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## A RENAISSANCE OF THE CIVILIAN TRADITION IN LOUISIANA

*Mack E. Barham\**

In 1937 in response to an article which contained the statement that "Louisiana is today a common law State,"<sup>1</sup> four eminent professors of law in a reappraisal of the civil law system in Louisiana<sup>2</sup> concluded that Louisiana was then still "a civil law jurisdiction." We were then and are now a *civilian jurisdiction*, and had and have a *civilian system*. Again, however, a reappraisal will be made here to determine to what extent we did and do adhere to the *civil law tradition* in Louisiana.

John Henry Merryman<sup>3</sup> has defined a legal system as "an operating set of legal institutions, procedures and rules." He says that in this sense there is no such thing as a civil law system, a common law system, or a socialist law system, for each sovereignty tends to deviate from its original or basic system. He defines 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. . . . It puts the legal system into cultural perspective."

As used in this paper, "civil law tradition" means that tradition of legal concepts and principles as generally applied today by a community of jurisdictions with a somewhat similar development and evolution from the Twelve Tables of Rome and the work of Roman juriconsults. It will refer to concepts of the nature and role of law, the methods of operation of a legal system, the manners of applying and perfecting the law which are most commonly accepted and practiced by the numerous civil law systems. "Civil law system" or "civilian system" as used here will be more nearly aligned with "civil law jurisdiction." It will mean the system of law employed in a partic-

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\* Associate Justice, Supreme Court of Louisiana.

1. Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937).

2. Daggett, Dainow, Hebert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937).

3. J. MERRYMAN, *THE CIVIL LAW TRADITION* (1969).

ular jurisdiction that intentionally attempts to embody the civil law tradition.

#### REAPPRAISAL OF "A REAPPRAISAL APPRAISED"

This writer's legal education in the mid '40s consisted of civil law studies in Louisiana State University and of common law courses in the university of a common law state.<sup>4</sup> While the civil law tradition was treated in the context of specific civil law courses and students were constantly reminded that Louisiana was a civil law system or jurisdiction, there was no unified approach to why these obtained in Louisiana. There was no in-depth instruction as to the advantage of advancing the civil law tradition in the midst of a nation of states employing a contrary approach. Except in the teaching of a few professors, the teaching methodology employed in civil law courses in the civilian tradition was not strikingly different from the instruction given in the common law courses in the common law jurisdiction. Although our Code provisions are explainable through jurisprudence, too often, whether intentionally or not, by the use of cases the student was led to a belief that law was what the jurisprudence pronounced. The Louisiana Civil Code was our source, but a neophyte in the study of law found it difficult to distinguish between the casebook method in common law courses and the study of case interpretation in Code courses.

These remarks are not to be taken as condemning either the teaching methods adopted or the roles assumed in our system of law by the faculties of the Louisiana law schools. Rather, they are intended to direct attention to the pressures which have been exercised upon these faculties to divert them from the civil law tradition; and they are intended to focus upon the law schools' dominant role in bringing lawyer, legislator, teacher, and judge back to the civilian tradition in Louisiana. Most lawyers, teachers, and jurists believe in retaining a strong civilian tradition. However, the necessity of earning a living by the practice of law, by teaching law students how to be winning advocates, and by making quick judicial decisions to keep up with an ever-increasing caseload has made it expedient for the lawyer, the teacher, and the judge to adopt methods and

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4. University of Colorado.

give answers which, if they do not detract from the civil law tradition, at least do not support it.

In a consideration of only the role and function of the judiciary in the civil law tradition, there are found in our jurisprudence deviations from that tradition which are so consistent as to require, if followed, that lawyers, teachers, and judges not use a civilian approach. Under our Code and through the historical civilian tradition, jurisprudence is not a major source of law, yet it has been and it remains such in reality. Possibly the belief in jurisprudence as a primary source of law is so strongly embedded in the minds of many of the judiciary and the practicing bar of Louisiana because our civil law system coexists in a nation with states which because of their common law heritage so regard jurisprudence. Even if our bar really believes that legislation is the primary source of law, it practices under the principle that jurisprudence is a major source of law. Lawyers often only perfunctorily examine legislative expression before they turn for final authority to the jurisprudence to resolve the legal question posed by their clients' cases. When the court asks the lawyer in argument to give the authority for a point which he advocates, the court probably expects a case citation even where there is positive codal or statutory authority. As a result of the pressure under which we perform our various roles in our legal system, there has been a tendency to stray from strict civilian methods and concepts.

My many visits to the law schools as a lecturer have made apparent the broad gap between the teacher and the lawyer and the judge in their understanding of their respective functions and roles in the civil law system. Because of these differences a variety of deviations from the civil law tradition in these spheres of influence caused the formation of a vicious circle of departure. The faculties of the law schools may feel compelled to use the casebook method of teaching if they are to fulfill the immediate need of their students to pass the bar examination, designed by the lawyer, and to become successful practitioners before the courts. Then these attorneys practicing in our courts, because of their teaching and their response to some decisional requirements, cite the opinions of the courts as the primary authority of law in their legal arguments. It is

immaterial whether the courts actually require or have merely learned to expect the citation of decisions as a primary source of law, for their opinions do in fact often hinge upon the holdings in particular cases. These decisions are studied in the law schools, and the faculties may well feel justified in using the casebook method in order to prepare their graduates to respond with what courts' opinions indicate is decisive of litigation. This circle can be broken at any one point, but for us to begin a return to a true civilian concept, it must be obliterated. Fortunately, its destruction has already begun, and this beginning must be attributed to the law schools.

#### THE ACADEMICIANS: WELLSPRING OF THE RENAISSANCE

The renaissance of Louisiana as a civil law jurisdiction practicing in the civilian tradition has come about through a number of factors. The increasing enrollment of students in our law schools required able administrators to assemble larger faculties. They have retained civilian scholars with national reputations, but also they have acquired new professors with broad comparative and civil law backgrounds who have quickly gained reputations as outstanding exponents of civilian doctrine. Faculty members new and old have produced a mounting library on the Louisiana civil law system. Our law reviews have been expanded, and under the supervision of able faculty members these publications have been revitalized. They furnish authoritative and learned writings in every field of civilian law, and are a primary source of doctrine in Louisiana.

In France and in most European jurisdictions doctrine is a tremendous force in shaping the legislative expression as well as the judicial application of the law. Until recently Louisiana had little doctrine available in the English language, and the scarcity of French translations for lawyers, legislators, and judges deprived Louisiana of a most necessary tool in a legal system following the civilian tradition. For example, in France doctrinal criticism often was and is more impressive for future legislation and judicial interpretation than the brief statements in the decisions by the courts.<sup>5</sup> One of the most

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5. R. DAVID & H. DEVRIES, *THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS* 122-26 (1958); J. MERRYMAN, *THE CIVIL LAW TRADITION* 59-64 (1969).

helpful continuing doctrinal sources in Louisiana is the annual symposium on the work of the appellate courts by the faculty of the Louisiana State University Law School through the *Louisiana Law Review*. Tulane University School of Law proposes, in addition to its law review, periodic publications of research papers limited to examination of specific areas of the civil law.<sup>6</sup>

A powerful force tending to keep Louisiana a civil law system in the best of the civil law tradition is the Louisiana State Law Institute. It was created by legislative act in 1938,<sup>7</sup> and has in numerous ways contributed to our return to the civilian tradition. The Law Institute, under charge from the legislature, produced the projet for our Criminal Code in 1942, our Revised Statutes of 1950, and the Code of Civil Procedure in 1960 with the corresponding revisions in the Civil Code necessarily accompanying it, and under legislative mandate and authority it is constantly revising and attempting to update all of the laws of the state. Also the Law Institute has made available what now amounts to a considerable library of translations of a number of French authorities.<sup>8</sup>

The Institute of Civil Law Studies<sup>9</sup> at Louisiana State University is also making a considerable contribution. It has con-

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6. TULANE CIVIL LAW FORUM, to be published bimonthly beginning February, 1973, by the Tulane School of Law.

