Louisiana Law Review

Volume 47 | Number 5
Student Symposium: Conflict of Laws in Louisiana
May 1987

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ALBERT TATE, JR.: JUDGE, JURIST AND THE BARBER IN VILLE PLATTE

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With hair askew and pipe clenched tightly in his teeth, wearing his green banker's visor and favorite blue sweater, Al Tate was a constant threat to burst into the office of one of his law clerks with new analytical approaches to pending cases. The judge, the case and his ideas, rarely in any distinguishable order, would roll into the room and depart as suddenly as they had come, but with the definite impression that justice was in the making. Sorting out just what had happened after Judge Tate left the room was part of the mechanics of being his law clerk. Capturing and applying the judge's genius to disputes before the court were the art of the job.

Law clerks are privileged witnesses of the judicial process. They see how issues in a case appear and disappear, how they gain priority, and how they come to be resolved. In most instances, they also see how a judge works within this process and within the law to achieve a just result. Law clerks are therefore privy to some of the secrets of those who are the primary actors in the judicial process. Judge Tate left his law clerks with a distinct picture of his approach to judging cases and achieving correct and fair results. Only a very poor witness would fail to see the judge's passion for the law or his philosophy for deciding cases. His primary work was the careful application of existing law to decide most of the disputes before the court; only secondarily did he assume the more celebrated role of jurist interpreting and expanding the law. Judge Tate undertook both tasks, however, with a zeal for justice and fairness to the common man. As he would ask when debating an issue, "But what would the barber in Ville Platte say about that?"

We cannot in these few pages give the reader more than a glimpse of Albert Tate, Jr. as judge and jurist. We can, however, draw upon our observations as law clerks to Judge Tate while he served on the United States Fifth Circuit Court of Appeals and offer some perspectives on the work of this fine judge and the principles that formed his sense of justice. In particular, Judge Tate brought with him to the Fifth

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Circuit two legacies from his years on the Louisiana appellate courts: a healthy regard for the rights of the common man and a passion for Louisiana law. Although his judicial philosophy did not always permit him to express his views on these matters, the judge found proper forums in which he could assume the role of jurist that he had exercised more freely on the Louisiana Supreme Court.

In the paragraphs that follow, we describe briefly Judge Tate's views on the proper role of an appellate judge. Judge Tate's judicial philosophy helps explain both why he spoke out when he did and the principles that affected what he said. With this framework established, we examine a few of Judge Tate's opinions as a Fifth Circuit judge concerning two of his most passionate concerns—the rights of the common man and Louisiana law—and, if we are lucky, catch a look at the jurist at work.

I. When to Judge

Perhaps the most misconceived notion about Judge Tate is that he took too expansive a view of his role as jurist and sought out opportunities to legislate from the bench. The opposite is true. Judge Tate accepted as his primary and often exclusive role that of the judge deciding the dispute put to the court according to well-accepted principles of law. Early in his judicial career, the judge expressed his view that all but a few cases could be decided by application of precedent and logic.[1] Only those few remaining cases called for the application of other principles:

> Although a great preponderance of an appellate judge's caseload—perhaps 90 or 95% or more—similarly involves routine application of precedent and word-logic, fairly soon in the life of the new judge the moment comes when he realizes that there are some cases in which he (or no one) can find "the" law—that is, legislative enactments or sufficiently related decisions by his own or other courts that definitely indicate which of two contrary reasonable positions should have favorable judgment upon the facts found to be correct.[2]

That Judge Tate served for the majority of his career as an appellate judge in Louisiana, in which, pursuant to civilian methodology, precedents are in theory "regarded only as an interpretation[s] of the law (i.e., of legislation)"[3] and not as establishing binding rules of law, did

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1. Tate, "Policy" in Judicial Decisions, 20 La. L. Rev. 62 (1959) (hereinafter "Policy").

2. Id. at 62 (footnotes omitted).

3. Tate, Techniques of Judicial Interpretation in Louisiana, 22 La. L. Rev. 727, 743-44 (1962) (emphasis omitted). See also Tate, Civilian Methodology in Louisiana, 44 Tul. L. Rev. 673 (1970).

not change his view that all but a few cases could be decided by precedent and logic. He noted that "in actual practice, Louisiana judges do not lightly disregard a settled line of precedents, even though in theory they are free to do so."[4] Indeed, Judge Tate felt "morally bound," as a Louisiana judge, "to honor a higher court precedent containing a considered holding squarely and clearly applicable to the conflict" at issue.[5] Of course, he also felt that "a lower court is not required to apply mechanically precedents of higher courts which were never intended to supply a principle for the distinguishable type of conflict now before the lower court."[6]

