Published in September, November, January, March, May, and July
LOUISIANA LAW REVIEW
(ISSN 0024-6859)
Louisiana State University
Paul M. Hebert Law Center
Baton Rouge, Louisiana 70803-1012
Entered as second-class matter, October 14, 1946, at the Post Office at Baton Rouge, Louisiana, under the Act of March 3, 1879.
Second class mailing at Baton Rouge and additional entry offices.

Printed by Western Newspaper Publishing Co., Inc.
Indianapolis, Indiana

All unsolicited manuscripts become the property of the publisher unless accompanied by return postage.

Price per Volume: $36.00. Foreign subscriptions: $48.00. Price per issue: $7.00.

POSTMASTER send change of address to Louisiana State University Law Center, Baton Rouge, La. 70803-1012.

THE JUDICIAL REVIVAL OF LOUISIANA'S CIVILIAN TRADITION: A SURPRISING TRIUMPH FOR THE AMERICAN INFLUENCE

*Kenneth M. Murchison**

Because Louisiana's legal system derives from a civil law base, legal scholars have generally ignored the state when describing legal developments in the United States. After noting obvious anomalies like Louisiana's failure to adopt the sales and secured transaction portions of the Uniform Commercial Code,[1] these scholars usually except Louisiana from the general trend they are describing.

The burden of this paper is to demonstrate that this attitude is both unfortunate and unwise. Because the Louisiana tradition is distinct, it offers an unmatched opportunity for American scholars to understand how social and cultural influences have affected American law. To be sure, tracing these forces in a different environment will require additional time and energy, but the insights that emerge should justify the effort. At the same time, placing Louisiana in the American context will also help Louisiana scholars understand how national developments here influenced the state's legal system.

This article examines the modern revival of Louisiana's civil law tradition in judicial opinions beginning around 1970. At first glance, this subject would appear to further confirm the singular nature of the state's law. But appearances can be deceiving, and the article will demonstrate how this seemingly unique Louisiana development is actually a manifestation of a modern American influence.

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Chancellor William D. Hawkland and the Paul M. Hebert Law Center supported the preparation of this paper with a research grant during the summer of 1987. Numerous colleagues and friends, some of whom strongly disagree with the thesis of the paper, have provided assistance. The advice and criticism of George Armstrong, Julio Cueto-Rua, Lee Hargrave, Alston Johnson, Gerald LeVan, Alain Levasseur, Saul Litvinoff, Frank Maraist, Robert Pascal, George Pugh, and Symeon Symeonides have been particularly helpful.

1. At least one of these anomolies may be on its way to extinction. The 1988 session of the Louisiana Legislature has adopted a security devices bill largely patterned on Article 9 of the Uniform Commercial Code. See 1988 La. Acts No. 528 (effective July 1, 1989).

Louisiana's Legal System: A Brief Overview

The colonial legal history of the territory from which Louisiana was carved is complicated.[2] France owned the territory from 1712 to 1762, and French law—primarily the Custom of Paris—applied. In 1762, France transferred ownership of the territory to Spain, but the Spanish did not assume control or install a Spanish legal system until 1769. The Spanish retained sovereignty until 1800, when the colony was receded to France. France, however, did not reassume control of the territory until twenty days before the 1803 transfer of ownership to the United States, and French law was apparently never reestablished prior to the beginning of American sovereignty.

President Jefferson hoped to establish English common law throughout the territory acquired in the Louisiana Purchase.[3] Events frustrated those hopes as to private law, but Louisiana did adopt Anglo-American law as the basis for its criminal law and procedure.[4]

The congressional act organizing the territorial government continued existing laws until they were changed.[5] In 1806, the territorial legislature appointed two jurisconsults, James Brown and Moreau Lislet, to prepare a digest of the laws of the territory. The product of their labors, the Digest of 1808, became the source for the civil codes that were adopted in 1825 and 1870. Moreover, a provision in the Constitution of 1812, which has been repeated in every subsequent constitution, protected the civil law by prohibiting the incorporation of any system of law by general reference.[6]

Scholars have debated the question of whether Louisiana's legal system is primarily based on French or Spanish law.[7] That debate,

2. See generally A. Yiannopoulos, Louisiana Civil Law System Coursebook 28-29 (1977); Hood, Louisiana and the Civil Law: A Crossroad in Louisiana History, 22 La. L. Rev. 709, 710-12 (1962).

3. See generally G. Dargo, Jefferson's Louisiana: Politics and the Clash of Legal Traditions (1975); R. Kilbourne, A History of the Louisiana Civil Code 1-43 (1987).

4. 1805 La. Acts, ch. 50, § 33, p. 440.

5. Act of Mar. 26, 1804, ch. 38, § 11, 2 Stat. 283, 287 (1845); Act of Oct. 31, 1803, ch. 1, § 2, 2 Stat. 245 (1845).

6. La. Const. of 1812 art. IV, § 11. See also La. Const. of 1974 art. III, § 15; La. Const. of 1921 art. III, § 18; La. Const. of 1913 art. 33; La. Const. of 1898 art. 33; La. Const. of 1879 art. 31; La. Const. of 1868 art. 116; La. Const. of 1864 art. 120; La. Const. of 1852 art. 117; La. Const. of 1845 art. 120.

7. The leading protagonists have been Professor Batiza of Tulane who argues for the primacy of French sources, see Batiza, The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance, 46 Tul. L. Rev. 4 (1971), and Professor Pascal of LSU who argues that Spanish sources were more important in areas where the two systems differed, see Pascal, Sources of the Digest of 1808: A Reply to Professor Batiza, 46 Tul. L. Rev. 603 (1972). See also Rabalais, The Influence of Spanish Laws and Treaties on the Jurisprudence of Louisiana: 1762-1838, 42 La. L. Rev. 1485 (1982); Yiannopoulos, The Early Sources of Louisiana Law: Critical Appraisal of a Controversy, in Louisiana's Legal Heritage (Haas ed. 1983).

however, tends to conceal the more significant point that Louisiana embraced the civilian tradition of Western Europe rather than the English common law, which provides the basis for the private law of the remainder of the United States.[8]

Today, even civilian scholars concede that Louisiana has a mixed system of civil and common law. Criminal and public law are expressly grounded in the Anglo-American tradition, and commercial law and torts have drawn heavily from Anglo-American sources, particularly during the nineteenth century.[9] Nonetheless, the Civil Code has remained the source of most of Louisiana's private law, and the twentieth century has produced renewed efforts to revitalize the state's civilian heritage.

The Civilian Revival of the 1930s: An Academic Affair

The initial efforts to revitalize the civil law were associated with efforts to improve legal education in the state during the first third of the twentieth century. Both Louisiana State University and Tulane University sought out civilian scholars for their faculties[10] and established law reviews dedicated to producing civilian scholarship.[11]

By the 1930s, the academic revival had achieved considerable momentum. In 1937, however, one of those who had been recruited to assist with the revival became an apostate. Gordon Ireland, a law professor at LSU, challenged the very idea that Louisiana was a civilian jurisdiction.

Ireland began to teach civil law and other subjects at LSU in 1935. After receiving an LL.B. degree from Harvard in 1905, he practiced

8. See Hood, supra note 2, at 724.

9. See, e.g., Barham, Methodology of the Civil Law in Louisiana, 50 Tul. L. Rev. 474, 480 (1976) (tort law) [hereinafter Barham, Methodology]; Pope, How Real Is the Difference Today Between the Law of Louisiana and That of the Other Forty-Seven States?, 17 Geo. Wash. L. Rev. 186, 190, 193 (1949) (tort law and commercial law); Tête, The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent, 48 Tul. L. Rev. 1, 16 (1973) (law merchant).

10. Among the early civilians at Tulane were Mitchell Franklin, Clarence Morrow, and Ferdinand Stone. At LSU, those who were hired during the 1930s to teach civilian subjects included Harriet Daggett, Joseph Dainow, Gordon Ireland, and J. Denson Smith.

11. The Tulane Law Review, a successor to the Southern Law Quarterly which appeared from 1916-19, began publication under its present title in December 1929. An editorial in the initial issue of the new publication declared that the review would "give special attention to a study of the civil law and to the experience of those organs charged with administering the problems of codification . . . ." Beutel, The Place of Louisiana Jurisprudence in the Legal Science of America, 4 Tul. L. Rev. 70, 71 (1929). The review's dedication to civil law, comparative law, and codification has remained on its masthead to the present.

The Louisiana Law Review began publication in 1938. According to its inaugural issue, "it will be the policy of the . . . Review to place special emphasis on matters pertaining to civil and comparative law." Hebert, The Law Review and the Law School, 1 La. L. Rev. 157, 158 (1938).

law for two decades before he earned a J.S.D. from Yale in 1926. He then was an assistant professor of Latin American Law at the Harvard Law School until LSU hired him.[12]

Following two years of studying Louisiana law, Ireland wrote an article analyzing the state's legal system. In this *Tulane Law Review* article, he came to the heretical conclusion that "it must be admitted that *Louisiana is today a common law State.*"[13]

Ireland's challenge served to rally Louisiana's civilians. His dean and three other faculty colleagues published an article challenging his conclusions in the next issue of the *Tulane Law Review*,[14] and Ireland left LSU before the fall of 1938.[15]

Louisiana's academic civilians were not content with challenging Ireland in print. They, especially Dean Paul M. Hebert of LSU, sought institutional support for the civil law in Louisiana. The *Louisiana Law Review* began publication the following year, and both LSU and Tulane continued to recruit civilian scholars. In 1938, the state legislature established the Louisiana Law Institute as a vehicle for revising and modernizing the Civil Code.[16] The Law Institute has since encouraged translations of European commentators[17] as well as original civilian treatises on major branches of Louisiana's private law.[18]

12. The basic facts of Ireland's biography are drawn from the Association of American Law School's Directory of Law Teachers in Member Schools for 1935 and 1949-1950.

13. Ireland, Louisiana's Legal System Reappraised, 11 Tul. L. Rev. 585, 596 (1937) (emphasis in original).

14. Daggett, Dainow, Hebert, and McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana, 12 Tul. L. Rev. 12 (1937). See also Greenberg, Must Louisiana Resign to the Common Law?, 11 Tul. L. Rev. 598 (1937); Tullis, Louisiana's Legal System Reappraised, 12 Tul. L. Rev. 113 (1937).

15. For a summary of Ireland's subsequent career, see The Association of American Law School's Directory of Law Teachers for Member Schools for 1949-50, at 113-14. After leaving LSU, Ireland was a Professor of Law at Portia Law School (now the New England School of Law) from 1939-42 and a visiting professor at Catholic University from 1944-50. A review of the faculty minutes of the LSU Law School from 1936 to 1938 revealed no reason for Ireland's departure.

16. 1938 La. Acts No. 166. See generally Smith, Historical Sketch of the Louisiana Law Institute, 245 La. 124 (1963).

17. See 1 Aubry & Rau, Obligations (La. St. L. Inst. trans. 1965); 2 Aubry & Rau, Property (La. St. L. Inst. trans. 1966); 3 Aubry & Rau, Testamentary Successions & Gratuitous Dispositions (La. St. L. Inst. trans. 1969); 4 Aubry & Rau, Intestate Successions (La. St. L. Inst. trans. 1971); 5 Baudry-Lacantinerie & Tissier, Aubry & Rau, Carbonnier, Prescription (La. St. L. Inst. trans. 1972); David, French Law: Its Structure, Sources and Methodology (La. St. L. Inst. trans. 1972); Gény, Method of Interpretation and Sources of Private Positive Law (La. St. L. Inst. trans. 1963); Planiol, Civil Law Treatise (3 vols. La. St. L. Inst. trans. 1959). For a description of the translation program, see Dainow, Civil Law Translations and Treaties Sponsored in Louisiana, 23 Am. J. Comp. L. 521 (1975).

18. See 1 S. Litvinoff, Obligations, in 6 Louisiana Civil Law Treatise (1969); 2 S. Litvinoff, Obligations, in 7 Louisiana Civil Law Treatise (1975); L. Oppenheim & M. Nathan, Successions and Donations, in 10 Louisiana Civil Law Treatise (1973); L. Oppenheim & S. Ingram, Trusts, in 11 Louisiana Civil Law Treatise (1977); F. Stone, Tort Doctrine, in 12 Louisiana Civil Law Treatise (1977); A. Yiannopoulos, Personal Servitudes, in 3 Louisiana Civil Law Treatise (2d ed. 1978); A. Yiannopoulos, Predial Servitudes, in 4 Louisiana Civil Law Treatise (1983); A. Yiannopoulos, Property, in 2 Louisiana Civil Law Treatise (2d ed. 1980). West Publishing Company has published each of these volumes as part of its Civil Law Treatise Series. However, the most recent volumes of that series have covered worker's compensation, a subject whose basic legislative charter lies outside the civil code. See W. Malone & A. Johnson, Workers' Compensation Law & Practice, in 13 and 14 Louisiana Civil Law Treatise (2d ed. 1980).