7. La. Acts 1938, No. 166. The Louisiana State Law Institute was conceived in 1932 within the faculty of the Law School of Louisiana State University. A prospectus was drafted in 1933, but it was not organized until 1938 when the Board of Supervisors of Louisiana State University and the Legislature chartered it in accordance with that prospectus as an "official advisory law revision commission, law reform agency and legal research agency of the state of Louisiana." John H. Tucker, Jr., who was its first and longtime president, along with Dean Paul M. Hebert, prepared the legislation. Dr. J. Denson Smith was its first and continues to be its Director. See Smith, *Historical Sketch of the Louisiana State Law Institute*, 245 La. 124 (1963).

8. PLANIOL, *CIVIL LAW TREATISE* 3 vols. (La. St. L. Inst. transl. 1969); GÉNY, *METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW* (La. St. L. Inst. transl. 1963); AUBRY & RAU, *CIVIL LAW TRANSLATIONS* 4 vols. (La. St. L. Inst. transl.) OBLIGATIONS (1965), PROPERTY (1966), TESTAMENTARY SUCCESSIONS & GRATUITOUS DISPOSITIONS (1969), INTTESTATE SUCCESSIONS (1971); BAUDRY-LACANTINERIE & TISSIER, AUBRY & RAU, CARBONNIER, *CIVIL LAW TRANSLATIONS* (La. St. L. Inst. transl. 1972) PRESCRIPTION.

9. The Institute of Civil Law Studies was founded in 1967 by a separate charter issued by the Board of Supervisors of Louisiana State University to function within the framework of the School of Law with Professor Joseph Dainow as Director. Its purposes are to encourage and facilitate research and publication in the areas of civil law and comparative law. It also sponsors seminars, symposia, and lecture programs in these fields of study.

ducted annually an in-depth seminar concentrating on the function of a judge in a civil law jurisdiction in the best of the civilian tradition. Under the sponsorship of the Law Institute with some assistance from the Institute of Civil Law Studies, a number of civil law treatises from our own doctrinal writers have been prepared,<sup>10</sup> and others are in preparation. The de la Vergne Manuscript,<sup>11</sup> Batiza's *Sources of the 1808 Civil Code*,<sup>12</sup> and the scholastic debate<sup>13</sup> which followed their publication stimulated historical research into the various systems as our doctrinal writers sought for the sources of our Code. Since the civilian judiciary is influenced by academicians far more than are the jurists in common law systems, the Louisiana courts, as expected, have responded to these new doctrinal sources. It is the resurgence of the civilian tradition as expressed by the courts through their opinions under provocation by academic influence that brings new hope for a strong civilian tradition in our legal system.

Part of the response of the law schools which has accounted for a resurgence of the civilian tradition in Louisiana has been the inclusion in the first-year curriculum of an introductory course to the civil law.<sup>14</sup>

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10. A. YIANNPOULOS, 2 LOUISIANA CIVIL LAW TREATISE, PROPERTY (1967); A. YIANNPOULOS, 3 LOUISIANA CIVIL LAW TREATISE, PERSONAL SERVITUDES (1968); S. LITVINOFF, 6 LOUISIANA CIVIL LAW TREATISE, OBLIGATIONS BK. I (1969).

11. MOREAU LISLET, A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808) (de la Vergne vol. 1968).

12. BATIZA, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971).

13. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972); Sweeney, *Tournament of Scholars Over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972).

14. This paper was first conceived as a review of the coursebook for first-year students by A. N. Yiannopoulos, Professor of Law at Louisiana State University. This coursebook gives to the first-year law student a succinct, well organized, cohesive text which develops the source and the history of the civil law tradition, makes a comparative analysis of the systems which follow that tradition, traces the development of codification, provides an understanding of the fundamental concepts of our own Civil Code, and gives a basic statement of the philosophy and theory of the civil law tradition which makes it valuable as developed and practiced in our jurisdiction. The book then introduces the law student to a historical, comprehensive, and philosophical study of the preliminary title and the first two books of our Civil Code. The contents of a large part of the introductory remarks in this paper are based upon the material in this coursebook. Another excellent work used in this introductory course is S. LITVINOFF & W. TETE, *LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS* (1969).

## THE JUDICIAL ROLE AS A MEASURE OF THE CIVILIAN TRADITION

Legal scholars, jurists, and philosophers over the centuries have tried to define the civilian tradition. Each jurisdiction which attempts to follow the civilian tradition will have its own civil law system with varying deviations from the numerous other systems throughout the world. Civil law tradition is the oldest of all legal traditions and encompasses more national jurisdictions than any other. It has been more influential in the development of new legal systems, and it has had more impact upon the other traditions than they have had upon it. We often oversimplify in making a definitive statement of what is the civil law tradition. A particular system of law cannot be defined as a civil law system just because its source is the Roman law, for the common law is strongly influenced by the Roman law. Civil law is not necessarily codified law, for France was a civil law jurisdiction without code before 1804, as was Germany before 1900 and Greece as late as 1946. Neither can we dismiss the common law with an oversimplified definition that it is jurisprudential law under the doctrine of stare decisis.

Civil law tradition can best be examined comparatively with the other two legal traditions<sup>15</sup> when we look to the natures and roles of the judicial and legislative processes. Even though there is lack of total uniformity in the respective roles assigned to these branches of government in countries which follow the civil law, all civil law systems have much in common which holds them together in a single tradition. Common to all civil law systems is the fundamental tenet that legislative expression is the primary source of law, and common to all civil law systems now is the comprehensive written and integrated basic text of that legislative expression. While the role, the authority, the province, and the power of the judiciary may appear on the surface to be the same in the many systems, in practice there is considerable variation.<sup>16</sup> This variation in the role and function of the judiciary appears in the decision-making process

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15. Common law and socialist legal traditions.

16. DAINOW, *The Method of Legal Development through Judicial Interpretation in Louisiana and Puerto Rico*, 22 REV. JUR. U.P.R. 108 (1953); Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 LA. L. REV. 235 (1958); Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727 (1962); Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211 (1968).



in cases where the written law is ambiguous or obsolete or where there is no written law.

Common law scholars often depict the role of the judiciary in a civilian tradition as mechanical,<sup>17</sup> but that opinion is based largely on the folklore and the fiction<sup>18</sup> which mask the actual role of the judiciary as played in the many civil law systems. Here in Louisiana, for example, the judge, the lawyer, and the layman all want to believe that a judge makes a judicial determination simply by applying "the law" which the legislator has enacted to the case before him. Actually, there is no invariable single judicial process which assures that a judge will be led not only to "the law" but also to a logical and reasonable application of that legislative expression to the facts and circumstances of the case he must decide. While many may wish that the judicial process were merely mechanical and functional, such a process would often require the judge to reach unconscionably unjust results.

The concept of the judge's role as purely mechanical or functional is largely formed through both lawyers' and laymen's anxiety for certainty under the law. Certainty is a quality which all men of the law assign as a primary requirement of the law. However, that certainty in the law which would be exacted by some would deprive the courts of the power to temper the harshness of the rule of law in a particular case and would permit prior erroneous expressions to prevail over major legislative policy considerations. Moreover, such certainty would prevent the primary attainment desired under the law, justice through reason. A purely mechanistic role for the judiciary would in fact obviate the need for a judiciary, so that the sovereignty could function with only a legislator to express the law and an enforcer to put the law into effect.

François Génys,<sup>19</sup> "an unquestioned member of the club of legal classics,"<sup>20</sup> has been one of the most influential writers

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17. Von Mehren, *The Judicial Process in the United States and in France—A Comparative Study*, 22 REV. JUR. U.P.R. 235 (1953).

18. J. MERRYMAN, *THE CIVIL LAW TRADITION* 86 (1969); F. GÉNY, *METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW* (La. St. L. Inst. transl. 1963).

19. 1861-1959.

20. F. GÉNY, *METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW* (La. St. L. Inst. transl. 1963), *A Critical Introduction* by Jaro Mayda, at V.

in determining the function and role of the judge in modern civil law systems. Gény's critics have given many labels to his legal philosophy, but perhaps, as Jaro Mayda, one of his translators and admirers, notes, the philosophical category "eclectic," meant to be denigrating and derogatory by some of Gény's critics,<sup>21</sup> best fits his proposed approach of methodology in the judicial function. "Eclectic" is defined as selecting or choosing from various sources, not following any one system but selecting and using the best elements of all systems. In order to describe and to propose the proper judicial role or function in the best civilian tradition, Gény brings to the civil law tradition the best approaches of all of the systems that have used the civil law. Gény offers the "free scientific approach" as a replacement for the often fictional functional approach.