Only when a judge was adrift without controlling precedent, therefore, did Judge Tate advocate the use of "policy considerations" to decide a case. These "policy considerations" were defined functionally as "what is best for the community as a precedent and . . . what impresses [the judge] as the fair solution of the question for the parties concerned."[7] According to Judge Tate, the obvious dangers of policy choices being made in cases by judges with "[i]ndividualistic and non-representative views" generally were offset by the availability of further appellate review and the use of multi-judge panels.[8] Failing all else, the application of policy in judicial decision-making was held in check by the necessity for sound legal reasoning. As Judge Tate aptly observed:

> [W]hatever part policy may play in the decisional process, the final product as expressed by the rendered opinion must use normal legal reasoning; for unlike the mistakes of physicians which according to the popular saying are buried, those of appellate judges are published and perpetuated and, if unsound, soon fall prey to higher courts or the critical pens of the law reviews or both.[9]

As his enunciation of these principles demonstrates, Judge Tate believed that the use of policy considerations to decide cases was properly limited to a certain class of cases and further restricted in application by collegial and supervisory review and sound legal reasoning. Judge Tate said it better:

> [J]udges do not and should not dispense justice simply according to their individual notions of what is fair for the individuals concerned, or of what will in the future provide a sensible rule

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4. Tate, Techniques of Judicial Interpretation in Louisiana, 22 La. L. Rev. 727, 747 (1962).
5. Id. at 751.
6. Id. at 750-51.
7. Policy, supra note 1, at 63.
8. Id. at 69.
9. Id.

> for the community. The justice they attempt to render must be accomplished within the framework of their judicial system and subject to the discipline of the judicial craft, which permits discretionary judicial choice only in the absence of legislative policy or of prior binding precedent or of a clear answer to the present litigation deduced either from legislative provisions or prior precedent or both. These observations concerning policy considerations as a factor in judicial decisions should be read as subject to such qualification.[10]

Judge Tate's judicial philosophy, therefore, presents a limited view of the role of a judge as jurist. "Policy" considerations, defined as the best precedent for the community and the fairest resolution of the dispute for the parties, are only to be applied when no settled rule decides the case, and then only according to accepted principles of sound legal reasoning. Even those with strict views of the policy-making function of judges must concede that judges are called upon at times to decide cases in which no precedent governs. In such circumstances, few could disagree that principles similar to those articulated by Judge Tate should apply to ensure cautious employment of policy considerations.

This review of Judge Tate's judicial philosophy renders curious the charge that the judge took an expansive view of his juristic role. Those who make this charge perhaps misread Judge Tate's candor in his decisions as evidence of a liberal view towards judicial policy-making. As clearly as he stated his views of when a judge permissibly could act as jurist, Judge Tate clearly identified the policy considerations at work in those opinions in which he himself assumed that role. Such an approach may be regarded as rare, for it is not uncommon for judges to hide their actions as jurists and thereby conceal the policy considerations that in fact shape their decisions. Citation of factually distinguishable precedent as binding authority, omission of discussion of contrary authority and misapplication of precedent are familiar devices employed in opinion writing to obscure the lack of true precedent and, therefore, the fact that the decision makes a policy choice in circumstances previously unaddressed by the court. Judge Tate's open approach, while sometimes prone to draw criticism, at least allowed for clear identification of the reasoning supporting the policy choices made and permitted collegial and supervisory review of those choices. Without close study, critics could confuse such openness with an expansive view of the juristic role of the judge. Judge Tate, however, was true to his judicial philosophy. Though he held strong views on issues affecting the rights of the common man, the judge exercised his prerogative to speak out as jurist only in carefully selected cases.

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10. Id. at 68-69.

II. Advice in Dissent

One forum on the Fifth Circuit that permitted Judge Tate to express his concerns as jurist was in dissenting opinions. A dissent affords a judge an opportunity to express individual views since the judge is freed from the responsibilities of delivering the opinion of the court and of rendering an opinion acceptable to other members of a collegial panel. The subject matters of a judge's dissents are also matters of interest, since an overworked judge with a consistently heavy caseload cannot afford to spend valuable hours drafting opinions that do not decide cases. Judges, therefore, tend to select their dissents carefully and on issues of fundamental concern to them. For these reasons, dissents reflect both the types of issues a judge finds important and the judge's views on those issues.

A great number of Judge Tate's dissents occurred in cases where policy choices had been made, or precedents questionably applied, to deny basic rights to individuals. In the few selected dissents discussed below, Judge Tate assumed the role of jurist to advocate against intrusive searches of persons of Hispanic descent, the denial of naturalization to homosexuals and the arbitrary limitation of recovery to a victim of an air crash disaster. Though not always invoking the most popular cause, the judge's dissents demonstrate his steadfast refusal, consistent with his judicial philosophy, to sanction perceived injustices to the common man.