These efforts entrenched the civil law in the law schools of the state.[19] They also prompted occasional speeches praising the civil law from the bench and bar.[20] But the civilian revival did not significantly impact the state's judiciary until the 1970s, and that development is really a separate story.

The Judicial Revival of the 1960s and 1970s

The Early Leaders: Justices Barham and Tate

Many of Louisiana's judges have participated in the judicial revival of the state's civilian tradition. Among supreme court justices, a number of individuals have contributed. The present Chief Justice, John Dixon, and Associate Justice Calogero have been members of the court throughout the period of the civilian revival; they have consistently supported it.[21] Others on the present court, especially Justice Dennis,[22] have also invoked the civilian tradition with some frequency. However, Justices Mack Barham and Albert Tate, Jr., both on the court during the 1970s, provided the initial impetus for the revival. Thus, their scholarly writings offer a theoretical framework for understanding the revival, and their service on the court identifies the cases to be evaluated.

A native of Bastrop, Louisiana, Justice Barham earned his LL.B. degree from LSU in 1946 after completing one year of his legal studies at the University of Colorado.[23] Following fifteen years in private prac-

19. In 1967, for example, LSU created the Institute for Civil Law Studies. See Barham, A Renaissance of the Civilian Tradition in Louisiana, 33 La. L. Rev. 357, 361 n.9 (1973) [hereinafter Barham, Renaissance].

20. See, e.g., Tucker, The Code and the Common Law in Louisiana, 29 Tul. L. Rev. 739 (1955). For an article suggesting that the differences between the law of Louisiana and that of other states were not very great, see Pope, supra note 9.

21. See, e.g., Morse v. J. Ray McDermott & Co., 344 So. 2d 1353 (La. 1977) (Calogero, J., authoring opinion on rehearing on abuse of rights); Dixon, Judicial Method in Interpretation of Law in Louisiana, 42 La. L. Rev. 1661 (1982).

22. See, e.g., Hoefly v. GEICO, 418 So. 2d 575 (La. 1982), noted in 58 Tul. L. Rev. 642 (1983).

23. For the basic facts of Justice Barham's biography, see The Association of American Law Schools Directory of Law Teachers of Member Schools for 1977, at 101; Hebert, Remarks on the Occasion of the Retirement of Justice Barham, 318-19 So. 2d (La. Cases) 6, 8-9 (1976).

tice and as a city judge, he was elected to the district court where he served for seven years. After a brief term on the Louisiana Second Circuit Court of Appeal, Justice Barham joined the Louisiana Supreme Court in 1968. He remained an associate justice for seven years until his retirement in 1975. Following his retirement from the judiciary, he joined the faculty of the Tulane Law School for two years before reentering private practice.

Justice Tate earned a B.A. from George Washington University in 1941 and an LL.B. from Yale in 1947.[24] He returned to Louisiana and earned a certificate in Civil Law Studies at LSU before practicing law in Ville Platte for six years. In 1954, he was elected judge on Louisiana's intermediate appellate court, where he remained until he was elected to the Louisiana Supreme Court in 1970. Justice Tate served on the state supreme court until his 1979 appointment to the United States Court of Appeals for the Fifth Circuit. He was a member of the Fifth Circuit at the time of his death in 1986.

The Theoretical Framework

Justice Barham issued the manifesto of the judicial revival in a 1973 article published in the *Louisiana Law Review*.[25] In the article, he both announced and advocated a revival of Louisiana's civilian "tradition," a heritage that he described as essentially a matter of technique rather than substance.[26] A key component of that technique was a rejection of the common law doctrine of stare decisis, a rejection that freed civilians from past decisions that did not serve present social needs.[27]

As interpreted by Justice Barham, the civilian tradition elevated the judicial role. Acknowledging the Civil Code's substantive inadequacy to solve the myriad problems of modern life, Justice Barham emphasized the judge's "legislative" duties and abandoned the "fiction that judges do not make law."[28] He further insisted that civilian judges abandon the "fiction" that the judiciary can easily find the meaning of unclear

24. For the basic facts of Justice Tate's biography, see The Association of American Law Schools Directory of Law Teachers of Member Schools for the 1967-68, at 288 (1968).

25. Barham, Renaissance, supra note 19. See also Barham, Liability Without Fault, 17 La. B.J. 271 (1970) [hereinafter, Barham, Liability Without Fault]; Barham, Methodology, supra note 9.

26. Barham accepted Merryman's definition of a legal tradition as "a set of deeply rooted, historically conditioned attitudes about the role of law in the society and in the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught." Barham, Renaissance, supra note 19, at 357 (quoting J. Merryman, The Civil Law Tradition (1969)).

27. Id. at 372-74.

28. Id. at 369.

statutory language "by determining legislative intent."[29] Only by abandoning that fiction, he argued, could modern judicial decisions provide acceptable legislative solutions for the rapidly changing conditions of modern society.[30]

Justice Barham emphatically rejected the notion that legal interpretation in the civilian tradition was mechanistic or certain. Drawing explicitly on the "free scientific approach" of the French scholar, François Gény,[31] Justice Barham deemphasized the value and importance of certainty as a criterion for judicial decisionmaking. Indeed, he identified the willingness to overrule prior decisions as an essential element of the civilian tradition.[32] Moreover, even as he recognized the primacy of legislation, Justice Barham also insisted on the legitimacy of other sources of law, including custom.[33] In addition, he argued that judicial decisions should be evaluated by their potential for producing socially desirable results.[34]

Justice Barham's civilian manifesto reflected the American influence on Louisiana's civilian tradition in at least three ways. First, he admitted that Louisiana lawyers and judges tended to rely on judicial decisions more than lawyers and judges in most civilian jurisdictions.[35] Second, he accepted the propriety of examining the law of other United States jurisdictions to determine what judicial results would best serve the economic and social needs of Louisiana.[36] Third, he occasionally cited modern common law scholars, especially Edward Levi.[37]

When one turns to the legal thought of Justice Tate, brief summary is far more difficult. His contributions are not centered in a single article. Instead, they extend across a rich and voluminous series of articles that embrace a host of theoretical and practical subjects.[38]

The nature of the judicial function was a subject in which Justice Tate remained interested throughout his long and distinguished career. Over a span of nearly three decades, he wrote a number of articles analyzing the judicial role from a variety of perspectives.[39] Occasionally,

29. Id.

30. Id. at 370.

31. Id. at 364-66.

32. Id. at 373.

33. Id. at 367-69.

34. Id. at 374.

35. Id. at 372.

36. Id.

37. Id. at 371, 389.

38. For bibliographies of Justice Tate's scholarly writings, see 47 La. L. Rev. 925 (1987), and 61 Tul. L. Rev. 773 (1987).

39. See generally Rees, Albert Tate on the Judicial Function, 61 Tul. L. Rev. 721 (1987).

he addressed that role from a strictly civilian viewpoint.[40] More frequently, he drew openly from both common law and civilian sources.

Justice Tate emphasized the role of the Louisiana judge in shaping a law responsive to contemporary social and economic needs, but he was far more willing than Justice Barham to acknowledge the American influence on Louisiana law. He consistently recognized that the Louisiana judiciary was an American creation.[41] Beyond that, he frequently acknowledged the importance of precedent for Louisiana lawyers and judges.[42] Although he occasionally invoked the civilian doctrine of jurisprudence constante,[43] he also conceded that "some common-law judges and some common-law jurisdictions have devised techniques and approaches not greatly dissimilar to those of the civil law."[44] Finally, he regularly cited leading American legal scholars such as Cardozo,[45] Pound,[46] and Llewellyn.[47]

Like Justice Barham, Justice Tate most frequently relied on Gény when he turned to civilian sources. As early as 1965, he published a favorable review of the Louisiana Law Institute's English translation

40. See, e.g., Tate, The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience, in The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions (Dainow ed. 1974) [hereinafter Tate, Mixed Jurisdictions]; Tate, Civilian Methodology in Louisiana, 44 Tul. L. Rev. 673 (1970) [hereinafter Tate, Civilian Methodology]; Tate, Louisiana and the Civil Law, Techniques of Judicial Interpretation in Louisiana, 22 La. L. Rev. 727 (1962) [hereinafter Tate, Techniques].

41. See, e.g., Tate, Mixed Jurisdictions, supra note 40, at 29; Tate, Civilian Methodology, supra note 40, at 679; cf. Tate, The Law-Making Function of the Judge, 28 La. L. Rev. 211, 233 (1968) [hereinafter Tate, Law-Making Function] ("*American* courts have always exercised the responsibility to revise and accommodate private law where needed to adjust it to the legal and social environments of the times.") (emphasis added). See also Tate, The Role of the Judge in the American Republic, 3 La. B.J. 77 (1955), reprinted in 16 La. L. Rev. 386 (1956) (defending the United States Supreme Court from criticism in light of its decision in Brown v. Board of Education).

42. See, e.g., Tate, Civilian Methodology, supra note 40, at 673; Tate, Techniques, supra note 40, at 743; Tate, "Policy" in Judicial Decisions, 20 La. L. Rev. 62, 68 (1959) [hereinafter Tate, Policy].

43. See, e.g., Tate, Techniques, supra note 40, at 744; Tate, Civilian Methodology, supra note 40, at 678.

44. Tate, Mixed Jurisdictions, supra note 40, at 36; cf. Tate, Techniques, supra note 40, at 753 (suggesting United States Supreme Court's "Sunburst Doctrine" for prospective overruling of past decisions as a model for Louisiana judges).

45. See, e.g., Tate, The Judge's Function and Methodology in Statutory Interpretation, 7 S.U.L. Rev. 147, 151-56 (1981) [hereinafter Tate, Statutory Interpretation]; Tate, Mixed Jurisdictions, supra note 40, at 36 n.44; Tate, Law-Making Function, supra note 41, at 221; Tate, Book Review, 25 La. L. Rev. 577, 584 (1965) [hereinafter Tate, Book Review].

46. See, e.g., Tate, Statutory Interpretation, supra note 45, at 148 n.1; Tate, Policy, supra note 42, at 68-69.

47. See, e.g., Tate, Statutory Interpretation, supra note 45, at 152 n.2.; Tate, Mixed Jurisdictions, supra note 40, at 29-31; Tate, Law-Making Function, supra note 41, at 211 n.1.

of Gény.[48] Thereafter, citations to Gény appeared both in his scholarly articles[49] and in his judicial opinions.[50]

For Justice Tate, the essence of the civilian tradition was a commitment to legislative supremacy.[51] That commitment, however, did not negate the judge's creative role. He viewed the judge as the legislator's "colleague,"[52] who was to translate abstract legislation into solutions for specific problems. He did not advocate an "original intent" approach to statutory construction. Instead, he sought to determine "what general precept was intended to be provided by the *legislation*, not the *legislators*, to apply to factual situations of the general nature of those giving rise to the dispute now before the court."[53] To derive that precept, he advocated a functional approach that relied not on "logic alone" but also on "policy considerations of what rule is best for the community as a whole and of what rule provides the fairest solution of the present controversy."[54] So open-ended was Justice Tate's theory of statutory interpretation that he even argued that the judge might properly ignore "the formal wording of the legislative rule" when it failed to "furnish the legal principle appropriate for decision of the [particular] case."[55]

Justice Tate always insisted that preexisting doctrine governed the vast majority of cases.[56] Nonetheless, like Justice Barham he readily acknowledged the qualitative significance of the judge's lawmaking role.[57] A 1968 article recognized the need for judicial lawmaking in three situations: when the legislature fails to provide a rule,[58] when a new legislative rule needs to be fitted into the existing legal frame-work,[59] and when "a substantial change in social conditions" makes application of the "literal wording" of the legislative rule inappropriate.[60] Defending

48. Tate, Book Review, supra note 45, at 577.

49. See, e.g., Tate, Law-Making Function, supra note 41, at 229 n.54; Tate, Techniques, supra note 40, at 734.

50. See, e.g., Chambers v. Chambers, 259 La. 246, 249 So. 2d 896, 906 (1971) (Tate, J., dissenting); Hibbert v. Mudd, 187 So. 2d 503, 510 (La. App. 3d Cir. 1966) (Tate, J., dissenting).