Gény rejects the "traditional" method of determining the proper rule of law in a case. Gény would adhere to the principle that a judge must apply the rule of law furnished by the legislator whenever it is applicable, but in the absence of written law he directs the judge to resort to custom, which he defines broadly. In the absence of both of these sources he would direct the judge to "a free objective search for rules" (*libre recherche scientifique*). According to Gény, the judge should utilize independent scientific procedures in the absence of formal law authority by examining "the objective nature of things" for "the balance of interests" which would suggest the proper rule rather than by fixing a rule "by means of a forced interpretation of statutory texts."<sup>22</sup> Gény believes that the object of the judge is to discover the deeper realities in the context of society "upon which even the formal sources of law are based, in order to find the correct rule to apply where the written law is silent."<sup>23</sup> Gény advocates deduction by analogy from existing law and custom, but requires further an examination of the ideals and the ideas which have built the political, economic, and social structures of the society in order to determine the essential purposes to be served by the law. Actually his approach permits the utilization of any method of intellectual research which would obtain a rule of law based upon social utility and validity.

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21. Gény was apparently considered by many of his contemporaries to be conservative or at least positioned in the middle of the road.

22. F. GÉNY, *supra* note 20, at 420.

23. Book Review, 25 *LA. L. REV.* 577, 584 (1965).

All of us who act as judges do so with some preconceived idea of the judicial function, with some deeply ingrained ideas of the role of the judge. With these preconceptions we turn out a work-product which we hope fits within the framework of what we believe is our constitutional and legal directive in a government organized for strict separation of powers. However, scrutiny through objective research will reveal that what we do is not always what we say or think we do. François Gény's greatest contribution is that he forces the modern jurist to look beyond *the fiction, the facade*, of the role of the judge.

#### FUNCTIONS OF A CIVILIAN JUDGE

In many civilian jurisdictions the sources of law available to the judge are established through the historical development of custom. Few codes in other civil law systems contain the numerous definitions which are to be found in the Louisiana Civil Code; but it was fortunate that our Code was express in defining the role of the court and the sources of law, for the members of the judiciary who attempted to interpret and apply the Code, especially in the early years, were often trained at common law and acted without a historical heritage of the civil law customs. Louisiana now has such a legal heritage that the definitions should be deleted from our Code, for the express words of the Code assigning the sources of law have often been cause for dispute in our jurisprudence.<sup>24</sup>

The first chapter of our Civil Code is "Of Law" and contains only three articles. Article 1 provides that "Law is a solemn expression of legislative will," and article 3 provides: "Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent." Under the chapter "Of the Application and Construction of Laws," we find article 13, which provides: "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit." And article 21, also in that chapter, reads: "In all civil matters, *where there is no*

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24. See, e.g., *Ellis v. Prevost*, 13 La. 230 (1839); Dainow, *The Method of Legal Development through Judicial Interpretation in Louisiana and Puerto Rico*, 22 Rev. Jur. U.P.R. 108 (1953); for discussion that codes should avoid definitions see Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 TUL. L. REV. 213 (1937).

*express law*, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.<sup>25</sup> (Emphasis here and elsewhere has been added.) These articles have no counterparts in the Code Napoleon.

Our Code, then, has established in express language the primary source of law—legislative expression, the secondary source of law—custom, and even the tertiary source of law—natural law and reason or received usages. It is important to note the Code's recognition that law is not always the legislative expression.<sup>26</sup>

While the French did not define the sources of law, their mandate to the judges under Code Civil article 4 recognizes the need for sources other than the legislative written expression. That article states: "Judges who refuse to give a decision under pretext of silence, obscurity or inadequacy of legislation may be proceeded against as guilty of denial of justice." Just as Gény found many years after the enactment of the French Code that the legislative will or even intent was not always ascertainable, Locré<sup>27</sup> reached that same conclusion at the very time of the Code's adoption. As Locré comments,<sup>28</sup> before the adoption of the Code the French courts, under strict interpretation of an order of the Constitutional Assembly, concluded they were forbidden to act when the legislation was not clear and express. Accordingly they went to the legislature when they believed there was need for interpretation or new legislation. Article 4 of the French Code was designed to reinforce the judiciary's

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25. See A. YIANNPOULOS, *LOUISIANA CIVIL LAW SYSTEM* §§ 34, 38 (1971); Dainow, *The Method of Legal Development through Judicial Interpretation in Louisiana and Puerto Rico*, 22 *REV. JUR. U.P.R.* 108 (1953).

26. The original French version of article 1 reads: "La loi est une déclaration solennelle de la volonté législative, sur un objet général et de régime intérieur." The pertinent part of the article, retained in our present code, reads in English: "Law is a solemn expression of legislative will." Most translators attribute to the French word "loi" the meaning "legislation," and translate "droit" to encompass the "law" in all its aspects. Following the French version in our earlier codes, Professor Yiannopoulos says that article 1 ought to be translated "*legislation* is a formal expression of legislative will." If this be so, that expression alone leaves room for sources of law other than legislation. A. YIANNPOULOS, *LOUISIANA CIVIL LAW SYSTEM* § 32 (1971).

27. J. LOCRÉ, *ESPRIT DU CODE NAPOLÉON* (1805).

28. Paraphrasing an unpublished translation of a portion of Locré's *ESPRIT DU CODE NAPOLÉON* (1805) by Dean Joseph M. Sweeney of the Tulane University School of Law.

obligation to decide the specific litigation before it. Loqué says:

"The power to decide cases, even when the law is silent, is essential to the function of the courts.

"If the nature of things could be so ordered as to write in advance in the text of the legislation a formal resolution of all conceivable disputes, judges would no longer be needed; the decisions being ready-made, there would be need no longer of persons to apply the law, but only of persons to enforce it."<sup>29</sup>

Gény and Loqué require a judge to objectively examine his determination of the rule of law in a case to determine the actual source from which it is obtained and the utility of that rule in society. They would strip away the folklore and the fiction, and look to the actualities and practicalities of judicial interpretation and application. If Louisiana jurisprudence is in

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29. Further quoting from Dean Sweeney's translation of Loqué: "Indeed, legislation deals with the totality of men; considers men in the mass, never as individuals; it must not meddle with particular facts or with lawsuits which divide citizens. Were it otherwise, it would be necessary to make new laws daily; their multitude would destroy their dignity and endanger their observance. The judge would be without function, and the legislator, enmeshed in details, would soon be no more than a judge. Private interests would besiege the legislative power; they would divert it, at every moment, from the general welfare of the society.

"There is a science for legislators, as there is one for judges; and the one does not resemble the other. The science of the legislator consists in finding, for each matter, the rules most favorable to the common good; the science of the judge is to put these principles into operation, to ramify them, to extend them, through wise and reasoned application, to private issues; to study the spirit of the law when its letter would be deadly; and not to expose himself to the risk of being in turn slave and rebel, and disobeying through servility.

"The legislator must watch the case law; he may be enlightened by it, and he may, on the other hand, correct it; but there must be a case law. With the immensity of diverse issues which make up civil litigation, and of which the decision requires, in the majority of cases, less the application of a specific provision than the combining of several provisions which lead to the decision instead of providing it, one can no more do without case law than without legislation. Now, it is to case law that the Civil Code leaves the rare and unusual situations which cannot be included in a scheme of rational legislation, the details, too varied and debatable, which must not preoccupy the legislator, and all subjects which it would be useless to try foreseeing or which hasty foreseeing could not define without danger. It is for experience to supply as time goes on the gaps which the Civil Code leaves. The codes of a people *make themselves with time*; but properly speaking, *one does not make them*.

"In enacting laws for every unforeseen issue, we would soon overwhelm our legislation with a prodigious quantity of laws which would destroy its unity and serve to shackle the administration of justice."

part court lawmaking, then the court should not act under the fiction and the facade that it only interprets legislative will.

Louisiana judges are expressly mandated by the Code to decide the litigation before them, and are given three sources of law for use in the decisional processes. The civil law tradition implements these sources through doctrine and jurisprudence constante. In removing some of the fiction which surrounds the judicial process we might begin by accepting the fact that there is not express *legislative will* to be found in any source of legislation which will be dispositive of every case. Since there are sources of law other than legislative expression, the fiction that judges do not make law must be discarded.