In *United States v. Garcia*,[11] the court was asked to review the constitutionality of a stop and search of the defendant's vehicle about 115 miles from the Mexican border. The facts surrounding the stop were not disputed. At 11:30 in the evening, two agents in a roving border patrol car spotted a pick-up truck with a camper attachment traveling north on Interstate 35. The agents observed that the truck appeared to be heavily loaded, that it was traveling slowly and that the windows of the camper shell were fogged over. The agents pulled alongside the truck and shined their flashlight into the cabin. They observed three women in the front seat and five or six men in the back seat. The agents testified that the clothes and hair of the men appeared dirty and unkempt. The agents stopped the vehicle and found that it contained a number of Mexican citizens without immigration papers.

In a case such as *Garcia*, it is sometimes easy for a court to permit an agent's successful guess that a vehicle contained illegal aliens to justify the search. But this overlooks a grave danger and threat to the rights of law-abiding Hispanic citizens. Had the agents stopped the vehicle and discovered no illegal aliens after searching the vehicle and its occupants, no arrests would have been made and no issue presented

11. 732 F.2d 1221 (5th Cir. 1984).

to the court, although the Hispanic citizens would have been the object of an equally intrusive search and detention. The propriety of a stop and search, therefore, must be considered apart from its results, since a court generally will not review the cases in which bad guesses were made.

Judge Tate's dissent in *Garcia* was prompted in part by the majority's failure to apply with consistency prior decisions of the Fifth Circuit. As the dissent pointed out, the court previously had refused to give any weight to several of the factors relied upon by the majority in upholding a search when a vehicle is stopped as far from the border as in *Garcia*. Indeed, prior decisions had not given weight to the heavy load factor, the hunkering down of a vehicle's passengers, the reaction of passengers to the shining of a flashlight, or the lateness of the hour of travel. Careful parsing of the facts showed that only three factors relied upon by the agents could support the reasonableness of their conduct: their previous experience with illegal alien traffic on the highway, the type of vehicle, and the unkempt appearances of the passengers. And, of these three factors, Judge Tate determined that the controlling one had to be the "appearances" of the truck's occupants:

> That the highway on which Garcia was stopped and that the type of truck she was driving are commonly used for the smuggling of aliens must be insufficient, standing alone, to support reasonable suspicion for a stop, unless, of course, we are willing to permit all vehicles commonly used for smuggling (of which there are an increasing number) to be stopped at any distance over 115 miles from the border on designated highways—subject only to the discretion and availability of border patrol agents. The controlling factor in this case, if the stop was lawful, must be the unkempt appearances of the truck's occupants, which is alleged to be consistent with the appearance of illegal aliens. In short, we must rely on the ability of a border patrol agent to discern whether the appearance of the Hispanic occupants of a given vehicle are more or less like that of the typical illegal alien, rather than that of any other poor and disheveled American of Hispanic descent.[12]

This passage best explains the basis for Judge Tate's dissent. It was inconceivable to Judge Tate that a person's appearance as disheveled or unkempt could be a controlling factor in the constitutionality of a stop and search, especially when such an assessment is essentially subjective in nature:

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12. Id. at 1232 (Tate, J., dissenting).

> Whether a person appears "dirty" or "unkempt" varies greatly with the subjective perceptions of the person making the assessment. The standard will differ with each agent's experience and attitude about the typical appearance of an illegal alien. While I concede that this factor is worthy of some consideration, I cannot contribute controlling weight—in the sense of the constitutionality of a stop—to the hygienic appearances of a vehicle's occupants as interpreted by border patrol agents.[13]

A motivating factor in this dissent, therefore, was the apparent approval by the majority of the use of a dirty appearance as a controlling factor in justifying a stop. The occupants of this truck easily could have been a group of field hands returning from work. Because of the great distance from the border, no legitimate inference could be drawn that these people had illegally entered the United States. The decisional authority prior to *Garcia* had not authorized a stop in such circumstances, thus positing for the court a clear choice between conflicting policies. Should the power of border patrols to stop persons be increased in light of the growing number of illegal aliens entering the country, or should persons of Hispanic descent be saved from intrusive stops and detention far from the border based upon subjective assessments of border patrol agents? Presented with this choice, Judge Tate would protect the otherwise unprotected little man—and so he stated:

> Differentiating the United States from police states of past history and the present, our Constitution in its Fourth Amendment prohibition against unreasonable searches protects all our residents, whether middle-class and well-dressed or poor and disheveled, from arbitrary stop by governmental enforcement agents in our travel upon the highways of this nation.
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> The perceived social problem in controlling the hordes of illegal migrants from Mexico, does not, in my opinion, justify stopping people of Hispanic-descent appearance far from the border, simply because the hour is late and they appear to be poor and dirty working people, any more than it would justify the similar arbitrary stop of any native-born or naturalized American simply because he has the same characteristics of appearance.[14]

To Judge Tate, the disrespect attendant to a stop and search based upon ancestry and appearance and the damage that such stops would do to our basic constitutional freedoms as individuals simply outweighed the need to accord further powers to border patrol enforcement officers.

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13. Id.
14. Id. at 1229 (Tate, J., dissenting).

Consistent with his judicial philosophy, however, this policy choice was identified and clearly expressed rather than hidden in some doubtful application of precedent.

Judge Tate expressed a similar regard for individual freedoms in his dissent in *Matter of Longstaff*.[15] The facts in this case are somewhat peculiar. Longstaff, a native and citizen of the United Kingdom of Great Britain and Northern Ireland, was admitted to the United States in 1965 as a permanent resident. He settled in Texas, where he successfully established himself in a business under the tradename Union Jack. In 1980, Longstaff applied for naturalization as a citizen of the United States. Despite a finding by the examiner that he was of good moral character, Longstaff was denied naturalization because he admitted that he had engaged in homosexual activity before entering the United States in 1965. According to the relevant statutory framework, a person could be denied naturalization if he had not been "lawfully admitted" at the time of entry into the United States. At the time Longstaff entered the United States, Congress had listed "psychopathic personality" and "sexual deviation," interpreted to include homosexuality, as causes for exclusion in a list of seven *medical* bases for exclusion.[16] The statutory framework further required that a physician, either a medical officer of the Public Health Service or a civil surgeon employed by the United States, conduct an examination of an alien suspected of being medically excludable and certify in a medical certificate that a medical cause for exclusion existed.

Although the statutory framework was relatively clear, the real problem posed to the court had yet another source. At the time Longstaff applied for naturalization, the Immigration and Naturalization Service could not obtain medical certification of homosexuality from the Public Health Service. Since 1979, pursuant to an order by the Surgeon General, the Public Health Service has refused *medically* to diagnose and certify that an individual was a homosexual. In Longstaff's case, therefore, no medical certificate existed certifying his homosexuality. The Immigration and Naturalization Service relied instead on Longstaff's candid admission about his homosexuality prior to entering the United States.

In resolving this delicate problem, the majority reasoned that Longstaff's admissions about this homosexuality should be construed as sufficient for a finding that he was medically excludable at the time he entered the United States. The majority stated:

> To remand the case for a medical determination of homosexuality would appear to be to ask for a certification of the obvious. It is patent that sexual preference cannot be determined

15. 716 F.2d 1439 (5th Cir. 1983).

16. See 8 U.S.C. § 1182(a).

> by blood test or physical examination; even doctors must reach a decision by interrogation of the person involved or of others professing knowledge about that person. To require the INS to disregard the most reliable source of information, the statements of the person involved, would be to substitute secondary evidence for primary.[17]

In his dissent, Judge Tate took issue with the majority's willingness to alter the statutory framework to deny Longstaff's petition for naturalization. Indeed, the reason for the majority's departure from the plain statutory requirement of medical certification stemmed largely from the difficulty of obtaining medical certification of homosexuality. As Judge Tate pointed out, the fact that the Public Health Service refused medically to certify someone as a homosexual hardly justified permitting the Immigration and Naturalization Service to rely on lesser evidence to exclude a person for that "medical" reason:

> It is basic . . . that this court is without authority to ignore the mandate of Congress' statutory scheme merely because there is an interagency dispute over the mechanics of statutory enforcement. If this administrative dispute renders the exclusion of homosexuals under the statute ineffective, then it is for Congress, not this court, to alter its statutory scheme requiring medical certification. Absent such congressional intervention, I am unwilling to infer that Congress intended to allow the non-medical personnel of an administrative agency to use "medical" classifications—as is the practice in present day Russia—to exile persons for newly-discovered mental defects or other "medical conditions."[18]

In *Longstaff*, therefore, the court was presented with yet another policy choice. Strictly applied, the statutory framework did not provide for Longstaff's exclusion from the United States without a medical certificate certifying his homosexuality. Because such certification had become difficult, if not impossible, to obtain, the court was faced with the choice of altering the statutory requirement to permit a finding of homosexuality based upon bureaucratic interrogation or refusing to extend bureaucratic powers to exclude persons for medical reasons without direct congressional intervention. Allowing non-medical personnel to find "medical conditions," which loosely includes such conditions as "mental defects," could lead to significant abuse of the rights of individuals who could otherwise lawfully enter the United States. As Judge Tate wrote:

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17. *Longstaff*, 716 F.2d at 1448.
18. Id. at 1453 (Tate, J., dissenting).