51. See, e.g., Tate, Techniques, supra note 40, at 727; Tate, Statutory Interpretation, supra note 45, at 155.

52. Tate, Techniques, supra note 40, at 737; Tate, Law-Making Function, supra note 41, at 222.

53. Tate, Techniques, supra note 40, at 732 (emphasis in original).

54. Id. at 738.

55. Id. at 737.

56. See, e.g., Tate, Law-Making Function, supra note 41, at 211; Tate, Policy, supra note 42, at 62, 68.

57. Tate, Law-Making Function, supra note 41, at 211-12.

58. Id. at 213-16.

59. Id. at 218-20.

60. Id. at 229.

the appropriateness of judicial lawmaking in this last situation, he argued that "the words of legislation contain a principle of regulation intended by the legislators to apply to contemplated norms of their own and succeeding times,"[61] but substantial changes in social conditions could make the principle inapplicable to circumstances that would fall within the statutory wording. In that case, judicial lawmaking was appropriate because "the mechanical adjudication by reference to the statute's literal wording alone may, under the changed conditions, amount to an irresponsible application of a legal rule devised neither by legislative intention nor by the deciding court."[62]

Justice Tate offered a more fully developed theory of the judicial function than Justice Barham. In it he insisted on the judge's duty both to consider the policy implications of a decision[63] and to render a decision that justly resolves the particular dispute.[64] Thus, he justified the judge's lawmaking function on the need to keep the law "alive and current and responsive to the changing needs of our society."[65] Moreover, he never separated the judicial function from the actual litigants who came before the judge. Judges could not, he asserted, "be deterred from improvising in the exceptional case" by looking "to legal considerations of justice." Instead of condemning this "justice-function safety valve," he embraced it on the ground that "human justice is rooted in values beyond rules and legal formalism."[66] Of course, he never advocated deciding cases "simply on the basis of the individual equities of the parties before [the judge]."[67] Rather, the judge's function was to select or to create a rule "of general application to other interests to be similarly situated in the future."[68] For Justice Tate, the commitment to both policy and justice in the particular case formed a coherent unity. Just as the fairness to the individual case had to be connected to general rules, so also must rules be connected to fairness. The application of a rule to produce "an individual result manifestly unfair and unsensible" suggested "not the unfairness of the law but its misapplication by the practitioner or judge."[69]

61. Id.
62. Id.
63. See generally Tate, Policy, supra note 42.
64. See generally Tate, The Justice Function of the Judge, 1 S.U.L. Rev. 250 (1975) [hereinafter Tate, Justice Function].
65. Tate, Law-Making Function, supra note 41, at 212.
66. Tate, The "New" Judicial Solution: Occasions for and Limits to Judicial Creativity, 54 Tul. L. Rev. 877, 915 (1980).
67. Id.
68. Tate, Justice Function, supra note 64, at 253-54; see also Tate, Mixed Jurisdictions, supra note 40, at 25; Tate, Statutory Interpretation, supra note 45, at 149.
69. Tate, Policy, supra note 42, at 74.

As in the case of Justice Barham, one can readily identify several American influences on Justice Tate's legal philosophy. He acknowledged the significance of the American model for Louisiana's judicial institutions, and he recognized the practical importance of precedents to Louisiana lawyers and judges. Moreover, he referred to American scholars with even greater frequency than Justice Barham. Finally, his commitment to achieving justice in the particular case parallels a primary emphasis of modern American legal thought.

Practical Accomplishments

Justices Dixon and Calogero joined the Louisiana Supreme Court in 1971 and 1973. They frequently united with Barham and Tate to give Louisiana a new "civilian" supreme court beginning in 1973. This new civilian majority drastically rearranged the decisional landscape of the state's law. But the results of their labors were not exclusively, or even primarily, directed at the core of the civil law—obligations, property, successions, and family law. Their new approach also profoundly affected criminal law and procedure, constitutional law, and civil procedure, and was most prominent in torts, the private law subject on which the Civil Code articles are the least comprehensive.

Notwithstanding an early opinion protesting the expansion of federal post-conviction remedies,[70] Justice Barham was the driving force behind the changes in criminal law and procedure. Indeed, he was frequently willing to grant defendants greater rights than he could persuade a majority to recognize.[71]

In criminal law, the watershed decision was *State v. Prieur*,[72] which reversed a line of jurisprudence dating back to 1938.[73] *Prieur* narrowed the opportunities for the prosecution to introduce evidence under the Louisiana statute allowing proof of "other crimes" to show knowledge, intent, and system.[74] The specific holding excluded evidence of a second robbery by the defendant without some additional similarities between the circumstances of the two offenses. Justice Barham justified the *Prieur* result not only on the plain meaning of the statute but also

70. State ex rel. Barksdale v. Dees, 252 La. 434, 211 So. 2d 318 (1968).
71. See, e.g., State v. Lindsey, 310 So. 2d 89, 92 (La. 1975) (Barham, J., dissenting); State v. Landrum, 307 So. 2d 345, 349 (La. 1975) (Barham, J., dissenting); State v. Blackwell, 298 So. 2d 798, 807 (La. 1974) (Barham, J., dissenting); State v. Ledet, 298 So. 2d 761, 769 (La. 1974) (Barham, J., dissenting); State v. Moseley, 284 So. 2d 749, 753 (La. 1973) (Barham, J., dissenting); State v. Taylor, 282 So. 2d 491, 498 (La. 1973) (Barham, J., dissenting); State v. Anderson, 229 So. 2d 329, 341 (La. 1969) (Barham, J., dissenting), rev'd, 403 U.S. 949, 91 S. Ct. 2288 (1971).
72. 277 So. 2d 126 (La. 1973).
73. Id. at 132 (Summers, J., dissenting).
74. La. R.S. 15:445-46 (1981).

"sound notions of fundamental fairness embodied in our State constitution."[75] The opinion relied extensively on leading American treatises on evidence to support the court's new view.[76] It also announced a new set of procedural rules governing evidence of "other crimes." Like the Warren Court of the 1960s, however, the court provided that the new rules would only apply to *Prieur* itself and trials that began after the final judgment in *Prieur*.[77]

Prieur was not an aberrational decision. The new civilian majority also revised a number of other areas of criminal law and procedure during the 1970s. It allowed defendants to reserve the right to appellate review when pleading guilty,[78] refined the distinction between "present recollection revived" and "past recollection recorded,"[79] narrowly construed inventory searches,[80] and broadened federal standards with respect to standing to contest unreasonable searches and seizures.[81] Moreover, the sympathetic treatment of the rights of criminal defendants continued after Justice Barham's retirement in 1975. His replacement, Justice Dennis, quickly joined the other members of the *Prieur* majority.[82]

Decisions involving constitutional questions outside criminal law and procedure show a less consistent theme. Primarily at Justice Tate's prodding,[83] the new civilian court was occasionally willing to apply sympathetically the expanded rights that were a legacy of the Warren Court era.[84] For example, Justice Tate authored an opinion holding that the apparent low bidder on a state contract had a property interest in the contract award that entitled the bidder to due process protection under the fourteenth amendment.[85] He also found the "public figure"

75. 272 So. 2d at 128.

76. Id. at 128-29 (citing 1 Wigmore, Evidence § 194 (3d ed. 1940) and McCormick on Evidence § 190, at 450-51 (Cleary ed. 1972)).

77. 277 So. 2d at 130.

78. State v. Crosby, 338 So. 2d 584 (La. 1976).

79. State v. Tharp, 284 So. 2d 536 (La. 1973).

80. State v. Jewell, 338 So. 2d 633 (La. 1976).

81. State v. Culotta, 343 So. 2d 977 (La. 1976); but see State v. Barrett, 408 So. 2d 903 (La. 1982).

82. See, e.g., State v. Culotta, 343 So. 2d 977 (La. 1976); State v. Crosby, 338 So. 2d 584 (La. 1976).

83. For a survey of Justice Tate's constitutional decisions as both a state and federal judge, see Rubin, Constitutional Protection for the Barber in Ville Platte, 61 Tul. L. Rev. 715 (1987).

84. See, e.g., Succession of Robins, 349 So. 2d 276 (La. 1977).

85. Haughton Elevator Div. v. State, 367 So. 2d 1161 (La. 1979), noted in 40 La. L. Rev. 871 (1980). More recent decisions have continued this generous construction of due process. See, e.g., Bell v. Department of Health and Human Services, 483 So. 2d 945 (La.), cert. denied, 107 S. Ct. 105 (1986), analyzed in Murchison, Developments in the Law, 1986-1987—Local Government Law, 48 La. L. Rev. 302, 322-27 (1988).

defense to libel applicable in a case[86] where powerful political interests had threatened political reprisal against judges who voted to overturn the libel verdict.[87] More recently, the court has even recognized certain rights protected by the Louisiana Constitution that are arguably broader than those protected by the federal Constitution.[88] On the other hand, the court has never shown much sympathy for modern equal protection theories that would invalidate statutes that discriminate against women.[89]

Some of the new civilian court's most innovative opinions came in the area of civil procedure, a field in which Justice Tate had long been a recognized expert.[90] The court's opinions in the 1970s largely implemented views he had expressed much earlier in scholarly writings. A major change involved appellate review of fact finding by trial courts. Because Louisiana's appellate courts are free to review findings of facts,[91] reversals on factual grounds are more common than in other states. Justice Tate had espoused deference to the facts found by trial courts when he was a judge on the state's intermediate appellate court.[92] During the 1970s, the Louisiana Supreme Court took major steps toward that position.

First, the court significantly narrowed the appellate courts' authority to reverse trial courts' judgments on factual grounds. "Manifest error" had long been the basis for factual reversals, and two important decisions from the 1970s restrictively defined that term.[93] According to

86. Kidder v. Anderson, 354 So. 2d 1306 (La.), cert. denied, 439 U.S. 829, 99 S. Ct. 105 (1978).

87. Rubin, supra note 83, at 716. Governor Edwin Edwards called the decision a "slap in the face to public officials." Baton Rouge Morning Advocate, Feb. 3, 1978, § A, at 14, col. 1 (quoted in Hargrave, The Work of the Appellate Courts for the 1977-1978 Term—Louisiana Constitutional Law, 39 La. L. Rev. 807, 822 n.61 (1979)).

88. See, e.g., State v. Parms, 523 So. 2d 1293, 1303 (La. 1988) (search and seizure); see also Sibley v. Board of Supervisors of LSU, 477 So. 2d 1094 (La. 1985) (equal protection). See generally Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1 (1974).

89. See, e.g., Corpus Christi Parish Credit Union v. Martin, 358 So. 2d 295 (La.), cert. denied, 439 U.S. 897, 99 S. Ct. 261 (1978); State v. Ivy, 307 So. 2d 587 (La. 1975); State v. Devall, 302 So. 2d 909 (La. 1974). See generally Hargrave, Developments in the Law, 1984-1985—Louisiana Constitutional Law, 46 La. L. Rev. 535, 542-45 (1986). Even Justice Barham was cautious in his recommendations for reform of Louisiana's community property laws. See Barham, Community Property: Symposium on Equal Rights, Introduction, Equal Rights for Women versus the Civil Code, 48 Tul. L. Rev. 560 (1974) [hereinafter Barham, Community Property].

90. A. Tate & F. Maraist, Louisiana Practice, Cases and Materials (1978).

91. La. Const. art. V, §§ 5(C), 10(B).

92. See Tate, "Manifest Error": Further Observations on Appellate Review of Facts in Louisiana Civil Cases, 22 La. L. Rev. 605 (1962).

