even if there *are* civil elements to the action, nevertheless, it is more fitting that our system of justice give a defendant criminal protection rather than deprive him of *some* of the rights to which he is entitled. In addition, it is more practical that the defendant enjoy criminal protection absent an uncertain and often unreasoned determination in each case as to whether the "civil" or "criminal" tags apply. In this way all parties to paternity suits will know exactly what

125 *Ibid.*

126 MD. ANN. CODE art. 12, § 8 (1957).

127 Fiege v. Boehm, 210 Md. 352, 123 A.2d 316 (App. 1956).

128 *Ibid.*

129 GELDART, ELEMENTS OF ENGLISH LAW 8-9 (1911).

rules govern in every case. If the mother, under this plan, has too much difficulty securing the father's support of the child, let the taxpayers provide for the young wards of the state. The public risks merely the loss of its dollars, but the defendant convicted of bastardy suffers an inestimable loss including his reputation and self-respect. The conflict thus presented permits but one decision.