> Of far greater importance than Longstaff's unfortunate individual plight, and the rather simple factual issues presented by it, is the subjection to deportation of all other persons against whom a governmental agency may assert as a reason for deportation—perhaps (as in the case of Longstaff) many years after presumably lawful entry into the United States—a newly discovered pre-admission "medical" cause for exclusion from entry.
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> . . .
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> This spectre, and the avoidance of the possibility of abusive bureaucratic deportation powers, is what I believe the Congress intended to avoid by conclusively fixing a professionally certified medical cause for exclusion from lawful admission . . . .[19]

Longstaff provides not only an example of Judge Tate's concern for the individual, but also a living application of his judicial philosophy. The majority could have decided Longstaff's appeal on the basis of the clearly articulated statutory framework. Nonetheless, it chose for policy reasons to depart from Congress' legislative expression by permitting exclusion for homosexuality without medical certification. As the structure of Judge Tate's dissent demonstrates, the error is twofold. Not only should no policy choice have been made, since clear legislative expression determined the result, but the policy choice adopted by the majority is a dangerous one indeed, since it permits non-medical bureaucratic personnel to make medical assessments of "psychopathic personality" and "mental defect" without congressional authorization. To the judge, this was a high price to pay for the denial of Longstaff's naturalization.

The majority of the court in *In Re Aircraft Disaster near New Orleans, Louisiana on July 9, 1982*[20] also drew a vehement dissent from Judge Tate, in this instance for their reduction of a damage award to the plaintiff inconsistent with proper standards of federal appellate review. The issues in this case revolved around the recovery by the plaintiff for the death of his wife and all three of his children when a Pan American jetliner crashed into and destroyed his home. The majority reduced the plaintiff's recovery for the loss of his wife from $1,000,000 to $500,000, and for the loss of his three minor children from $400,000 to $250,000 each.

As Judge Tate pointed out in his dissent, the federal standard of appellate review of damage awards for excessiveness is extremely limited.

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19. Id. at 1453-54.

20. 767 F.2d 1151 (5th Cir. 1985).

Citing substantial authority, Judge Tate reminded the majority that the size of an award is essentially a question of fact not to be disturbed absent a clear abuse of discretion.[21]

Judge Tate's central attack, however, focused upon the majority's apparent willingness to look to jury awards in other cases to reduce this plaintiff's recovery, all without proper legal basis. Judge Tate wrote:

> In shorthand terms, the fundamental error of the majority is its failure to recognize that, as a threshold matter, the award of damages is essentially a factual determination by the trier of fact under the particularized facts of each case—*not* a matter that on appellate review is to be scaled as allowable by a trier of fact only by the use of numbers derived from prior appellate approval of awards for losses of wives and children that were made under varying factual conditions; *not* as if the loss of a wife or the loss of a child represents some kind of a fungible loss to be measured interchangeably, so that the loss of any wife is the same as the loss of any other wife under all circumstances.[22]

Again, Judge Tate's criticism of the majority was two-fold. Not only were policy considerations about the size of jury awards unnecessarily taken into account, these considerations were applied to reduce the recovery by an individual who had suffered an immeasurable loss at the hands of the defendant. To Judge Tate, it was not the size of the jury award that was shocking or without basis in the record, it was the majority's willingness to bypass appropriate standards of appellate review:

> [I]n my view the panel departs from [established principles of appellate review] with but cursory reference, in determining that the present awards were excessive without first examining and explaining why our judicial conscience should be shocked, or why these awards "clearly exceed the amount that *any* reasonable man could feel the claimant is entitled to," *Bridges*, *supra*, 553 F.2d at 880. It seems to me that we cannot do so without examination of the particular facts before us, when in a few short seconds the tortious act of the defendant killed the claimant's wife and three little boys, the center of the claimant's life, and the focus of his hopes, ambitions, and happiness, and destroyed through his grief at this loss his reason for being, under record evidence reasonably accepted by the trial jury. I

21. Id. at 1161-62 (Tate, J., dissenting).
22. Id. at 1160.

> simply cannot say that this award is manifestly excessive under its facts.[23]

Although the limitation of jury awards is a much debated social and legal issue, current standards of federal appellate review do not permit the reduction or increase of jury awards based upon the vicissitudes of public opinion as to their magnitude. Had *In Re Air Crash* presented facts in which a policy choice could have been made, such as in *Garcia*, perhaps such considerations would have been relevant. Even then, however, Judge Tate would have found it difficult to weigh the interests of corporations and their insurers in limiting the damages caused by their negligence against an individual's loss of his family and dreams. As Judge Tate pointed out, however, that issue did not need to be reached, since established precedents should have foreclosed the consideration of the amount of a jury award amply supported by record evidence.