93. Arceneaux v. Dominque, 365 So. 2d 1330 (La. 1978); Canter v. Koehring Co., 283 So. 2d 716, 724 (La. 1973).

these decisions, the reviewing court must give great weight to factual conclusions of the trier of fact. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of facts should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The supreme court justified this rule "not only upon the trial court's better capacity to evaluate live witnesses . . . but also upon the proper allocation of trial and appellate functions between the respective courts."[94]

The court imposed a second limitation on appellate authority to reverse trial judgments that involved damage awards, especially awards for noneconomic loss.[95] Two decisions from the late 1970s illustrate the trend. The first[96] found procedural and substantive limits in the concept of manifest error. Procedurally, it required that the appellate court must make "the finding that the record supports the claim that the lower court abused its discretion" before "the appellate court can disturb the award."[97] Substantively, it required that "the record must clearly reveal that the trier of fact abused its discretion in making its award."[98] Moreover, even when reversal was appropriate, the appellate court's authority was limited. It could only lower the award to the highest point that was "reasonably within the discretion afforded" the trial court; it could not simply choose "what it considers an appropriate award on the basis of the evidence."[99] The second important decision[100] reemphasized that the trial court has "much" discretion in assessing damages and added another procedural requirement: the appellate court must give "articulated reason[s]" explaining why the award is excessive.[101]

The court was equally innovative with respect to rules governing the conduct of civil litigation. Perhaps reflecting Justice Tate's long-held belief that courts should control their own rules of procedure,[102] the court developed several important procedural vehicles that are not apparent from the literal language of the Louisiana Code of Civil Procedure. Frequently, the Louisiana court's solutions in these instances

94. *Canter*, 283 So. 2d at 724.
95. In addition to the opinions discussed in the text, see also Boswell v. Roy O. Martin Lumber Co., 363 So. 2d 506 (La. 1978); Anderson v. Welding Testing Laboratory, Inc., 304 So. 2d 351 (La. 1974); Miller v. Thomas, 258 La. 285, 246 So. 2d 16 (1971).
96. Coco v. Winston Indus., Inc., 341 So. 2d 332 (La. 1977).
97. Id. at 335.
98. Id.
99. Id.
100. Reck v. Stevens, 373 So. 2d 498 (La. 1979).
101. Id. at 501.
102. See Tate, The Rule-Making Powers of the Courts in Louisiana, 24 La. L. Rev. 555, 557 (1964).

were remarkably similar to those adopted in the Federal Rules of Civil Procedure.

Williams v. State[103] is perhaps the most dramatic illustration. The official comments to the Louisiana Code of Civil Procedure state that the rules only adopted the "true" class action and not "hybrid" or "spurious" class actions.[104] Nonetheless, Justice Tate's opinion allowed a mass tort action resulting from food contamination at the state penitentiary to proceed as a class action under the Louisiana statute even though federal courts had previously characterized such lawsuits as "spurious" class actions.[105] He based the decision to allow the class action to proceed on a "functional and pragmatic" analysis of "the intertwined values of effectuating substantive law, judicial efficiency, and individual fairness."[106]

A second area of innovation involved distinguishing "necessary" and "indispensable" parties. In the leading opinion,[107] Justice Tate went beyond the "unfortunate wording"[108] of the articles of the Code of Civil Procedure to embrace a functional approach that followed the current Federal Rules of Civil Procedure.[109] He allowed parties to be classified as "indispensable only when that result is absolutely necessary to protect substantial rights."[110] Moreover, Justice Tate's opinion emphasized that situations in which a party was properly classified as indispensable existed only rarely. By carefully shaping its decree, a court could frequently "avoid any possibility of prejudice to the rights of an absent party and still do justice to the parties before the court."[111]

Interpretation of the state's longarm statute[112] is another procedural area that deserves brief mention. Considered as a whole, the decisions of the Louisiana civilians reflect a sympathetic response to legislative innovation of the 1960s[113] rather than a sharp break with the past. Nonetheless, the decisions after 1973 do manifest a greater willingness on the part of the justices to exercise jurisdiction over nonresidents.[114]

103. 350 So. 2d 131 (La. 1977).
104. La. Code Civ. P. art. 591 comment (c).
105. 350 So. 2d at 140 (Summers, C.J., dissenting).
106. Id. at 133-34.
107. State v. Lamar Advertising Co., 279 So. 2d 671 (La. 1973).
108. Id. at 676.
109. See Fed. R. Civ. P. 19.
110. 279 So. 2d at 677.
111. Id.
112. La. R.S. 13:3201-07 (1968 and Supp. 1988).
113. 1964 La. Acts No. 47 (codified at La. R.S. 13:3201-07 (1968 and Supp. 1988)). See generally McMahon, Louisiana Legislation of 1964: Civil Procedure, 25 La. L. Rev. 28 (1964); Tate, The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Civil Procedure, 29 La. L. Rev. 269, 271-76 (1969).
114. Compare the cases cited infra note 115 to Riverland Hardware Co. v. Craftsman Hardwood Lumber Co., 259 La. 635, 251 So. 2d 45 (1971).

On several occasions, the court emphasized that Louisiana's longarm statute should be broadly construed to reach as far as the fourteenth amendment's due process clause would allow.[115] One could not, however, accurately describe the decisions as involving insensitivity to the need for fairness to nonresident defendants. Not only did the court decline to exert jurisdiction over nonresidents with very tangential ties to the state,[116] it also required that nonresidents be treated fairly with respect to service of process[117] and the availability of normal trial delays.[118]

Even under the new civilian majority, the Louisiana Supreme Court declined to follow American developments with respect to relitigation of issues raised in prior lawsuits. In the 1970s, the court rejected collateral estoppel[119] and adhered to a civilian version of res judicata that required strict identity of parties, the cause of action, and the thing demanded.[120] Even here, however, occasional attempts at reform surfaced. A 1974 opinion by Justice Tate[121] precluded the parties to a divorce action from relitigating the fault determination in a prior separation judgment. Moreover, decisions from the 1980s have precluded relitigation in two important disputes involving immovable property. The first barred relitigation by broadly construing the issues raised in the first suit.[122] The second modified the general rule in suits relating to land titles. In such cases, the initial decision barred all claims that could have been pleaded as well as those that were actually pleaded.[123]

Conflicts rules represent another area where significant changes emanated from Louisiana Supreme Court decisions in the 1970s. Despite some earlier creative opinions by Justice Tate when he was a judge on the Louisiana First Circuit Court of Appeal,[124] Louisiana had generally

115. Clay v. Clay, 389 So. 2d 31, 37 (La. 1979); Adcock v. Surety Research & Inv. Corp., 344 So. 2d 969, 971 (La. 1977); Drilling Engineering, Inc. v. Independent Indonesian American Petroleum Co., 283 So. 2d 687, 689 (La. 1973). See also Moore v. Central La. Elec. Co., 273 So. 2d 284 (La. 1973).

116. Adcock v. Surety Research & Inv. Corp., 344 So. 2d 969, 973 (La. 1977); Fisher v. Albany Machine & Supply Co., 261 La. 747, 756, 260 So. 2d 691, 694 (1972); Riverland Hardware Co. v. Craftsman Hardwood Lumber Co., 259 La. 635, 251 So. 2d 45 (1971).

117. See, e.g., Ray v. South Central Bell Tel. Co., 315 So. 2d 759 (La. 1975).

118. See, e.g., Clay v. Clay, 389 So. 2d 31 (La. 1979).

119. See Welch v. Crown Zellerbach Corp., 359 So. 2d 154 (La. 1978). For a discussion of early cases suggesting that Louisiana might accept the doctrine of collateral estoppel, see Comment, Preclusion Devices in Louisiana: Collateral Estoppel, 35 La. L. Rev. 158 (1974).

120. La. R.S. 13:4231 (1984) (formerly Article 2286 of the Civil Code). See Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976); Sliman v. McBee, 311 So. 2d 248 (La. 1975); Scurlock Oil Co. v. Getty Oil Co., 294 So. 2d 810 (La. 1974).

121. Fulmer v. Fulmer, 301 So. 2d 622 (La. 1974).

122. R.G. Claitor's Realty v. Juban, 391 So. 2d 394 (La. 1980).

123. Ryan v. Grandison Trust, 504 So. 2d 844 (La. 1987).

124. See, e.g., Doty v. Central Mut. Ins. Co., 186 So. 2d 328 (La. App. 3d Cir.), writ denied, 249 La. 486, 187 So. 2d 451 (1966); Universal C.I.T. Credit Corp. v. Hulett, 151 So. 2d 705 (La. App. 3d Cir. 1963). For a description of those opinions, see Symeonides,

adhered to the traditional conflicts rules applying the law of the locus of the contract[125] or tort.[126] That tradition began to change soon after Justice Tate joined the court in 1970. Unfortunately, however, he did not author the majority opinion in any of the leading cases. A 1972 decision reaffirmed the traditional contract rule in an insurance case involving an insurance contract executed and delivered in Florida,[127] but Tate's concurring opinion reserved the possibility of embracing a more modern American theory in an appropriate case.[128] A year later, the court abandoned the lex loci delicti rule for torts, at least in the case of false conflicts, where Louisiana was the only state with a legitimate interest in having its law apply to an accident occurring outside its borders.[129]

For several reasons, the 1973 decision left the scope of the new doctrine uncertain.[130] First, because the case that the Louisiana Supreme Court decided involved a false conflict, only inferences from the opinion and not the holding of the case embrace the new rule for real conflicts. Second, footnotes in the opinion refer favorably to two modern American approaches to conflicts problems that are not identical.[131] Because the 1973 opinion remains the Louisiana Supreme Court's most definitive pronouncement on the new doctrine, some of the uncertainty following the original decision remains. However, state courts of appeal[132] and federal courts[133] have interpreted the supreme court's opinion to commit Louisiana doctrine to a modern American approach even outside the field of torts.[134]

Within the sphere of private legal relations directly addressed by the Civil Code, the most significant changes the new civilian court

Louisiana Conflicts Jurisprudence, A Student Symposium: Introduction, 47 La. L. Rev. 1105, 1106-07 (1987).

125. La. Civ. Code art. 15 (renumbered by 1987 La. Acts No. 124); Theye Y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 161 So. 2d 70 (1964).

126. Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970).

127. Deane v. McGee, 261 La. 686, 260 So. 2d 669 (1972).

128. Id. at 699; 260 So. 2d at 674 (citing Restatement (Second) of Conflicts of Laws §§ 6, 188, 205 (1971)).

129. Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973).

130. See generally Symeonides, Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions, 47 La. L. Rev. 1029 (1987); Student Symposium, Conflict of Laws in Louisiana, 47 La. L. Rev. 1109 (1987).

131. 276 So. 2d at 311 n.2 (referring to Brainerd Currie's "interest" analysis), 312 n.3 (citing Restatement (Second) of Conflicts of Laws § 6 (1969)). See also Couch, Louisiana Adopts Interest Analysis: Applause and Some Observations, 49 Tul. L. Rev. 1 (1974).

132. See, e.g., Burns v. Holiday Travels, Inc., 459 So. 2d 666 (La. App. 4th Cir. 1984); Lee v. Ford Motor Co., 457 So. 2d 193 (La. App. 2d Cir.), writ denied, 461 So. 2d 319 (1984).

133. See, e.g., Brinkley and West v. Foremost Ins. Co., 499 F.2d 928 (5th Cir. 1974); Ardoyno v. Kyzar, 426 F. Supp. 78 (E.D. La. 1976).

134. Bell v. State Farm Mut. Auto. Ins. Co., 680 F.2d 435 (5th Cir. 1982). Justice Tate, by 1982 a member of the Fifth Circuit, was the author of the *Bell* opinion.

wrought during the 1970s occurred in tort doctrine. To those unfamiliar with civil law, this result is a surprising one for a civilian revival because the Civil Code has so few provisions addressing delictual liability. However, the civilian tradition has a long and distinguished heritage of doctrine analyzing delictual liability, and the French version of that doctrine proved attractive to the Louisiana Supreme Court.

The basic tort rule of Louisiana's Civil Code is the fault principle of article 2315,[135] which article 2316 defines to include negligence.[136] In addition, article 2317 imposes vicarious liability for "the act of persons for whom we are answerable, or of the things which we have in our custody . . . with the following modifications . . . ."[137] The "modifications" render parents liable for the acts of their children,[138] curators liable for those under their care,[139] employers liable for the acts of their employees,[140] and owners liable for their

135. La. Civ. Code art. 2315 provides in pertinent part:
Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

136. La. Civ. Code art. 2316:
Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

137. La. Civ. Code art. 2317:
We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

138. La. Civ. Code art. 2318:
The father and the mother and, after the decease of either, the surviving parent, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.
The same responsibility attaches to the tutors of minors.

139. La. Civ. Code art. 2319:
The curators of insane persons are answerable for the damage occasioned by those under their care.

140. La. Civ. Code art. 2320:
Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the function in which they are employed.
Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.
In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

animals[141] and buildings.[142]

Louisiana courts have traditionally relied on article 2315 both to embrace negligence as the basic standard of liability[143] and to accept most of the American corollaries to the negligence principle. For example, Louisiana decisions went beyond the literal text of article 2320 to impose vicarious liability on employers without proof of employer negligence.[144] Louisiana courts also expanded the scope of liability by borrowing doctrines like last clear chance[145] and res ipsa loquitur.[146] In addition, Louisiana law accepted the defenses of contributory negligence[147] and assumption of risk,[148] as well as charitable[149] and governmental[150] immunity.