Codes in the civilian tradition are general statements of the law, statements of broad policy, statements of direction, statements of law which are meant to have a long continuity of existence. In some respects more similar to constitutions than to statutory enactments, civil codes are meant to provide a basic system of law which can acquire new life when necessary in changing time and circumstances. Codes in civilian jurisdictions do not seek to solve particular legal problems or to speak upon precise legal issues. Most civil codes cast aside the idea of bringing together that which existed before. They usually originate by discarding, almost as in a revolution, the existing law and adopting new law in its place. Louisiana's first Civil Code began as an attempt to compile an existing system of law. The original mandate to the drafters of the 1808 Civil Code was for a compilation of the Spanish laws in effect in Louisiana. However, our Code of 1808 in end result had as its principal source the Code Napoleon or its *Projet* and the French doctrinal writers, with the Spanish influence persisting only in some particular areas. The Civil Code of 1825 expressly provided in article 3521 that all prior laws in existence in Louisiana were repealed, "and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code." Two years later the Supreme Court of Louisiana in *Flower v. Griffin*<sup>30</sup> attempted to continue in effect the provisions of the old Code. Immediately following that decision, legislation was enacted providing for the abroga-

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30. 6 Mart.(N.S.) 89 (La. 1827).

tion of "all the civil laws which were in force before the promulgation of the civil code lately promulgated."<sup>31</sup> Our Code, then, is actually a general statement of an original body of civil law for Louisiana.<sup>32</sup>

Civil codes differ drastically from the modern codes in common law jurisdictions. The codes of the common law states are merely compilations of case law or statutes, similar to our collection of statutory laws in the Louisiana Revised Statutes of 1950. Although statutory law is specific as compared to the statement of law in the civilian codes, the former, though more explicit, is still not designed to give express answers to all future litigation, for when the legislature enacts a statute, it usually is seeking to cure a specific evil and therefore narrowly views the future consequences of the enactment. Its attention will not be directed at other aspects of the evil or the natural consequences which must flow from the corrective process. Therefore under both the Code and the statutes there will be many lacunae in the law which our Civil Code directs the judge to fill from another source. It is in the filling of the gaps in the law that the judge most frequently plays the role of lawmaker. The method for supplying the law in such a situation will vary according to the problem presented. Perhaps the gap can be filled by use of custom in its historical meaning, but custom under this narrow definition is not applicable in modern society as frequently as it was when our Code was adopted. Natural law, reason, and received usages as extensions of custom are more easily resorted to. Jurisprudence which has become accepted through long use and which is not contrary to express law, along with doctrine, also offers assistance. Basically, when the law is silent, the judge is called upon to reason how a legislative body would express itself upon the issue. Induction, deduction, analogy, exegesis, empirical logic, historical research, functional examination, free scientific research, and reasoning processes of many nomenclatures may be called upon singly or in combination according to the problem-solving needs for filling the void.

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31. La. Acts 1828, No. 83, § 25.

32. A. YIANNPOULOS, *LOUISIANA CIVIL LAW SYSTEM* 53-70 (1971); Tucker, *Source Books of Louisiana Law*, 6 *TUL. L. REV.* 280 (1932); Tucker, *Source Books of Louisiana Law*, 7 *TUL. L. REV.* 82 (1932).

Another fiction which must be dispelled is that when the expression of the legislature is ambiguous, imprecise, or unclear, the judiciary can easily find the meaning of that expression by determining the legislative intent. Here the judge must look to the intent of the lawmakers who, at a time in the past, enacted the expression of law decisive of the issue to be adjudicated. The legislative intent may be ascertained by considering the precise expression in the context of the whole cloth of the law. It may be ascertained by an examination of laws in *pari materia*. It may be ascertained by analogy with some other expression upon the subject of the law. But many legal issues presented for adjudication today arise out of situations which could not have been encompassed within the most extreme fantasies and dreams of the legislators who enacted the laws perhaps a century before. Here is presented the serious problem of ascertaining legislative intent when no intent could have existed regarding the issue before the court. The supplying of this intent results in lawmaking by the court.<sup>33</sup> Supplying legislative intent becomes more difficult in modern society, for changes in economic, technological, and social conditions come about rapidly now instead of slowly over the years as in the past.

Rapidity of change also makes more onerous the judge's role in exercising the judicial function where a law has become so obsolete that a literal application of the written expression would produce a ridiculous result. The changing of constitutional interpretation by the United States Supreme Court also lays new burdens upon our state judiciary when civil laws regarded as valid for many years are suddenly held to be unconstitutional. Because the legislature is not constantly in session and because it often abdicates its responsibility to revise and update the laws, our courts are sometimes required to change positive expressions from the state legislature and supplement them with judicial expressions so as to harmonize our law with the United States Supreme Court decisions.

One other aspect of the judicial function in Louisiana should be examined to lay guidelines for determining whether the judiciary is acting in a civilian tradition. Louisiana, like Quebec,

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33. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 19-23 (1949).



Puerto Rico, and a few other civil law jurisdictions, is enmeshed in a national system which follows another legal tradition. This situation may make it difficult for our courts to adhere to the civilian tradition, but at the same time we should recognize the very enviable position we occupy for the development and evolving of the best possible system of civil law. Though adhering to the civil law tradition, our courts have ready access without any language barrier to a voluminous source of comparative law, the study of which can enrich our own law when the courts are unable to find express legislative will.

In the best of the civilian tradition our courts are required to look to our sister jurisdictions for custom, natural law, reason, and received usages. While we in Louisiana remain civilian in legal concept and in system, because of national ties and common interests we are also a people of one nation who often share common customs, a common understanding of what the natural law should be, even a common approach to legal solutions through logic and reason. Because in a civilian tradition the source of law second only to legislative will is custom, our courts will of necessity resort to appraisals of customs without our state boundaries and within our national borders because we are a part of a larger community of common customs in many areas of law. As adherents of the civilian tradition, we initially examine the sources in our own system and our own law for enlightenment, but we must also make our system live in the context of its national existence. We benefit from this approach, and our search for and use of the law and the jurisprudence of common law states for these purposes need not detract from, taint, or limit our search for good civilian methods in the best of its tradition.

#### AN INDEX OF THE RENAISSANCE

Are there concrete examples that there is a resurgence of the civilian tradition in Louisiana? Since the academicians who appraised our civil law system in 1937 said that the ability of our courts to discard and overrule jurisprudence was an index for determining whether we were in fact a civil law jurisdiction, a comparison of the situation they found in existence then and the present situation should be helpful.

While the overruling of case law is not, in and of itself, determinative of a civil law approach by the courts, the recognition by the courts that jurisprudential law is not a binding source of law is necessary in a true civilian system. These appraisers<sup>34</sup> in 1937 found that 76 cases had been overruled in the previous 25 years. A cursory examination of the jurisprudence of the last five years shows that more than 25 cases have been expressly overruled and an incalculable number have been impliedly overruled.<sup>35</sup> Perhaps more important than the overruling of individual cases by name is that much of the present jurisprudence has, by the very annunciation of the principles upon which the results rest, modified, extended, or discarded the reasoning of prior jurisprudence. For example, *Laird v. Travelers Insurance Co.*<sup>36</sup> and *Pierre v. Allstate Insurance*

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34. Daggett, Dainow, Hebert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937).