Much has been said in the preceding pages about Judge Tate's judicial philosophy and his unwillingness to join majority opinions that prematurely resorted to policy considerations, as in *Longstaff* or *In Re Air Crash*, or that made policy choices that appeared contrary to the interests of the individual, as in *Garcia*. In all three instances, however, Judge Tate was the champion of the individual laboring against the government or other large interests. A cursory review of these decisions could lead to the criticism that Judge Tate blindly chose to defend the common man in every instance. That criticism, however, would be both incorrect and unfair. It was not by blind choice, but rather by adherence to his judicial philosophy, that the judge reached the conclusions that he did. Admittedly, that philosophy led him to results which favored the common man in each of these cases. This is not, however, due to the inherent nature of that philosophy but to the facts of those cases and the applicable statutes and precedents. In other cases, that philosophy led Judge Tate as the author of a majority opinion to deny relief to individuals with whose plight he nonetheless sympathized.

In *Ramirez v. Rueles*[24] a group of migrant agricultural workers brought an action against the members of a state employment services agency seeking relief for wrongs they had suffered in connection with their recruitment in Texas for employment in Delaware. The plaintiffs suffered severely inhumane conditions on their journey to Delaware and were subjected to substandard living conditions at the Delaware job site. They sought relief under the Wagner-Peyser Act[25] on the grounds that

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23. Id. at 1162 (citation omitted) (quoting Bridges v. Groendyke Transp., Inc., 553 F.2d 877, 880 (5th Cir. 1977)).

24. 736 F.2d 168 (5th Cir. 1984).

25. 29 U.S.C. § 49 (1973).

the wrongs they had suffered violated the objectives of this statute and its regulatory progeny. Although it could not be disputed that the plaintiffs had been mistreated by the defendants, or that the defendants had fallen far short of fulfilling the duties imposed upon them by the applicable statutes and regulations, Judge Tate was constrained to find that the plaintiffs could not recover for these wrongs under any existing authority. As the Judge noted in the majority opinion:

> The procedures through which [the] truck was authorized for use as a vehicle to transport migrant workers concededly did not achieve their intended purpose of requiring safe and adequate transportation in the circumstances of this case. But the failure of the regulatory procedures to achieve their purpose does not mandate a conclusion that *these defendants* failed to carry out a regulatory duty for which they may be subject to liability under *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969)]. As the district court correctly concluded, the duty to check the adequacy of the transportation used by crewleaders fell to others under the regulatory scheme in force at the time of these events. In all likelihood, however, the real failure was inherent in the regulatory scheme itself.[26]

If Judge Tate had been a true believer in unrestrained judicial legislation, he could have found upon the facts of *Ramirez* a sound basis for imposing liability upon the defendants. As his opinion demonstrated, he was certainly offended by the harm endured by the plaintiffs and their families:

> The events giving rise to this litigation present a vivid picture of how an expensive and complex bureaucratic web of agencies can fall short of their intended purpose, and, in the process, leave their alleged beneficiaries—often persons without the resources to help themselves—unprotected from those who would exploit them.[27]

Nonetheless, the faithful application of existing precedent, as well as statutory and regulatory authority, did not permit extension of liability to the defendants. Consistent with his judicial philosophy, therefore, Judge Tate could not and did not resort to policy considerations when deciding this appeal and instead correctly denied relief to the plaintiffs.

The *Ramirez* case provides only a single example of the many cases in which Judge Tate decided a dispute based upon precedent and other existing authority rather than upon policy considerations that he con-

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26. 736 F.2d at 172-73.
27. Id. at 169.

sidered deserving or correct.[28] As his judicial philosophy suggests, Judge Tate was strictly of the view that a judge writing an opinion for the court was duty bound to present the court's opinion and not his own. Judge Tate's strict adherence to this view is best exemplified by his unique, and theoretically consistent, practice of dissenting from his own opinions in certain cases.