The breadth of the changes in tort doctrine during the 1970s is too great to discuss in detail here. Nonetheless, the examples that follow should suffice to illustrate the importance of the changes.

During the 1970s, the Louisiana Supreme Court adopted many tort law changes without explicitly resorting to civilian tradition. The court reaffirmed[151] its rejection of "proximate cause" analysis in favor of the duty-risk approach that it had embraced in 1962.[152] More precisely, the court extended the duty-risk approach it had established for cases governed by statutory rules to a general principle for all negligence

141. La. Civ. Code art. 2321:
The owner of an animal is answerable for the damage he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm done, without being allowed to make the abandonment.

142. La. Civ. Code art. 2322:
The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

143. See Luke v. Morgan's La. & T.R. & S.S. Co., 147 La. 30, 84 So. 483, 485 (1920).

144. See, e.g., Hart v. New Orleans & Carrollton R.R. Co., 1 Rob. 178 (La. 1841).

145. See, e.g., Jackson v. Cook, 189 La. 860, 181 So. 195 (1939).

146. See generally Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases, 4 La. L. Rev. 70 (1941).

147. See, e.g., Fleytas v. Pontchartrain R.R. Co., 18 La. 339 (1841). As early as 1945, Professor Wex Malone criticized contributory negligence as a betrayal of Louisiana's civilian heritage. See Malone, Comparative Negligence—Louisiana's Forgotten Legal Heritage, 6 La. L. Rev. 125 (1945).

148. See, e.g., Settoon v. Texas & Pacific Ry. Co., 48 La. Ann. 807 (1896).

149. Grant v. Touro Infirmary, 254 La. 204, 223 So. 2d 148 (1969); Jordan v. Touro Infirmary, 123 So. 726 (La. App. 1922).

150. See Stewart v. City of New Orleans, 9 La. Ann. 461 (1854).

151. Hill v. Lundin & Assoc., Inc., 260 La. 542, 256 So. 2d 620 (1972).

152. Dixie Drive It Yourself System, Inc. v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962).

cases. Thus, it modified a number of strict rules to allow for a case-by-case analysis of negligence issues that was more sensitive to the facts of the particular situation.[153]

Although legislation was required to establish comparative negligence,[154] the court itself abolished governmental[155] and charitable[156] immunity and restricted the defenses of assumption of risk[157] and contributory negligence.[158] It also expanded the last clear chance[159] and res ipsa loquitur[160] doctrines, eroded the worker's compensation law as an exclusive remedy,[161] eliminated the locality rule for malpractice actions against physician specialists,[162] and held the state liable for torts committed by a deputy sheriff.[163] Drawing heavily on section 402A of the *Restatement (Second) of Torts*[164] without citing it directly,[165] the court also embraced a theory of products liability that did not require proof of negligence.[166]

For other types of strict liability, the court did invoke a uniquely "civilian" methodology.[167] The earliest of these decisions was *Langlois v. Allied Chemical Corp.*[168] Speaking through Justice Barham, the court indicated for the first time that the "fault" for which article 2315 imposed liability was not limited to negligence. The opinion relied on property principles[169] to establish fault and thus to impose liability on

153. See cases cited in Robertson, Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc., 34 La. L. Rev. 1, 25-26 (1973).

154. La. Civ. Code art. 2323.

155. Board of Comm'rs v. Splendour Shipping & Enterprises Co., 273 So. 2d 19 (La. 1973).

156. Garlington v. Kingsley, 289 So. 2d 88 (La. 1974). See generally Boland, The Abolition of the Doctrine of Charitable Immunity in Louisiana—Garlington v. Kingsley, 21 La. B.J. 253 (1974).

157. See, e.g., McInnis v. Fireman's Fund Ins. Co., 322 So. 2d 155 (La. 1975).

158. See, e.g., Baumgartner v. State Farm Mut. Auto Ins. Co., 356 So. 2d 400 (La. 1978).

159. See, e.g., Leake v. Prudhomme Truck Tank Service, Inc., 260 La. 1071, 258 So. 2d 358 (1971).

160. See, e.g., Boudreaux v. American Ins. Co., 262 La. 721, 264 So. 2d 621 (1972).

161. Canter v. Koehring Co., 283 So. 2d 716 (La. 1973).

162. Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331 (La. 1978).

163. Foster v. Hampton, 381 So. 2d 789 (La. 1980).

164. Restatement (Second) of Torts § 402A (1965).

165. The court did cite Judge Traynor's decision in Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963), which anticipated the Restatement formulation.

166. Chappuis v. Sears, Roebuck & Co., 358 So. 2d 926 (La. 1978); Weber v. Fidelity & Casualty Ins. Co. of New York, 259 La. 599, 250 So. 2d 754 (1971).

167. For a good general overview, see Andrus, Strict Liability Under Civil Code Articles 2317, 2318 and 2321: An Initial Analysis, 25 La. B.J. 105 (1977).

168. 258 La. 1067, 249 So. 2d 133 (1971).

169. La. Civ. Code arts. 667, 669.

a landowner under article 2315 without proof of the landowner's negligence. The court soon followed *Langlois* with decisions imposing strict liability for damages resulting from the acts of animals[170] and children[171] and for damages caused by defective things.[172]

Justice Tate offered the most comprehensive explanation of this new civilian theory in *Loescher v. Parr.*[173] *Loescher* held a landowner liable for a rotting tree that fell on an automobile even though the trial judge found that the owner did not know that the tree was defective and that his ignorance of the defect was not negligence. Drawing on decisions interpreting similar articles in the French Civil Code,[174] *Loescher* held the owner strictly liable under article 2317 for defective things under the owner's control. The court defined a thing as "defective" whenever it presented an "unreasonable hazard of injury" to others.[175] When a "defective" thing caused injury, an owner could avoid liability only by proving an intervening cause in the form of the victim's fault, the fault of a third party, or an irresistible force.[176]

The changes in tort doctrine were undoubtedly the new civilian majority's most obvious alterations of private law, but they were not the court's only accomplishments. The Civil Code regulates the fields of conventional obligations, property, successions, and family law with much greater specificity than it covers delictual liability. In these areas, the changes made by Louisiana's civilian justices were less dramatic, but they were not insignificant.

At least four developments in the field of obligations deserve brief notation. First, the court expanded the cases in which solidary liability was established by operation of law. The most important practical consequence of this expansion came in tort cases, where it prevented prescription running against an employer when suit was filed against an employee.[177] A second major change was judicial recognition of actions for unjust enrichment.[178] Here the court followed French

170. Holland v. Buckley, 305 So. 2d 113 (La. 1974).

171. Turner v. Bucher, 308 So. 2d 270 (La. 1975).

172. Loescher v. Parr, 324 So. 2d 441 (La. 1975).

173. Id.

174. Id. at 447-48.

175. Id. at 447.

176. Id. at 449.

177. Foster v. Hampton, 381 So. 2d 789 (La. 1980); see generally Johnson, Developments in the Law, 1979-1980—Obligations, 41 La. L. Rev. 355, 355-58 (1981).

178. See Coleman v. Bossier City, 305 So. 2d 444 (La. 1974); Edmonston v. A-Second Mortgage Co., 289 So. 2d 116 (La. 1974); Brignac v. Boisdore, 288 So. 2d 31 (La. 1973). In 1967, a plurality of the Louisiana Supreme Court had recognized the action for unjust enrichment, but two members of the majority declined to join the opinion explaining the basis for the decision. See Minyard v. Curtis Prod., Inc., 251 La. 624, 205 So. 2d 422 (1967).

doctrine[179] recognizing a similar action even though the French Code, like the Louisiana Civil Code, made no general provision for an unjust enrichment action.[180] Third, the court protected unsophisticated parties to contracts, especially consumers, in a variety of circumstances.[181] The areas covered by the decisions included implied warranties for the sale of automobiles,[182] apparent authority of corporate employees,[183] penalties for usurious contracts,[184] and contract recission.[185] Finally, the court limited the right to recover nonpecuniary damages to contracts that have "for [their] object[s] the gratification of some intellectual enjoyment."[186]

The Louisiana civilians also rendered important decisions regarding property rights, but none of these decisions changed the basic character of Louisiana property interests. Indeed, the overall impact of these decisions was rather conservative. The previously noted reluctance to use equal protection doctrine to invalidate gender-based discrimination frequently involved property interests of economically dependent women.[187] In addition, the court was quite sensitive to state interests in property matters. For example, the court adhered to an established line of cases when it denied adjacent land owners any right to alluvial buildup around lakes.[188] It rejected the newer, more creative construction of the Code that Justices Summers and Marcus advocated in dissent.[189]

179. See Brignac v. Boisdore, 288 So. 2d 31, 35 (La. 1973); Minyard v. Curtis Prod., Inc., 251 La. 624, 650, 205 So. 2d 423, 432 (1967).

180. Both codes do authorize actions for unjust enrichment in particular cases. See Tate, The Louisiana Action for Unjustified Enrichment, 50 Tul. L. Rev. 883, 893 n.46 (1976) [hereinafter Tate, Louisiana Action].

181. See generally Hersbergen, Unconscionability: The Approach of the Louisiana Civil Code, 43 La. L. Rev. 1315 (1983) [hereinafter Hersbergen, Unconscionability]; Hersbergen, Contracts of Adhesion Under the Louisiana Civil Code, 43 La. L. Rev. 1 (1982).

182. See, e.g., Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc., 262 La. 80, 262 So. 2d 377 (1972).

183. See, e.g., United States Fidelity & Guar. Co. v. Dixie Parking Serv., Inc., 262 La. 45, 262 So. 2d 365 (1972).

184. See, e.g., Thrift Funds of Baton Rouge, Inc. v. Jones, 274 So. 2d 150 (La. 1973).

185. Mercello v. Bussiere, 284 So. 2d 892 (La. 1973).

186. Meador v. Toyota of Jefferson, 332 So. 2d 433, 435 (La. 1976). The 1984 revision to the civil code articles on obligations alters this rule. Article 1998 now permits recovery of damages for nonpecuniary loss when the defaulting obligor intended to aggrieve the feelings of the obligee or when the contract is intended to satisfy a nonpecuniary interest and the defaulting obligor knew or should have known that his failure would cause the nonpecuniary loss.

187. See Corpus Christi Credit Union v. Martin, 358 So. 2d 295 (La.), cert. denied, 439 U.S. 897, 99 S. Ct. 261 (1978); State v. Ivy, 307 So. 2d 587 (La. 1975); State v. Devall, 302 So. 2d 909 (La. 1974); Barham, Community Property, supra note 89; Hargrave, supra note 89.

188. State v. Placid Oil Co., 300 So. 2d 154 (La. 1974) (on rehearing).

189. Id. at 155, 178.

The most notable example of the court overruling a prior property decision also favored the government by holding that state patents conveying navigable water bottoms were absolute nullities, which were not ratified by a curative statute.[190] The new opinion, however, was considerably less innovative than it might initially appear. Academics had subjected the earlier decision to a barrage of criticism,[191] and the court had dodged the issue the first time it appeared in the 1970s.[192]

When the property cases involved statutory construction or compensation rather than constitutional interpretation or ownership, the court's decisions tended to be more protective of women and of citizens doing battle with the state. Thus, the court interpreted the Code's provisions with respect to community property in a way that protected both creditors[193] and the nonemployed spouse.[194] Likewise, it sympathetically valued the damages suffered by property owners whose property was taken by expropriation.[195]

In decisions involving descent and distribution, two common themes are readily apparent. On the one hand, the court seemed committed to distributing assets in accordance with the wishes of the decedent. For example, the court held that a statutory will was valid notwithstanding minor defects of form,[196] and it upheld designations of pension beneficiaries that were not in the form prescribed for donations.[197] At the same time, the court showed considerable solicitude for claims based on tangential family relationships. Thus, decisions from the 1970s ruled that the marriage of the biological parents legitimated children born of adulterous unions,[198] invalidated a codal provision prohibiting a parent from giving a child born of an adulterous union any substantial part

190. Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1975) (on rehearing).

191. See Dainow, The Work of the Louisiana Supreme Court for the 1953-1954 Term—Property, 15 La. L. Rev. 273, 273-75 (1955); Hebert & Lazarus, Legislation Affecting the Civil Code, 15 La. L. Rev. 9, 21-25 (1954); Yiannopoulos, Validity of Patents Conveying Navigable Waterbottoms—Act 62 of 1912, Price, Carter, and All That, 32 La. L. Rev. 1 (1971).