35. A few examples will suffice to show the trend. In *Blanchard v. Ogima*, 253 La. 34, 215 So.2d 902 (1968), the reasoning and language of a number of cases were impliedly overruled assigning a master's liability for the delicts of his servants and it would appear that the rationale of a number of cases assigning liability of a husband for the delicts of the wife on a community errand will have to be overruled. See Comment, 33 LA. L. REV. 110 (1972). *Bowen v. Doyal*, 259 La. 839, 253 So.2d 200 (1971), overruled two very recent Supreme Court cases. *State v. Morales*, 256 La. 940, 240 So.2d 714 (1970), overruled one case. *American Creosote Co. v. Springer*, 257 La. 116, 241 So.2d 510 (1970), overruled two cases in Louisiana jurisprudence on one point and four cases on another point. In *State v. Ray*, 259 La. 105, 249 So.2d 540 (1971), the Supreme Court of Louisiana overruled five cases, the latest of which was a 1967 decision. Moreover, in that case we used a vehicle seldom if ever used in Louisiana—the prospective overruling of jurisprudence, or what is commonly called the "Sunburst" approach. In *Rockholt v. Keaty*, 256 La. 629, 237 So.2d 663 (1970), this court effectively overruled a decision by eliminating all the language and rationale of that decision not absolutely required for the facts presented there. *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So.2d 133 (1971), without specific mention overruled the rationale of a number of cases upon two points of law discussed there. For some effects of *Langlois*, see the concurrence by the writer and Mr. Justice Tate in the denial of writs in *Theriot v. Transit Cas. Co.*, 267 So.2d 211 (La. 1972). In a number of areas the language and rationale of previous decisions have been effectively discarded without specific overruling. In various aspects of workmen's compensation law, the court has effectively overruled prior jurisprudence. *Bertrand v. Coal Operators Cas. Co.*, 253 La. 1115, 221 So.2d 816 (1969), by necessary implication overruled one supreme court decision and pointedly overruled a court of appeal case and a line of jurisprudence which had narrowly defined the accidental aggravation of a pre-existing disease. *McDermott v. Funel*, 258 La. 657, 247 So.2d 567 (1971), overruled three cases. *United States Fid. & Guar. Co. v. Green*, 252 La. 227, 210 So.2d 328 (1968), expressly overruled three supreme court cases and six appellate decisions. *State v. Sandoz*, 258 La. 297, 246 So.2d 21 (1971), overruled four cases. See also *Heyse v. Fidelity & Cas. Co.*, 255 La. 127, 229 So.2d 724 (1969).

36. 267 So.2d 714 (La. 1972).

Co.,<sup>37</sup> which are expansions of *Dixie Drive It Yourself System v. American Beverage Co.*,<sup>38</sup> strike down the former defense of passive negligence, necessarily overruling numerous decisions on this issue. Moreover, they are an evolution of a new causation approach using cause-in-fact and duty-risk rather than proximate cause. *Langlois v. Allied Chemical Corp.*<sup>39</sup> sets forth a new basis for assigning liability for damages from ultrahazardous activities. The application of other concepts involved in delictual responsibility such as last clear chance and *res ipsa loquitur*, the interpretation of the Workman's Compensation Act, and the jurisprudence determining the validity of testaments are just a few of the areas in which the court has shown its willingness to find new language and new rationale in applying statutory and codal law.

The willingness of the courts to disregard jurisprudence and reappraise the actual source of law is only one index for determining whether Louisiana courts are using civil law methodology. More important criteria for making this judgment would be whether codal and statutory expression is the primary source of law, whether custom, equity, reason, and common usage are resorted to in the absence of legislative expression, whether doctrine and other resources are used to supply a practical, logical, and socially valid rule of law where it cannot otherwise be determined.

The examples are so plentiful that it would be difficult to choose which ones best establish the theory I have advanced. Rather than exhibit the best examples of the civilian approach, the writer has chosen his own writings to be displayed as examples.<sup>40</sup>

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37. 257 La. 471, 242 So.2d 821 (1971).

38. 242 La. 471, 137 So.2d 298 (1962). See also *Hill v. Lundin & Associates*, 260 La. 542, 256 So.2d 620 (1972).

39. 258 La. 1067, 249 So.2d 133 (1971). See also the discussion of *Blanchard v. Ogima*, 235 La. 34, 215 So.2d 902 (1968), in connection with note 37, *supra*.

40. There are several reasons for this choice. First, an attempt by one judge to appraise and criticize the writings of other members of the court in a paper such as this may not be in the best tradition of professional conduct demanded of judges. Second, the written opinion reflects only a small part of the conceptual aspect of a jurist's determination of the reasoning process to be applied and the result to be reached in a particular case. The work, the research, and the intellectual battle consume far more of the judge's time than the reduction of all this to a written opinion. Like an iceberg, perhaps only one-ninth of the mass—the real technique, method, legal concepts, and rationale—will be visible. Therefore one's own

## EVOLUTION OF A JURIST SEEKING THE CIVILIAN TRADITION

Shortly after coming to the supreme court in 1968, I was the author of the majority opinion in *Blanchard v. Ogima*.<sup>41</sup> Here, although there was express language to the contrary in a particular provision of the Code, we allowed a long and undeviating line of jurisprudence to remain in effect which disregarded that specific codal provision. It is the reasoning why the express language in the Code was not followed which must be examined to see whether that opinion is in the civilian tradition.

Although Civil Code article 2320 makes masters liable for their servants' delicts only when the masters "might have prevented the act which caused the damage, and have not done it," our jurisprudence attached strict vicarious liability to masters for their servants' delicts. The historical comparative analysis of the common law and civil law approaches in this field showed a parallel development with almost simultaneous extensions and limitations of responsibility in each system. Particularly considering the jurisprudential departure in light of the development of vicarious liability in our common law states, we were impressed that both our system and the system in the other states simultaneously used the same concept in approaching the socio-economic problem of liability of a master for a servant in commerce. Examining the problem in the light of present-day commercial economic needs, I wrote for the majority:

"Louisiana jurisprudence has not interpreted this restriction literally, and the demands of modern commerce and the needs of society would not permit such a stringent and severe limitation of the liability of the master for his servant. However, by inquiring into the overall relationship of the parties and the element of control, our jurisprudence has established reasonable definitions and limitations of vicarious

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writings can be examined with a better knowledge (although it be subjective) of the total thought process which went into the opinions. Moreover, admittedly it is easier to analyze one's own work because the research was done when the opinions were written and need not be repeated now. The examples used here propose only to show an evolution of the juristic approach of one man trying to employ the civilian tradition as a judge in a civilian system in a nation adhering to a contrary system of law.

41. 253 La. 34, 215 So.2d 902 (1968).

liability to replace the literal codal restriction which has fallen into desuetude."<sup>42</sup>

We noted that the literal pronouncement of the Code was not strictly one of vicarious liability, for it imposed liability only upon the negligent master, that is, one who by omitting to act was at fault. However, we concluded, after appraisal of the jurisprudence as a source of deviation and with a proper reconsideration of legislative purpose under prevailing economic realities, that the jurisprudential declaration was a logical response to present-day exigencies for fixing liability upon the master vicariously without regard to his own fault. In modern commerce the master's business practices have built-in extra charges for his services and products sufficient to cover economic recompense to those who are harmed by his servants in the exercise of his business pursuits for his financial advantage. Therefore the vicarious responsibility of the master for the damage caused by his servants' delicts in the pursuit of the master's economic interests is imposed to give an economic source for recompense to innocent third parties.

Important also in *Ogima* is the fact that the court reaffirmed that this vicarious responsibility arose from a master-servant relationship under Civil Code article 2320, and not from a mandatary (principal-agent) relationship under Civil Code article 3000. In this particular area the court could very well have followed through with an express overruling of a number of cases which in their reasoning and language used mandate terms rather than master-servant terms to impose liability under Civil Code article 2320.<sup>43</sup>

As already stated, *Blanchard v. Ogima* refused to overrule prior jurisprudence which had deviated from the strict language of the Code. In *Carter v. Moore*,<sup>44</sup> when the majority pretermitted the issue of the ownership of the bottoms of navigable waters, I wrote a concurring opinion advocating the overruling of three cases involving a so-called rule of property. At first

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42. 253 La. at 43, 215 So.2d at 905.

43. See *Blanchard v. Ogima*, 253 La. 34, 215 So.2d 902 (1968); Daggett, Dainow, Hebert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937); Comment, 33 LA. L. REV. 110 (1972).

44. 258 La. 921, 248 So.2d 813 (1971).

glance these would seem to be inconsistent positions, but a careful reading of the Carter concurrence and the Blanchard opinion will show that there is no real divergence in the views expressed, for the result obtained in one and the result sought in the other are both founded on civilian approaches which are fitted to the problem-solving required in the particular cases.