In *Linsteadt v. IRS*,[29] Judge Tate drafted the opinion of the court and set forth the majority's finding that the district court had not erred in finding that the IRS properly refused to release certain documents to a taxpayer. After writing for the court and expressing the majority's view, Judge Tate then dissented from his own opinion to express his view that the IRS could not justify withholding the documents requested by the taxpayers.[30] Although this practice is curious, it follows from Judge Tate's position that the first duty of any judge is to decide disputes before the court in accordance with established authorities. If, after performing that function, a judge wishes to act as jurist to express a different view, he may do so, but only with a clear expression that the views offered are not those of the court.

As the preceding discussion illustrates, Judge Tate was a man of strong convictions with a true concern for the rights and well-being of the common man. His motivations were often akin to those of the now proverbial barber in Ville Platte rather than to those of larger entities and interest groups. His judicial philosophy, however, required that he express his beliefs only in cases where policy considerations were appropriate. In this manner, Judge Tate was true to his duty as a judge and jurist as well as to his devotion to the rights of the common citizen.

III. Contributions to Louisiana Law

While serving on the Fifth Circuit, Judge Tate followed very closely all developments in Louisiana law. As a Fifth Circuit judge, however, he had little opportunity to make significant contributions to Louisiana

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28. See also, e.g., Shawgo v. Spradlin, 701 F.2d 470, 478 (5th Cir.), cert. denied, 464 U.S. 965, 104 S. Ct. 404 (1983) (finding that a plaintiff's due process claim did not have merit, but commenting that the plaintiff's demotion did "not seem 'fair' to us as judges"); Montgomery v. Boshears, 698 F.2d 739 (5th Cir. 1983) (applying precedent to find that the nonrenewal of a non-tenured employee's contract did not offend procedural due process or First Amendment principles and that summary judgment was therefore appropriate); and Wilson v. Aetna Casualty & Sur. Co., 228 So. 2d 229, 232 (La. App. 3d Cir. 1969) (reversing a trial court decision favoring the plaintiff and enforcing a settlement and release obtained by the defendant, "despite . . . reasons which indicate that the plaintiff . . . had no bargaining power to resist the defendant's offer and was instead under strong economic duress to accept it").

29. 729 F.2d 998 (5th Cir. 1984).

30. Id. at 1005 (Tate, J., dissenting).

law. His Fifth Circuit decisions on questions involving Louisiana law are mere persuasive authority for and need not be followed by Louisiana courts. Further, acting as a Fifth Circuit judge, he was no longer free (even if only in theory) pursuant to civilian methodology to regard state court precedents as merely non-binding interpretations of issues arising in disputes governed by Louisiana law.[31] Rather, he was bound as a federal judge to follow Louisiana jurisprudential interpretations of issues governed by Louisiana law.[32] Judge Tate's willingness to use the certification procedure to the Louisiana Supreme Court on questions of Louisiana law as to which there was no clear controlling precedent virtually precluded him from any opportunity to use his vast knowledge to decide any important issues of Louisiana law arising in the Fifth Circuit.

An excellent example of the judicial restraint practiced by Judge Tate while on the Fifth Circuit may be found in *Tessier v. H. S. Anderson Trucking Co.*,[33] in which the plaintiff-wife in a Louisiana diversity case sought recovery of damages for loss of consortium resulting from a non-fatal injury to her husband. Louisiana courts, "in deference to early high-court precedent," had consistently refused to recognize such a cause of action, and based upon that authority, the United States District Court had dismissed the plaintiff's suit for failure to state a claim upon which relief could be granted.[34] The plaintiff contended on appeal, however, that such a cause of action had always existed under a proper interpretation of Civil Code articles 2315 and 1934(3), and that a subsequent amendment to article 2315 specifically authorizing recovery for such loss was merely intended to remove the bar to recovery that had been judicially created (in error), rather than intended to create a cause of action where none had existed before. The plaintiff urged that the Louisiana decisions on point were in error and that therefore civilian methodology commanded a different result than had been reached by the Louisiana courts and by the district court.

Judge Tate, writing for the court in *Tessier*, found the plaintiff's contentions to be "imaginative and persuasive."[35] Nonetheless, he noted that the court was "*Erie*-bound to follow Louisiana jurisprudential interpretations as they are, not as academic scholars say they should have been."[36] There being no controlling Louisiana law to the contrary, the court upheld the district court's dismissal of the suit.

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31. See supra note 3 and accompanying text.
32. C. Wright, Handbook of the Law of the Federal Courts § 58 (3d ed. 1976).
33. 713 F.2d 135 (5th Cir. 1983).
34. Id. at 136.
35. Id.
36. Id.