192. Carter v. Moore, 258 La. 921, 248 So. 2d 813 (1971).

193. Creech v. Capital Mack, Inc., 287 So. 2d 497 (La. 1973).

194. Due v. Due, 342 So. 2d 161 (La. 1977); Creech v. Capital Mack, Inc., 287 So. 2d 497 (La. 1973).

195. State v. Terrace Land Co., 298 So. 2d 859 (La. 1974); State v. Hoyt, 284 So. 2d 763 (La. 1973).

196. Succession of Porche, 288 So. 2d 27 (La. 1973). See also Succession of Killingsworth, 292 So. 2d 536, 549 (1973) (Barham, J., dissenting on original hearing); id. at 556 (Tate, J., concurring in rehearing opinion).

197. T.L. James & Co. v. Montgomery, 332 So. 2d 834 (La. 1976) (on rehearing). See also Baten v. Taylor, 386 So. 2d 333 (La. 1979) (double conditional legacy is not prohibited substitution).

198. Succession of Mitchell, 323 So. 2d 451 (La. 1975).

of the parent's estate,[199] and recognized an adopted child's right to inherit from natural parents as a compelling reason justifying appointment of a curator to examine sealed adoption records.[200]

The court's contributions were also significant in family law. As in the succession decisions, the court showed considerable sympathy for family relationships, particularly the welfare of children. It refused to allow a husband to disavow the paternity of his wife's children by proof of natural impotence,[201] allowed a child to have two sets of legitimate parents,[202] and increasingly accepted the "best interests of the child" standard in custody disputes.[203] The court also continued a long line of Louisiana decisions favoring innocent parties to invalid marriages. For example, the court allowed such putative spouses to recover under the state's workers' compensation law.[204] Finally, the court weakened some traditional doctrines that had previously made divorces particularly hard to obtain. As an illustration, the court rejected the doctrine of recrimination, which denied either party to a marriage a divorce when both were at fault.[205]

During the 1970s, the Louisiana Supreme Court also embraced another important civilian doctrine, abuse of rights. Accepting the position espoused by Professor Cueto-Rua,[206] a 1977 decision held that a company's refusal to waive a termination clause in a deferred compensation plan was unlawful.[207] Although the court accepted the company's legal right to refuse to waive the clause, it characterized the company's interest in exercising that right as "so insignificant in comparison with our strong public policy against wage forfeiture as to constitute neither a legitimate nor a serious interest."[208] As a result, the refusal to waive was invalid under the abuse of rights doctrine, which forbade "the exercise of a right . . . without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm . . . ."[209]

199. Succession of Robins, 349 So. 2d 276 (La. 1977).

200. Massey v. Parker, 369 So. 2d 1310 (La. 1979).

201. Tannehill v. Tannehill, 261 La. 933, 261 So. 2d 619 (1972); cf. Pounds v. Schori, 377 So. 2d 1195 (La. 1979).

202. Succession of Mitchell, 323 So. 2d 451 (La. 1975).

203. See, e.g., Stelly v. Montgomery, 347 So. 2d 1145 (La. 1977); Estes v. Estes, 261 La. 20, 258 So. 2d 857 (1972).

204. Cortes v. Fleming, 307 So. 2d 611 (La. 1973).

205. Thomason v. Thomason, 355 So. 2d 908 (La. 1978).

206. Cueto-Rua, Abuse of Rights, 35 La. L. Rev. 965 (1975).

207. Morse v. J. Ray McDermott & Co., 344 So. 2d 1353 (La. 1977) (on rehearing).

208. Id. at 1369.

209. Id. While reaffirming the doctrine, subsequent cases have emphasized the narrow range of situations in which an individual would not have a legitimate and serious reason for exercising a legal right. See, e.g., Illinois Cent. Gulf R.R. Co. v. International Harvester Co., 368 So. 2d 1009 (La. 1979).

In terms of methodology, the decisions of the new civilian court during the 1970s defy simple characterization. Certainly, the court frequently re-thought old solutions and overruled past decisions.[210] Other decisions, however, took pains to avoid reexamining previously decided issues,[211] followed trends that long antedated the civilian revival,[212] expanded legislative innovations,[213] or used creative approaches to statutory language to deal with problems the court had not previously faced.[214] At least occasionally, the Louisiana court was willing to rely on constitutional doctrine to achieve what it regarded as just results.[215] All in all, the cases reflect an eclectic approach that, as a perceptive observer noted about Justice Barham's decisions, "would have, no doubt, filled Gény's heart with pride."[216]

An Appraisal of the Judicial Revival

Since Gordon Ireland proclaimed that Louisiana was a common law jurisdiction fifty years ago,[217] civilian scholars have vigorously defended the importance of the civil law to the state's legal culture.[218] Forced to concede the significance of Anglo-American influences in many areas such as constitutional law, commercial law, and criminal procedure, more recent civilian scholarship has settled on the appellation "mixed jurisdiction" to describe Louisiana's legal system.[219] Unfortu-

210. See, e.g., Loescher v. Parr, 324 So. 2d 441 (La. 1975); State v. Prieur, 277 So. 2d 126 (La. 1973); Board of Comm'rs v. Splendour Shipping & Enterprise Co., 273 So. 2d 19 (La. 1973).

211. See, e.g., Carter v. Moore, 258 La. 921, 248 So. 2d 813 (1971).

212. See, e.g., Hill v. Lundin & Assoc., Inc., 260 La. 542, 256 So. 2d 620 (1972).

213. See, e.g., Thomason v. Thomason, 355 So. 2d 908 (La. 1978); Adcock v. Surety Research & Inv. Corp., 344 So. 2d 969 (La. 1977); Drilling Eng'g, Inc. v. Independent Indonesian American Petroleum Co., 283 So. 2d 687 (La. 1973).

214. See, e.g., Williams v. State, 350 So. 2d 131 (La. 1977).

215. See, e.g., Haughton Elevator Div. v. State, 367 So. 2d 1161 (La. 1979); Succession of Robins, 349 So. 2d 276 (La. 1977).

216. Hebert, supra note 23, at 14 (quoting Professor Saul Litvinoff).

217. Ireland, supra note 13, at 596.

218. See, e.g., Barham, Renaissance, supra note 19; Daggett, Dainow, Hebert, and McMahon, supra note 14; Yiannopoulos, Louisiana Civil Law: A Lost Cause?, 54 Tul. L. Rev. 830 (1980).

219. See, e.g., Dixon, L. Supra note 21, at 1661 (1982); Pugh, The Structure and Role of Courts of Appeal in Civil Law Systems, 35 La. L. Rev. 1163, 1188 (1975); Tate, The Interpretation of Written Rule of Law, 27 La. B.J. 79 (1979); Tate, Mixed Jurisdictions, supra note 40, at 23; Yiannopoulos, Civil Law in Judge Tate's Court: Three Decades of Challenge, 61 Tul. L. Rev. 743 (1987). Justice Tate attributed the coining of the phrase "mixed jurisdiction" to Professor T.B. Smith of Edinburgh. Tate, Civilian Methodology, supra note 40, at 673 n.2 (1970) (citing T. Smith, A Short Commentary on the Law of Scotland (1962)).

For a general overview of the nature and characteristics of mixed jurisdictions, especially in the United States, see McKnight, Some Historical Observations on Mixed Systems of Law, 22 Jurid. Rev. (n.s.) 177 (1977).

nately, the narrow debate over whether Louisiana is a common law or civil law jurisdiction has obscured a more basic inquiry: To what extent does Louisiana's legal system reflect the social, cultural, and economic influences that have impacted other American jurisdictions?

In large measure, the problem that Louisiana's "civilian" judges faced was one that confronted many American courts in the 1970s, namely, how to create a law adequate for the last third of the twentieth century in the absence of broad legislative revision. Perhaps, therefore, the American character of their solution to that problem should not be so surprising. In any event, both the form and the content of the civilian revival have a discernible American cast.

That a dramatic change occurred in Louisiana law during the 1970s is clear beyond peradventure. The state supreme court revised a host of doctrines in public law, private law, and procedure. Moreover, the revised doctrines clearly date from the formation of the new civilian majority created when Justice Calogero joined the court in 1973.[220] In that year, Justice Barham published his article heralding the civilian revival,[221] and the Louisiana Supreme Court rendered important opinions regarding criminal law and procedure,[222] civil procedure,[223] conflicts,[224] tort liability,[225] obligations,[226] and successions.[227] In the ensuing years, the court continued the process of revision that it had begun. By the end of the decade, virtually no area of Louisiana law remained untouched.

The form of Louisiana's civilian revival bears at least four American imprints. The American influence is reflected in the judicial role in reshaping doctrine, the authority of judicial decisions, the importance

220. The cases leading up to State v. Prieur, 277 So. 2d 126 (La. 1973), highlight the significance of Justice Calogero's election in producing a "new" majority on the Louisiana Supreme Court in 1973. See State v. Hills, 259 La. 436, 250 So. 2d 394 (1971) (Barham, Tate, and Dixon, JJ., dissenting); State v. Bolden, 257 La. 60, 241 So. 2d 490 (1970) (Barham and Tate, JJ., dissenting); State v. Crook, 253 La. 961, 221 So. 2d 473 (1969) (Barham, J., dissenting).

221. Barham, Renaissance, supra note 19.

222. State v. Wallace, 285 So. 2d 796 (La. 1973); State v. Tharp, 284 So. 2d 536 (La. 1973); State v. Woodruff, 281 So. 2d 95 (La. 1973); State v. Douglas, 278 So. 2d 485 (La. 1973); State v. Prieur, 277 So. 2d 126 (La. 1973).

223. Canter v. Koehring Co., 283 So. 2d 716 (La. 1973); Drilling Eng'g, Inc. v. Independent Indonesian American Petroleum Co., 283 So. 2d 687 (La. 1973); State v. Lamar Advertising Co. of La., 279 So. 2d 671 (La. 1973); Moore v. Central La. Elec. Co., 273 So. 2d 284 (La. 1973).

224. Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973).

225. Canter v. Koehring Co., 283 So. 2d 716 (La. 1973); Board of Comm'rs v. Splendour Shipping & Enterprises Co., 273 So. 2d 19 (La. 1973).

226. Brignac v. Boisdore, 288 So. 2d 31 (La. 1973); Mercello v. Bussiere, 284 So. 2d 892 (La. 1973); Thrift Funds of Baton Rouge, Inc. v. Jones, 274 So. 2d 150 (La. 1973).

227. Succession of Porche, 288 So. 2d 27 (La. 1973).

given to changing economic and social conditions, and the emphasis on just results.

Like the American judges who reshaped the common law in the nineteenth century,[228] the Louisiana civilians have emphasized the role of the judge in developing a law responsive to contemporary social and economic conditions.[229] As Justices Barham and Tate recognized,[230] this judicial primacy derives from the Anglo-American tradition, not the civilian tradition of Western Europe, where the influence of academic scholars is more important in redirecting doctrine.

The modern Louisiana jurists have also diminished the role of precedent in shaping modern decisions.[231] To be sure, rejection of stare decisis for the less rigid jurisprudence constante is consistent with civilian tradition.[232] But American legal thought of the twentieth century has also reserved the right to overrule prior decisions that no longer meet modern social needs[233] and, as Justice Tate himself acknowledged, that the Louisiana approach bears great similarity to the approach advocated by some American scholars.[234] Indeed, as long ago as 1930, Professor Goodhart identified three different approaches to precedent, "[t]he English, the American, and the civilian."[235] Not only did he note the "strong tendency" of American law away from the English doctrine

228. See, e.g., Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829) ("The common law of England is not taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.").

229. See, e.g., Barham, Renaissance, supra note 19, at 374; Tate, Policy, supra note 42, passim; Tate, Justice Function, supra note 64, passim.

230. See, e.g., Barham, Renaissance, supra note 19, at 372; Barham, Methodology, supra note 9, at 478-83; Tate, Mixed Jurisdictions, supra note 40 at 25; Tate, Civilian Methodology, supra note 40, at 679.

231. See, e.g., Loescher v. Parr, 324 So. 2d 441 (La. 1975); State v. Prieur, 277 So. 2d 126 (La. 1973); Board of Comm'rs v. Splendour Shipping & Enterprise Co., 273 So. 2d 19 (La. 1973).