The concurrence in *Carter* I believe to be my best approach to good civilian methodology in opinion-writing. It also reflects my view of the jurist's role as well as the role of jurisprudence in a civilian system. First examining the Code articles pertinent to the issue raised there, next surveying the history of the evolution of the statutory law and the jurisprudence which also concerned the problem, then examining Louisiana doctrinal writings upon the subject, the concurrence concluded that three cases—*Realty Operators v. State Mineral Board*,<sup>45</sup> *Humble Oil & Refining Co. v. State Mineral Board*,<sup>46</sup> and *California Co. v. Price*<sup>47</sup>—decided by the Supreme Court of Louisiana had departed from the Code law and from other jurisprudence correctly interpreting that law and should be overruled.

Having found these three cases to be inversely pyramided,<sup>48</sup> I wrote:

"Finally, in my view the concept of this so-called rule of property has little or no validity in this civilian jurisdiction. That concept stems from the theory of *stare decisis*, is founded entirely upon common law, and finds no basis in our Constitution, in our Civil Code, or in our statutory law. A study of the jurisprudence will show that the rule has been used in order to obtain a result in some cases but just as quickly discarded in other cases. I favor stability of law, of course, and constancy of jurisprudence. Here, however, the reversal of the *Price*, *Humble*, and *Realty Operators* cases would restore the constancy of the jurisprudence and reinstate the long-standing law and public policy of the state."<sup>49</sup>

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45. 202 La. 398, 12 So.2d 198 (1942).

46. 223 La. 47, 64 So.2d 839 (1953).

47. 225 La. 706, 74 So.2d 1 (1954).

48. "That jurisprudence begins with dicta, continues without resort to law, and ends in what it calls an 'unbroken line of jurisprudence.'"

49. *Carter v. Moore*, 258 La. 921, 959, 248 So.2d 813, 826 (1971).

That concurrence and Mr. Justice Tate's concurrence on application for rehearing show our concern over the fact that *Price, Humble, and Realty Operators* are contrary to a basic concept of public policy ingrained in our civil law as it was practiced in Louisiana even before the adoption of the Code and particularly contrary to that public policy as expressly stated in the Code. The basic policy question is how and to what extent our State controls navigable waters. Our concept has always been that the bottoms of navigable waters belonged to the State, and that the necessary control of navigable waters below the surface, at the surface, and above the surface was exercised by the State under that concept. My feeling was that mere statutory interpretation through a few cases could not destroy such a fundamental, necessary concept of our law; that those jurisprudential holdings were not only *contra legem* but also against public policy.

*Dickson v. Sandefur*<sup>50</sup> afforded the opportunity for extensive use of doctrine in making an in-depth study of the history of the source and evolution of Louisiana Civil Code article 518,<sup>51</sup> beginning with an examination of the minutes of the Council of State which passed the *Projet* of the French Civil Code, the comments of the members of the council who worked on the *Projet*, proceeding to such doctrinal writers as Demolombe, Toullier, Laurent, Daviel, Chardon, and Planiol, and to Louisiana doctrine. The opinion rejected the common law doctrine of avulsion relied upon by the court of appeal, and resolved the issue under the express language of Civil Code article 518. Numerous opinions emanating from all of our appellate courts indicate the great impact the new translations of doctrinal writings and our own doctrinal writings have upon the judiciary.<sup>52</sup>

In *Pringle-Associated Mortgage Corp. v. Eanes*,<sup>53</sup> the majority on original hearing reversed the court of appeals' holding

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50. 259 La. 473, 250 So.2d 708 (1971).

51. LA. CIVIL CODE art. 518: "If a river or stream, whether navigable or not, opens itself a new bed by leaving its former channel, the owners of the soil newly occupied shall take, by way of indemnification, the former bed of the river, every one in proportion to the quantity of land he has lost.

"They shall again take their former property, if the river or stream returns to its former channel."

52. Dainow, *Planiol Citations by Louisiana Courts: 1959-1966*, 27 LA. L. REV. 231 (1967); Dainow, *The Use of English Translation of Planiol by Louisiana Courts*, 14 AM. J. COMP. L. 68 (1965).

53. 254 La. 705, 226 So.2d 502 (1969).

which had overruled an old supreme court case, *Tilly v. Bauman*.<sup>54</sup> I stated in dissent on original hearing:

“The majority opinion fails to give meaning to the unambiguous language in the Civil Code, is contrary to the civilian concept of subrogation by law, disregards a long line of jurisprudence and the Code which make privileges stricti juris, and particularly repudiates and contravenes the direct legislative expressions of R.S. 9:4801 and 4812. I am in total agreement with a statement quoted by the majority from Ziegler, supra: ‘After all, on this question, is not the Code itself enough? . . .’

“I find that the Civil Code, our jurisprudence (except for *Tilly v. Bauman*), and our statutory law are explicit—so explicit that *Tilly v. Bauman* should be overruled as being erroneous, eddying alone and apart out of the mainstream of our law.”<sup>55</sup>

On rehearing the court reinstated the Court of Appeal’s judgment and overruled *Tilly v. Bauman*.

A dissent best discloses that this writer has previously felt not only the need to examine the role of a judge and the methodology to be used in a civilian system but also the need to express the technique which was used in determining the rule of law. This dissent is not offered to further argue the incorrectness of the majority view but is offered only to show the evolution of the writer’s juridical approach to civil law problem-solving. This case, *Tannehill v. Tannehill*,<sup>56</sup> posed the question of whether sterility could form the basis of an action en desaveu. The majority held that sterility induced by disease was not a ground for disavowal. The dissent answered:

“Not only do I disagree with the result and with the historical interpretation given to Article 185 of our Civil Code, but I strongly take issue with the majority’s method and technique of judicial interpretation. The use of exegetical approach in isolation does not discharge the judicial obligation when our court works to and through the Code. While

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54. 174 La. 71, 139 So. 762 (1932).

55. *Pringle-Associated Mtg. Corp. v. Eanes*, 254 La. 705, 734, 226 So.2d 502, 512-13 (1969).

56. 261 La. 933, 261 So.2d 619 (1972).



exegesis is certainly helpful, often very enlightening, it can entomb the court and the law in the darkness of the past. The combination of the exegetical, the empirical, and the functional methods of interpretation is required in order that the law serve the people, that the law be a reflection of the people's understanding, desires, and needs. Moreover, the more comprehensive approach is required under the mandate of our Code itself . . . ." (Quoting Civil Code articles 18, 3, and 21 and French Civil Code article 4.)<sup>57</sup>

After discussing Mr. Justice Tate's *Techniques of Judicial Interpretation in Louisiana*,<sup>58</sup> the dissent concluded:

"While we may not in Louisiana be permitted the free rein Gény calls for, we certainly can use the techniques of Gény and the French jurists to determine our law when it is doubtful in language and dubious in meaning. We are a civilian jurisdiction, and we should as a court follow that tradition.

. . . .

"What change in policy is needed here to reach the result this dissent offers? What has been the policy of the state on disavowal for sterility? The courts have been silent. The Code is silent. A functional approach supports the policy I advocate. Comparative law analysis supports that policy. The issue before us must be decided, and it cannot be deferred to legislative counsel. Basing its determination not to fairly adjudicate the issue before it solely upon an historical excursion into the past, the court has not complied with the spirit of the Code or the letter of the Code in discharging the judicial function.

"As our Code says, the most important consideration is to determine the true meaning, reason, and spirit of a law. Surely the vast majority of the people—and this would be reflected in their legislative representatives—would find it almost unfathomable that the law would allow disavowal for impotence but not for sterility. Is this fine distinction valid? Does it serve any purpose? Is it the custom of the people as reflected in their mental processes? Is this distinc-

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57. *Id.* at 954, 261 So.2d at 627.

58. 22 LA. L. REV. 727 (1962).

tion the public policy of this state? Does the public believe and understand that one condition justifies bastardy and the other does not?"<sup>59</sup>

A particular series of cases illustrates the very slow evolution of a jurisprudential rule of law in a single area of the law. In *Reymond v. State, Department of Highways*,<sup>60</sup> a case which has been defined as a "cause célèbre," the writer, as author of the majority opinion, stated that the basis in Louisiana for assigning responsibility for damage from hazardous or inherently dangerous activities was not to be found in the law of property of Civil Code article 667. That article creates a true predial servitude upon one estate in favor of an adjoining estate forbidding the "construction" or the "making of works" which damage the neighbor or deprive him of the enjoyment of his estate. The opinion specifically said we did not overrule the result obtained in the jurisprudence which had allowed recovery for damages from use of dangerous instrumentalities or man's engagement in inherently hazardous activities; we simply found article 667 inapplicable.