In *Tessier*, we see an example of Judge Tate having been restrained by *Erie* from acting to right what he may have perceived as a misinterpretation of Louisiana law. In *Perkins v. F.I.E. Corp.*,[37] we see an example of Judge Tate certifying to the Louisiana Supreme Court questions he was no doubt eminently qualified to decide. At issue in *Perkins* were, *inter alia*, questions of (a) whether the manufacture, sale, and marketing of handguns constituted an ultrahazardous activity giving rise to absolute or strict liability of the manufacturer, and (b) whether a handgun constituted an unreasonably dangerous product when marketed to the general public giving rise to strict liability of the manufacturer. These issues arose in the context of whether an innocent victim of a shooting can recover damages from the manufacturer of the handgun used in the shooting based upon absolute or strict liability principles of Louisiana law.

There being no controlling precedent in *Perkins*, Judge Tate's judicial philosophy would have permitted the use of policy considerations to decide the case. Having authored several important decisions regarding strict liability and products liability while serving in the Louisiana appellate court system, Judge Tate was well acquainted with the policy considerations bearing upon the issues certified in *Perkins* to the Louisiana Supreme Court. These were important issues that he would have been honored to have had the opportunity to decide. Nonetheless, we see yet another example of Judge Tate exercising restraint as a federal judge by deferring to interpretations of Louisiana law by Louisiana judges.

In any event, Judge Tate's influence on the development of Louisiana law as a Fifth Circuit judge was far more limited than was the case during his service as a Louisiana appellate court judge. Nonetheless, Judge Tate authored several opinions covering a broad range of issues of Louisiana law while on the Fifth Circuit, which issues relate to[38] prescription,[39] conflict of laws,[40] election of

37. 762 F.2d 1250 (5th Cir. 1985).

38. The following list is not intended to be exhaustive.

39. Driscoll v. N.O. Steamboat Co., 633 F.2d 1158 (5th Cir. 1981) (United States District Court for the Southern District of California found to be a "competent" court, within meaning of La. R.S. 9:5801, where venue was proper and court had subject matter jurisdiction, even though personal jurisdiction over the defendant was lacking); Billiot v. American Hosp. Supply Corp., 721 F.2d 512 (5th Cir. 1983) (timely suit against manufacturer of prosthesis held to toll prescription under La. R.S. 9:5628 as to claim against surgeon allegedly solidarily liable with manufacturer).

40. Bell v. State Farm Mut. Auto. Ins. Co., 680 F.2d 435 (5th Cir. 1982) (Louisiana law found applicable to uninsured motorist provision of an automobile insurance policy issued in Florida to a Florida resident on a vehicle licensed in Florida where the accident

remedies,[41] strict liability,[42] private disability pension plan,[43] contra non valentem,[44] and insurance.[45] It is evident from these decisions that while on the Fifth Circuit Judge Tate was not afforded the opportunities he enjoyed as a Louisiana appellate court judge to contribute to the development of Louisiana law.

IV. CONCLUSION

We hope that our small insights as privileged witnesses into the principles and ideas that motivated Judge Tate will give a sense of a man who served his community tirelessly and won the respect of his colleagues and the legal profession and will provide those who read this in years to come with some rough conception of the elements that made him a truly remarkable judge. The miracle of Judge Tate was the ease with which he combined the role of judge, jurist or visionary of the thoughts of the barber in Ville Platte to achieve fairness and justice in the judicial process and the individual case. His legacy to us is a model of excellence in public service as a judicial officer.

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occurred in Louisiana, the victim was from Louisiana, and the insured and the vehicle were both temporarily residing in Louisiana).

41. Intercontinental Eng'g-Mfg. Corp. v. C. F. Bean Corp., 647 F.2d 621 (5th Cir. 1981) (held that plaintiff may sue both the agent and his undisclosed principal in a single suit in order to obtain a judgment binding them in solido, even where a plaintiff seeks to recover in the alternative from an agent or his undisclosed principal cannot obtain the same judgment against both).

42. Matthews v. Ashland Chem., Inc., 703 F.2d 921 (5th Cir. 1983) (disputed factual issue found as to whether unreasonable risk of harm under negligence or strict liability theories in placing an empty propane gas cylinder for filling adjacent to an electronically cooled water cooler).

43. Glover v. South Cent. Bell Tel. Co., 644 F. 2d 1155 (5th Cir. 1981) (determination of committee administering a private pension plan is conclusive so long as the evidence before the committee was sufficient and the committee's action was not arbitrary, capricious, or in bad faith).

44. American Cyanamid Co. v. Electrical Indus., Inc., 630 F.2d 1123 (5th Cir. 1980) (Louisiana doctrine applied where facts supported district court finding).

45. Jasmin v. Dumas, 769 F.2d 1047 (5th Cir. 1985) (passenger entitled to elect to recover from applicable uninsured motorist policies the highest average).