232. See Barham, Renaissance, supra note 19, at 373; Tate, Techniques, supra note 40, at 744; Tête, supra note 9, at 1. But see Pugh, supra note 219, at 1197 ("There has never been any stated departure from the time-honored civilian tradition that the judgments of the Supreme Court are binding upon the parties only in the case in which rendered. Even more than might be thought typical of jurisprudence constante, however, the Supreme Court decisions have profound persuasive effect upon other courts and practicing attorneys, and far beyond the case in which rendered. In fact, lower courts have been reprimanded for deviating from a prior decision of the Supreme Court.").

233. For a widely cited example from 1973, the year Louisiana's civilian revival began in earnest, see Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973) (abolishing governmental immunity).

234. See supra text accompanying note 44. For an earlier discussion of the parallels between the Louisiana and the American approaches to stare decisis, see Comment, Stare Decisis in Louisiana, 7 Tul. L. Rev. 100 (1932).

235. Goodhart, Case Law in England and America, 15 Cornell L.Q. 173, 173 (1930).

of stare decisis, he predicted that the tendency would accelerate in the future until it approximated the approach of the civil law.[236] In large measure, his prediction has proved accurate throughout the United States, including Louisiana.

Even as they have acknowledged the supremacy of legislative mandate, the Louisiana civilians have followed the mainstream of American judicial reformers in reshaping outmoded doctrine. Like other American judges,[237] they have insisted that existing social and economic conditions are crucial determinants of proper judicial decisions.[238] Indeed, Louisiana's judges have been as creative in responding to changing conditions as any in post-realist America. Finally, the Louisiana civilians, like other innovative American judges,[239] have emphasized justice and fairness over certainty and stability. Both theoretically[240] and practically,[241] they have been willing to subordinate the desire for legal certainty to the achievement of just results.

The jurisprudential approach of the Louisiana civilians is also compatible with the mainstream of American legal thought. Both Justice Tate and Justice Barham frequently relied on the French scholar François Gény.[242] Gény was a forerunner of the German Free Law Movement of the early twentieth century, which advocated bold doctrinal innovation. A recent article has argued that the Free Law Movement deserves recognition for much that was innovative in American legal realism.[243] Regardless of the accuracy of that claim of civilian origins for modern American thoughts, Gény's open-ended approach to legal interpretation

236. Id. at 186. For a similar projection regarding Louisiana law and that of other American states, see Pope, supra note 9, at 193.

237. See generally B. Cardozo, The Nature of the Judicial Process (1921).

238. See, e.g., Williams v. State, 350 So. 2d 131, 133-34 (La. 1977); Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133, 137 (1971).

239. See, e.g., Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954); cf. O. Holmes, The Common Law (1881) ("[I]n substance, the growth of the law is legislative . . . . The very considerations which judges most rarely mention . . . are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."). See also Wright, Professor Bickel, The Scholarly Tradition and the Supreme Court, 84 Harv. L. Rev. 769 (1971).

240. See supra text accompanying notes 32-34 and 63-69.

241. Williams v. State, 350 So. 2d 131, 133-34 (La. 1977); Morse v. J. Ray McDermott & Co., 344 So. 2d 1353, 1369 (La. 1977); Brignac v. Boisdore, 288 So. 2d 31, 35 (La. 1973); State v. Lamar Advertising Co. of La., 279 So. 2d 671, 677 (La. 1973); State v. Prieur, 277 So. 2d 126, 129 (La. 1973); see also Robertson, supra note 153.

242. See, e.g., Barham, Renaissance, supra note 19, at 364-66; Tate, Book Review, supra note 45, passim; Tate, Law-Making Function, supra note 41, at 228; Tate, Techniques, supra note 40, at 734; Tate, Mixed Jurisdictions, supra note 40, at 34.

243. Herget & Wallace, The German Free Law Movement as the Source of American Legal Realism, 73 Va. L. Rev. 399 (1987). See also Tate, Book Review, supra note 45, at 577-79.

is certainly consistent with policy-oriented jurisprudence that has characterized American legal thought since World War II.[244]

The content of the decisions of the Louisiana civilians has been equally American. Surprisingly, the contributions of the civilian justices have not been confined to, or even principally directed at, the areas that constitute the bulk of the Civil Code—conventional obligations, property, successions, and family law. Instead, the most notable changes have involved public law, procedure, and delictual liability, areas that have long been bastions of the Anglo-American influence. Justices Barham and Tate were instrumental in engrafting the criminal procedure protections of the Warren Court[245] into Louisiana law. Indeed, some of their decisions even go beyond the requirements of federal constitutional law. Likewise, other constitutional law decisions of the Louisiana Supreme Court in the 1970s, such as those involving procedural due process and freedom of speech, have a modern American cast,[246] although one must concede that the Louisiana court was relatively slow to ban gender-based discrimination. Finally, most civil procedure decisions also followed American developments. They accorded greater deference to trial court findings of fact and expanded the availability of class actions. Only by refusing to embrace collateral estoppel did the court fail to accept Justice Tate's lead and to follow American procedural trends.

Within the private law sphere, the area of the civilian's greatest impact has been tort law, where the Civil Code's guidance is general rather than specific,[247] and where Louisiana law has always drawn heavily from American sources. As David Robertson has accurately observed,[248] modern Louisiana tort decisions rely significantly on the American legal realist, Leon Green, and Louisiana's own realist, Wex Malone.[249] In Robertson's words, at least the tort decisions of the early 1970s reflect "a modern civilianism determined to see the Civil Code through the eyes of the present."[250]

In their general thrust, the Louisiana tort decisions reflect a shift toward risk distribution principles of tort liability, a shift that is common

244. See generally, White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 Va. L. Rev. 279 (1973).

245. See generally Bureau of National Affairs, The Criminal Law Revolution and Its Aftermath, 1960-1977 (1978).

246. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (1985) (due process); Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209 (1964) (free speech).

247. See supra text accompanying notes 135-76.

248. Robertson, supra note 153, at 14-16.

249. See generally Tate, Wex Malone and Res Ipsa Loquitur in Louisiana Tort Law, 44 La. L. Rev. 1397 (1984).

250. Robertson, supra note 153, at 27.

throughout the United States. Parallel decisions in other states exist for many, if not most, of the important Louisiana tort rulings from the 1970s. For example, abrogation of governmental and charitable immunity followed a decisional pattern characteristic of other American jurisdictions.[251] So did Louisiana law with respect to products liability,[252] the abolition of the locality rule for medical specialists,[253] and res ipsa loquitur,[254] to take a few of the more obvious illustrations. One can also find American legislative and judicial parallels to the Louisiana decisions that expanded liability for the acts of an individual's animals[255] and children,[256] although Louisiana law certainly carries such liability beyond most other American jurisdictions.

Even the most unique of the new civilian decisions, strict liability for defective things, follows the American trend toward substituting risk distribution for fault as the basis for apportioning tort liability. Justice Tate himself justified the doctrine in risk-distribution terms in his scholarly writings.[257] Indeed, the "unreasonably dangerous" test for determining when a thing has a defect that gives rise to strict liability uses the same wording as the ***Restatement*** test for determining when a product is defective so as to require application of a strict liability test.[258] Finally, post-1980 decisions[259] confirm that the Louisiana doctrine

251. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts 1043-45, 1069-70 (5th ed. 1984).

252. Id. at 692-710.

253. Id. at 188.

254. Id. at 242-57.

255. Id. at 538-43.

256. Id. at 913.

257. Tate, The Interpretation of Written Rule of Law, 27 La. B.J. 79, 82-84 (1979):

> Additionally, however, the court [in adopting strict liability for the acts of things] took into implicit consideration that the restriction of liability for ownership of an object which caused harm, perhaps proper in the less crowded frontier days of an expanding economy—since it then encouraged growth and exploitation of resources—was no longer appropriate in the crowded, urban, developed society of today—where the irresponsibility of an owner or custodian was more likely to cause harm to others. Further, although not articulated as a reason, the prevalence of liability insurance in today's America permits this risk to be spread among society at large. The loss should not be borne by the innocent victim alone. His injury is, so to speak, a consequence of the risks of our social environment; and the mechanism of repairing his damage should rest primary responsibility upon the creator of the risk (the custodian), with the insuring principle permitting the latter to spread the cost of repairing the injury among those who created [similar] risks.

See also Tate, Statutory Interpretation, supra note 45, at 161.

258. Restatement (Second) of Torts § 402A (1965).

259. See, e.g., Entrevia v. Hood, 427 So. 2d 1146 (La. 1983).

has accomplished a typical American result by expanding negligence liability without proceeding all the way to absolute liability.[260]

The accomplishments of the civilian revival have been somewhat less dramatic in the areas most directly regulated by the Civil Code. One reason may be the greater specificity of the rules established by the code articles in these areas.[261] Another may be a perceived need for more certainty and continuity in areas such as property and successions. A third may be the similarity of some of the Civil Code rules to twentieth century attitudes.[262] Still a fourth may be the significant steps toward legislative revisions in these areas that occurred during the 1970s.[263]

Yet even in the core areas of the civil law, important developments took place, especially in family law. The Louisiana courts protected children as well as the economically dependent parties in marriages. In addition, the court continued a long-standing pattern of protecting the dependent parties to invalid marriages. For all of these themes, similar developments can be traced in the decisions of other states.[264]

Although less numerous, civilian innovations in obligations, property law, and successions, also seem generally consistent with American developments. For example, the new Louisiana action for unjust enrichment, though purportedly based on French doctrine, bears a striking

260. One Louisiana commentator claims that French doctrine achieved a similar result. See Tête, In Defense of Fault in the Guard Under Article 2317, 61 Tul. L. Rev. 759, 761-63 (1987).

261. In some areas, particularly obligations, the rules of the Louisiana Civil Code are more specific than is typical in many civilian jurisdictions. See Baudouin, The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec, in The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions 1, 4-5 (Dainow ed. 1974).

262. For example, the Civil Code, like recent law in other states, treats the landlord-tenant relationship as a matter of contract rather than a species of property, La. Civ. Code art. 2669; Armstrong & LaMaster, The Implied Warranty of Habitability: Louisiana Institution, Common Law Innovation, 46 La. L. Rev. 195 (1985). The obligations articles also contain a number of provisions that can protect consumers. See Hersbergen, Unconscionability, supra note 181, at 1428-29 ("The outcome of virtually all of the unconscionable contracts cases nation-wide could have been duplicated in Louisiana without either UCC Section 2-302 or its underlying common law inherent judicial power idea.").

263. In the mid-1970s, the Louisiana Law Institute began a major project to revise the entire Civil Code by stages. See La. L. Inst., Nineteenth Biennial Report 8-12 (1976). For a trenchant criticism of this piecemeal approach to revision, see Zenzel, Civil Code Revision in Louisiana, 54 Tul. L. Rev. 942 (1980). Even those involved with the process concede that it has some problems. See, e.g., Yiannopoulos, supra note 218, at 843.

264. See, e.g., Blakesley, The Putative Marriage Doctrine, 60 Tul. L. Rev. 1 (1985) (discussing national trend toward increased protection of innocent spouses). On the other hand, Justice Barham authored an excellent "civilian" opinion in one case that cut against the grain of protecting children, but he was unable to secure a majority to support his position. See Tannehill v. Tannehill, 261 La. 933, 945, 261 So. 2d 619, 624 (1972) (Barham, J. dissenting).

similarity to claims recognized by the *Restatement (Second) of Contracts*.[265] Similarly, property law cases appear to combine a typically American acceptance of broad governmental control with concern that the individual property owner be fairly compensated.[266] Likewise, deference to testamentary devices and the protection of illegitimates are certainly not out of harmony with broader American trends.[267]

Even the distinctively civilian abuse of rights doctrine has obvious parallels in other states. Substantively, the broad definition in Louisiana leaves great potential for expansion beyond the similar doctrines in the common law. The actual application of the doctrine in the reported decisions, however, would not surprise one who is familiar with the implied duty of good faith in American law. More importantly, the timing of the Louisiana development is striking. The civilian doctrine had existed for centuries. Louisiana courts embraced it in the 1970s just as other American jurisdictions expanded the implied duty of good faith in the legislative and judicial reforms of contract law during the 1960s and 1970s.[268]

Legal education may be one important source for the American flavor of Louisiana's civilian revival. Both Justice Tate and Justice Barham received legal training outside Louisiana. The likelihood of such an impact is particularly strong in Justice Tate's case. He eventually earned a certificate in civil law studies from LSU. However, he earned his LL.B. from Yale at a time when legal realism flowered there.[269] While Justice Barham's out-of-state education was less complete, it was far from insignificant. Before earning his law degree at LSU, he completed a year of his legal studies at the University of Colorado.