Voluminous criticism of this opinion appeared in the *Louisiana Law Review*.<sup>61</sup> Some of the critics—justifiably, because they were unable to determine from the case except in dictum the future basis for hazardous activity recovery—were concerned for the holding and its consequential effects. It must be remembered that an opinion can resolve only the issue before the court and cannot expound upon all the situations that might arise as a consequence of the holding, as can be done in law review commentaries. However, in cases after *Reymond* the writer has attempted to unfold more of the rationale for the holding there and to set forth the consequences of that holding. The principle of law which has finally evolved is now almost uniformly accepted by the academicians.

In *Robichaux v. Huppenbauer*,<sup>62</sup> the majority partially enjoined as a nuisance certain methods of operating a stable. In a concurrence this writer expounded upon a footnote in *Reymond*

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59. *Tannehill v. Tannehill*, 261 La. 933, 954-58, 261 So.2d 619, 628-29 (1972).

60. 255 La. 425, 231 So.2d 375 (1970).

61. *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Property, Torts, Mineral Rights & Expropriation*, 31 LA. L. REV. 196, 217; 231; 263, 282; 325, 329, 335 (1971).

62. 258 La. 139, 245 So.2d 385 (1971).

which stated that article 669 was a vehicle for defining the limits of the *activities* of man in use of property as they affect his neighbors. The source, the error of omission in translation from French to English in our earlier texts, and the evolution of that article were discussed. I found that under article 669 we could, according to "the rules of the police, or the customs of the place," determine all of those activities of man which were insufferable inconveniences in vicinage requiring abatement or control.

Then in *Langlois v. Allied Chemical Corp.*,<sup>63</sup> the implication in *Reymond* and the concurring statement in *Robichaux v. Huppenbauer* came full circle to a final conclusion. Here, in a delictual action where all parties litigant agreed that the defendant was responsible for damage ensuing when a poisonous gas escaped from its plant, numerous theories and Code articles were argued as a basis for responsibility in order to advance or to meet the special defense to liability. Writing for the majority, I stated: "[t]heir [the parties'] dilemma is partially the result of inconsistency in jurisprudential assignment of a legal basis for allowing recovery for damages resulting from the dangerous and harmful activities and enterprises."<sup>64</sup> Our court then held that article 2315 was the basis for assigning delictual damages when man is at fault. *More importantly, however, we clearly and concisely held that "fault" in article 2315 encompasses more than just negligence.* We said:

"Here we find that proof that the gas escaped is sufficient, and proof of lack of negligence and lack of imprudence will not exculpate the defendant. The defendant has injured this plaintiff by its fault as analogized from the conduct required under Civil Code Article 669 and others, and responsibility for the damage attaches to defendants under Article 2315."<sup>65</sup>

We held the plaintiff's cause of action delictual under article 2315, and, "after a study of the law and customs, a balancing of claims and interests, a weighing of the risk and the gravity of harm, and a consideration of individual and societal rights and obligations,"<sup>66</sup> we concluded that the defendant had carried on

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63. 258 La. 1067, 249 So.2d 133 (1971).

64. *Id.* at 1073, 249 So.2d at 136.

65. *Id.* at 1084, 249 So.2d at 140.

66. *Id.*

an activity for which it must respond in damages if the activity causes injury to another even though the defendant acts as prudently as possible in the conduct of the activity. We held that the fault concept of article 2315 may be supplied by analogy from other Code provisions or statutes which lay down rules of conduct under particular relationships.

In these cases Civil Code article 667 was defined as a law of real property creating a predial servitude, and article 669 was defined as a non-property rule<sup>67</sup> and the source for determining the insufferable inconveniences and hazardous activities which the law would control for all in the neighborhood. However, apparently the value of a distinction between the two articles was not clearly set forth.

Finally in dissent in *Hilliard v. Shuff*<sup>68</sup> I tried to supply what I believed to be the cogent reasons for making the exacting distinction between article 667 and article 669 which had not previously been clearly stated in the jurisprudence. *Hilliard* posed the problem of whether to require abatement of a construction on property adjacent to the plaintiff's which the evidence established possessed high potential for causing serious damage. The majority relied on article 669, treating the inadequate storage tank which contained volatile fuels under high pressure as a "nuisance." The majority found some evidence in the record that the plaintiff had not been able *in fact* to fully enjoy his estate. It gave only partial relief, remanding for the trial court to find what remedy could be afforded so plaintiff could have full enjoyment of his estate. Undoubtedly there was high potential for damage from the fuel tank as constructed and used on the border of plaintiff's property. I found nothing in the record to support a finding that the plaintiff had in fact been damaged, suffered an inconvenience, or been deprived of the use and enjoyment of his estate, but I reasoned that I did not need to. I would, even in the absence of such finding, have ordered the removal of the offending tank or at least the abatement of its

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67. By the terms of article 669, there are not two estates, a dominant and a servient estate; it applies to people on the same premises, to the entire neighborhood, to people who are not owners or holders under any title susceptible of acquiring a servitude.

68. 260 La. 384, 256 So.2d 127 (1972).

present use under the property rule of article 667.<sup>69</sup> I reasoned that under this predial servitude the owner of the dominant estate, *on an objective finding* of probability that at some time he might be deprived of the enjoyment of his property or suffer damage because of the work or construction made upon the servient estate, had the right to cause its removal.

Because few if any legal principles stand in isolation, the court's examination of one principle under a particular set of facts must be limited to an acceptance of all other legal principles which bear only collaterally upon it. While the court may address itself to the correction of error in relation to one Code article or one statute, it cannot address itself to the whole body of law which may affect or be affected by the specific law considered. For example, the development of Civil Code article 2315 by analogy with Civil Code article 669 as a source for assessing damage from ultrahazardous or dangerous instrumentalities was dictated by the prior jurisprudence on other aspects of delictual responsibility. Earlier decisions had upon many occasions awarded damages in these instances directly under article 669 without requiring proof of any negligence. Our Civil Code article 2317, in the exact language of a provision in the French Code Civil article 1384, makes us responsible for "the things which we have in our custody." The French have assigned the liability for damages from hazardous activities and dangerous instrumentalities in the absence of negligence under their article 1384, but in numerous Louisiana cases, the last as recent as 1969, *Cartwright v. Firemen's Insurance Co.*,<sup>70</sup> our courts have said that we are responsible for things under our control under article 2317 only when we are negligent because that article is modified by Civil Code article 2315. Before *Langlois v. Allied Chemical Corp.*,<sup>71</sup> fault under article 2315 was defined as negligence. Therefore we could not remove the jurisprudential stricture upon article 2317 until we held in *Langlois* that fault, as expressed in article 2315, encompassed acts which cause damage other than negligent acts.

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69. LA. CIV. CODE art. 667: "Although a proprietor may do with his estate whatever he pleases, still he can not *make any work* on it, which *may* deprive his neighbor of the liberty of enjoying his own, or which *may* be the cause of any damage to him." (Emphasis added.)

70. 254 La. 330, 223 So.2d 822 (1969); see discussion in Comment, 44 TUL. L. REV. 119, 147-49 (1969).

71. 258 La. 1067, 249 So.2d 133 (1971).

In *Theriot v. Transit Casualty Co.*,<sup>72</sup> Mr. Justice Tate and I joined in a concurrence in a writ denial, noting that the rationale of *Cartwright* and the jurisprudence which limited recovery under article 2317 to negligence were no longer applicable. If the court follows the concepts of *Langlois* and this concurrence, Civil Code article 2317 may, with or even exclusive of article 669, under article 2315 provide a broader base for liability for damages from ultrahazardous activities and dangerous instrumentalities. Here may also be found a vehicle for resolving product liability cases. The future will be determined by the doctrine which develops around the cases and by the briefs and argument of the attorneys before the courts as they persuade the courts of this state of the correct position to be taken under our Civil Code.

The discussion of the cases involving articles 667 and 669 indicates the limitations upon a court when it approaches a problem requiring new rules of law. A court cannot lay down broad, general principles in a single piece of litigation under a particular set of facts. A court must weave these rules of law case by case, and the whole cloth cannot be seen until many particular issues have been judicially determined.