This article offers a revisionist view of modern developments in Louisiana law. In brief, it argues that the impetus for the changes of Louisiana's civilian revival was the product of the changing American environment rather than civilian legal theory. However, several important qualifications are required to prevent misunderstanding.

First, to emphasize the impact of American influences on the civilian revival is to make a claim of primacy, not to deny the existence of other important influences. One such influence is undoubtedly the con-

265. Restatement (Second) of Contracts § 345(c), (d), 370-77 (1981).

266. For a similar pattern in very recent decisions of the United States Supreme Court, see Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987), noted in 48 La. L. Rev. 947 (1988); and Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S. Ct. 1232 (1987). For a brief analysis of these decisions, see Murchison, Developments in the Law, 1986-1987—Local Government Law, 48 La. L. Rev. 303, 308-22 (1987).

267. See, e.g., Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459 (1977).

268. See, e.g., U.C.C. § 1-203; Restatement (Second) of Contracts §§ 205-08 (1981).

269. See generally L. Kalman, Legal Realism at Yale, 1927-1960, at 145-87 (1986).

current revival of Louisiana's French culture, roots, and affiliations. Not only did the revival of French culture emphasize the state's unique heritage, it may also explain in part the general preference of Louisiana's civilian judges for choosing French rather than Spanish doctrine for guidance when it made civilian innovations.[270]

Second, calling attention to the American influences on Louisiana law should not obscure the fact that similar socioeconomic influences have frequently shaped the civil law in the twentieth century. The impact of these influences on civilian jurisdictions, particularly France, gave Louisiana sources for selecting civilian approaches to the problems they faced.[271] These continental developments undoubtedly suggest that the American experience is a subpattern of broader developments common to the developed countries of the western world. Nonetheless, the Louisiana experience seems more properly attributable to the American subpattern. For one thing, Louisiana uses American judicial institutions and an adversarial system quite different from the civilian models of Western Europe. Further, developments in Louisiana are particularly striking in areas like torts and criminal law where the impact of distinctive American institutions has been extremely important.

Third, to note the importance of American influences serves neither to deny that Louisiana remains a civilian jurisdiction nor to trivialize the importance of that classification.[272] Ireland was wrong when he proclaimed Louisiana was a common law jurisdiction. What he should have said (and what remains true today) is this: Louisiana is one of

270. Because it has rarely been the determinative issue in litigation, no judicial opinion has attempted an authoritative resolution of the scholarly debate as to whether Louisiana's private law is based on French or Spanish law. See supra note 8; cf. Tate, The Splendid Mystery of the Civil Code in Louisiana, 25 La. B.J. 29, 39 (1979) ("[I]t may not be determinative as an interpretative guide whether the sources be Spanish or French. Perhaps the mysteries of the origin of the Civil Code of Louisiana are the fount of its ever-youthful growth and accommodation."). Nonetheless, French law has been treated as the source of Louisiana's tort law. See, e.g., Turner v. Bucher, 308 So. 2d 270, 274 (La. 1975) ("We are of the opinion that the direct and original source of Article 2318 of our Code is the *Projet du Gouvernement*."); Loescher v. Parr, 324 So. 2d 441, 447-48 (La. 1975); see also Barham, Liability Without Fault, supra note 25. Moreover, Justice Barham declared in a 1976 article that "[v]ictory must now be conceded to those who hold to the belief that the primary source of [Louisiana's] first Code was either the *Projet*, a preliminary draft of the *Code Napoleon*, or the Code itself." Barham, Methodology, supra note 9, at 475-76. For recent scholarly efforts to draw on Spanish sources for Louisiana law, see Armstrong, Louisiana Condominium Law and the Civilian Tradition, 46 La. L. Rev. 65 (1985); Special Issue, 42 La. L. Rev. 1469 (1982).

271. For example, the French doctrine imposing liability for the acts of things was the product of the industrialization of France earlier in the twentieth century. See infra text accompanying note 274.

272. See Stein, Judge and Jurist in the Civil Law: A Historical Interpretation, 46 La. L. Rev. 241, 257 (1985); Yiannopoulos, supra note 218, at 845.

the United States, and the American experience has provided the decisive influence for the content of the state's contemporary legal system.

Because of its distinct legal heritage, Louisiana offers a unique opportunity for examining afresh the role that the form of a legal system plays in shaping the content of law. Scholars have long recognized that the inductive system of the common law and the deductive approach of the civil law represent two very different ways of conceptualizing legal problems.[273] The Louisiana developments of the 1970s show that the two systems can frequently produce similar results. Because Louisiana has been an American jurisdiction for 185 years, it provides a fascinating laboratory for discovering when, if ever, the differing methodologies are likely to produce differing substantive results.

The Louisiana experience also illustrates the relevance of modern civilian doctrine to the contemporary American experience. When the Louisiana Supreme Court perceived the need to broaden delictual and contractual liability, it discovered that French law had struggled with similar problems a generation earlier and had reached decisions that seemed workable in America as well.[274] As a result, calling attention to Louisiana's American ties encourages more, not less, attention to the state's legal thought as well as to the civilian tradition as a whole. By studying the Louisiana experience, judges and scholars from other states can gain a window to view legal concepts that have proved workable in other industrialized countries of the modern world.

To provide a specific illustration, civilian learning offers particular insights for the American fascination with the intent of legislators in constitutional law and statutory interpretation. Without abandoning their commitment to legislative supremacy, civilian scholars and judges have focused more on text and structure than on the historical objectives of members of the drafting body. By adopting a similar approach, American judges might both rationalize formal law and allow it to grow to meet new social and economic conditions.[275]

273. See generally H. Macmillan, Two Ways of Thinking (1934); Baudouin, supra note 261, at 15. But see Fraser, The Day the Music Died: The Civil Law Tradition From a Critical Law Studies Perspective, 32 Loy. L. Rev. 861, 864 (1987) (Everything critical legal studies "has said about American law is true of the civilian tradition").

274. A. von Mehren & J. Gordley, The Civil Law System: An Introduction to the Comparative Study of Law 590-702 (1977).

275. Of course, some American scholars have adopted approaches emphasizing the text, see Ackerman & Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 Yale L.J. 1466, 1559-61 (1980), and structure, see C. Black, Structure and Relationship in Constitutional Law (1969), of constitutional and legislative doctrines. For a good overview of the difficulties of discovering the intent of the framers of the constitution, see Reveley, Constitutional Allocation of the War Powers Between the President and Congress, 1787-1788, 15 Va. J. Int'l L. 73, 74-86 (1974); see also Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980); Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985).

Studying modern civilian concepts through the Louisiana window may also demonstrate that American law itself is not the indigenous invention of New World originality that Americans so frequently assume. Recent scholarship has suggested European and thus civilian roots for developments in legal education,[276] philosophy,[277] and legislation,[278] that have been traditionally treated as distinctly, if not uniquely, American. Thus, close observation of the mixed jurisdiction of Louisiana may well encourage not American jingoism, but a greater recognition of the degree to which all modern legal systems have "mixed" origins.

Fourth, to ascribe the form and content of the civilian revival to American cultural influences is not inevitably to endorse the correctness of those decisions. For example, the late Professor Wex Malone—a great Louisiana and American torts scholar—has sternly criticized strict liability for defective things.[279] Furthermore, the Louisiana Supreme Court occasionally seems to be overly concerned with following continental (usually French) doctrinal niceties regarding delictual liability.[280] Likewise, the court's rigid rejection of collateral estoppel[281] appears to reflect a triumph of conceptualism over procedural efficiency and fairness. What recognizing the importance of the American influence does suggest is the proper standard for evaluating and criticizing the decisions of Louisiana's courts. It is the same one that would be appropriate in any other state—the extent to which the decisions serve the needs of contemporary society.

Fifth, recognizing the importance of American cultural forces in shaping Louisiana's civilian revival does nothing to challenge the creativity or contributions of the state's judges, any more than noting the American character of developments in California or Illinois law would challenge the creativity of their great judges such as Traynor and Schaefer. What it does is to demonstrate that the best of Louisiana's

276. Clark, Tracing the Roots of American Legal Education—A Nineteenth-Century German Connection, 51 Rabels Zeitschrift 313 (1987).

277. Herget & Wallace, surpa note 243.

278. Herman, Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code, 56 Tul. L. Rev. 1125 (1982).

279. Malone, Ruminations on Liability for the Acts of Things, 42 La. L. Rev. 929 (1982).

280. See, e.g., Note, Ross v. La Coste de Monterville: An Unwarranted Extension of Strict Liability for the Act of Things, 48 La. L. Rev. 1285 (1988) (criticizing supreme court decision for relying on an erroneous view of French law); cf. Tate, Louisiana Action, supra note 180, at 902 (cautioning against reliance on intricacies of French doctrine).

281. See supra text accompanying notes 120-23; Dixon, Booksh, & Zimmering, Res Judicata in Louisiana Since Hope v. Madison, 51 Tul. L. Rev. 611 (1977).

judges—Albert Tate, Jr. comes immediately to mind—also deserve recognition as great American state court judges of the twentieth century. Like those judges, Justice Tate lead his court to reach just results in leading cases. He also helped to reshape doctrine to a form more suited to contemporary life,[282] and he developed important theoretical insights.[283] Unfortunately, those theoretical insights fail to overcome a central problem of twentieth century legal thought in the United States. By emphasizing justice for the individual case over rules of general applicability, Justice Tate's theory magnifies the importance of the particular judge's sensitivity and judgment. In the hands of a compassionate and wise judge, great accomplishments are possible. When the task is left to lesser mortals, the results may be considerably less sanguine.

In the final analysis, the closest parallel to Louisiana's judicial revival of the civilian tradition may well be found in the reformulation of common law doctrines by American judges in the nineteenth century.[284] Like those judges, Louisiana's civilians reshaped doctrine in a variety of areas. In both cases, the reshaped doctrine met the contemporary social and economic needs as perceived by the judges. But it was also faithful to the legal tradition from which it was drawn. Thus, by combining tradition with contemporary social and economic conditions, both efforts produced a new synthesis that was distinctively American.

Conclusion

A fascinating and important change occurred during the 1970s. The judiciary of a southern state reformulated much of its public, private, and procedural law in ways that followed patterns established in other states during the 1960s and 1970s. Because many of those changes employed the rubric of the civilian tradition, they passed largely unnoticed in the rest of the nation's legal community. The aim of this

282. In addition to the opinions discussed in the text of this article, preliminary assessments of the impact of Judge Tate's opinions on Louisiana doctrine are found in the articles already published in two law review issues dedicated to him. See 47 La. L. Rev. 921 (1987); 61 Tul. L. Rev. 711 (1987). Equally characteristic of Justice Tate was his tremendous love for people. See, e.g., Barham, A Civilian For Our Time: Justice Albert Tate, Jr., 47 La. L. Rev. 921 (1987) ("Of all the judges I have known, Al also had the largest heart for mankind as well as for each and every human being. He really cared."); Francione, Albert Tate, Jr., 61 Tul. L. Rev. 741 (1987) (describing Justice Tate's concern during his terminal illness for the law student he had hired as a clerk for the following year).

283. See supra text accompanying notes 38-69.

284. See generally M. Horwitz, The Transformation of American Law, 1780-1860 (1977); L. Levy, The Law of the Commonwealth and Chief Justice Shaw (1958).

article has been to share that story with the broader legal community in hopes that doing so will enrich the legal scholarship of both the state and the nation.

For the state, increased national scrutiny of Louisiana legal developments should discourage parochialism, an inevitable tendency if courts receive only insider evaluations. American critiques offer the best hope for avoiding that tendency in Louisiana. By subjecting Louisiana judicial decisions to the national criticism that decisions of other state courts face, they will expose Louisiana to the best ideas that contemporary American legal thought has for solving current legal problems. Moreover, civilian criticism will not offer a satisfactory substitute. Not only are Louisiana's economic, social, and cultural conditions most similar to those of other American states, Louisiana is also far removed from the centers of civilian learning. As a result, Louisiana decisions are unlikely to provide more than an occasional example or footnote for scholars from Europe or Latin America.

The benefits to the nation should also be substantial. For one thing, increased attention to Louisiana will serve to educate scholars and judges from other American jurisdictions. It will alert them to the theories and doctrines of a great legal tradition with which most are unfamiliar. Nor will these theories and doctrines need to remain abstract. European jurisdictions provide illustrations of how they can be used to solve legal problems in the modern industrialized world, and the Louisiana example will show their potential for adaptation to the American experience.