Although courts are not well suited for developing general statements of the law and although courts err in applying, interpreting, and developing law, it is apparent that jurisprudence, while not a primary source, is a valid source of law in some instances. Sometimes a legislature fails to fill a gap or to supply a new principle in place of one which has so fallen into desuetude that its application would bring an absurd result. Then the judiciary, which cannot avoid deciding a case before it, will finally evolve a broad principle or rule of law through a series of cases. It is such jurisprudence, formed in the exercises of this judicial function, which constitutes a source of law.

Actually, a court may move in the wrong direction and have to retrench when new rules of law are sought. *Rowe v. Travelers Insurance Co.*<sup>73</sup> and *Laird v. Travelers Insurance Co.*<sup>74</sup> are good examples of a learning process experienced by this writer. The two cases were factually similar, presented the same legal ques-

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72. 267 So.2d 211 (La. 1972).

73. 253 La. 659, 219 So.2d 486 (1969).

74. 267 So.2d 714 (La. 1972).

tion, and required the same judicial determination. Since both opinions reached the same result, neither need be said to be wrong in result. However, a different approach, different language, and a different rationale were used in each.<sup>75</sup> The error of using the wrong process in the judicial determination in *Rowe* was recognized in *Laird*, admitted, and corrected. A comparison of these two cases, which were decided only about two years apart, illustrates jurisprudential error and correction, and affords another reason for the validity of the principle that jurisdiction should not be the primary source of law. It also validates the Louisiana practice of overruling jurisprudence.

#### THE FUTURE OF THE RENAISSANCE

Perhaps the analysis of these writings will persuade the reader that the Louisiana judiciary is following the lead of the academicians and attempting to fulfill its role in the civil law tradition. If our courts are truly acting in the civil law tradition, the practicing lawyers of this state will find new challenges and opportunities and will assume greater responsibility for developing our law. If we recognize that the courts' first obligation in evaluating any case is to examine and research for an answer in the primary source of law, the codes or some other legislative expression, then the lawyer cannot necessarily determine the rights of his clients by finding a "goose case." He must first seek the legislative will through the codes and the statutes instead of the case law. If the written law is silent, ambiguous, or obsolete, he must look for other sources of law in preparing his case. The advocate will teach the court the underlying philosophy and theory of the principle he professes so that the court may ascertain the spirit of the law. Since jurisprudence is not one of the primary sources of law, the lawyer will most often cite and argue cases not as a source but as the rationale for the method of applying the law, as a basis for analogy, as an example of reason and logic, and as a good sample of judicial interpretation of the

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75. Both *Rowe* and *Laird* involved a stopped vehicle which only slightly infringed upon the lane of travel of the following vehicle, leaving sufficient room in that lane for passage. There was no traffic approaching in the other lane, and that lane of travel was unobstructed. *Rowe* used the proximate cause approach, and *Laird* used the cause-in-fact duty-risk approach. To the writer's mind the latter case presents the proper reasoning for the result which was obtained in each case.

law. The cases will be used for their doctrinal value after an evaluation of the sources stating the doctrine.

One reason for believing that civil law tradition will continue to strengthen in Louisiana is the mass of new doctrinal writings in the making, some of which are even now in the press. My work with the Civil Code has been greatly facilitated by the *Compiled Edition of the Civil Codes of Louisiana*.<sup>76</sup> There is soon to be published a new compiled edition of the Civil Codes of Louisiana which not only will afford a quick examination of the sources and evolution of our Code but will also include concordance tables and cross-references to all the existing translations and treatises and other works already published.<sup>77</sup> Also forthcoming are a work on predial servitudes, an additional work on obligations, a collection of original treatises on the civil law system in mixed jurisdictions,<sup>78</sup> and a book on Gény's theory of jurisprudence in the law.<sup>79</sup>

The appellate judges of this state have been given the opportunity for continuing education in the civil law tradition. This opportunity must be extended to the entire judiciary. First-year law students at some of the law schools are given the opportunity to study the basics of the civil law tradition, and I propose that this should be a requirement of curriculum at all schools. Only a few upperclassmen have had the advantage of an in-depth study of the philosophy and theory of the civil law tradition. I believe that all upperclassmen who intend to practice in Louisiana need an in-depth comparative study of present civil law systems as well as a study of the use of the civilian tradition in Louisiana's civil law system. Also, there should be a greater consideration of programs in continuing legal education for the practicing lawyer in the civil law tradition. The program should not be developed around single aspects of the civil law alone,

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76. 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA (La. St. L. Inst., Part I, 1940; Part II, 1942), published pursuant to La. Acts 1938, No. 165.

77. 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA (1972) (J. Dainow ed.).

78. THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS (1973) (J. Dainow ed.) a collection of essays by scholars with focus on Louisiana, Quebec, Scotland, South Africa, France, Germany, Israel, Mexico, and other jurisdictions.

79. J. MAYDA, FRANÇOIS GÉNY AND MODERN JURISPRUDENCE.



but should include an approach to a philosophical understanding and evaluation of the whole of the civilian tradition.

A discourse upon the renaissance of the civil law tradition in Louisiana must not omit mention of the Louisiana State Law Institute's continuous revision of the Civil Code. In addition to revision in that Code accomplished through the Institute's redaction of our new Code of Civil Procedure, the revision of Book II of the Civil Code is already well under way, and revision of Book III has begun. If this writer is correct in believing that a Civil Code is not a single restatement of law or jurisprudence but is a statement of the best law within the whole context of the system of law, then in revision it is to be hoped the legislature will not simply adopt prior jurisprudential statements or restatements of legal principles already outmoded and antiquated. The Institute should not fear to propose the very best law as it presents portions of the Code if that law fits within the total scheme of our Code. It is the obligation of the legislature to express through the Civil Code this state's public policy. If the legislature will not state public policy because the principle involved is controversial, it invites the judiciary to usurp the legislative function, for whether controversial or not, when an issue becomes a case before the court, a pronouncement of basic policy may necessarily follow from the decision of the issue. Under several articles of the Code of Criminal Procedure the redactors' comments actually state that because the law in that particular area was in a state of flux or that the resolution of the law was controversial, that Code purposely omitted to make a statement upon the law. When the legislature does this in one of our Codes, the lawmakers have relegated themselves to a secondary role in making law. They actually force the judiciary into a function for which it is not designed, which it does not wish to assume, and which would, except for the abdication of the legislative responsibility and the existing Code authority, be an unconstitutional exercise of power by the judiciary. As Professor Yiannopoulos has stated: "common law statutes have the force of law because judges permit it; in civil law judges can legislate because statutes allow the practice!"<sup>80</sup> As stated earlier, our Civil Code originally was a new statement of the best law as understood by the drafters. The re-

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80. A. YIANNPOULOS, *LOUISIANA CIVIL LAW SYSTEM* § 29, at 77 (1971).

vision of it should be a new expression of the best law which the reason of the people reflects through the will of the legislature.<sup>81</sup>

If this paper appears to overstate the present position of Louisiana's legal system or the academicians' and the jurists' roles in this system, this probably results from enthusiasm for future possibilities in the development of our legal system. In the judicial process in any system justice through reason must always be sought. Reason is generally better derived in a democracy through the consensus of the people who compose it as expressed by their representatives. But reason in particular cases has been assigned to the adversary arena of the courtroom, where the academically trained advocate tries to bring a court's mind and conscience to a decision of justice through reason. Reason cannot always be drawn directly from a consensus of the people's will as expressed through their representatives. When there is silence in the law, ambiguity, obsolescence, or absurdity or undue hardship in result, then the lawyer and the judge must work together to resolve the problem by supplying words or even changing words to receive the content which the community would give to them. It is here that all the legal profession will apply von Jhering's much paraphrased aphorism: "Through the Code but beyond it." As we go to the light to see, not the light itself, but what it illuminates, so we go to the Code for the enlightenment it provides.

To acknowledge that there can be no complete agreement as to reason under our institution of justice until it has been confirmed in the adversary arena of the court is to understand the purpose for which the institution was fashioned.<sup>82</sup> With that understanding the academicians, the attorneys, and the judges will together fashion and preserve a civilian tradition in Louisiana which will constantly seek for justice through reason—through law.

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81. Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 10 LA. L. REV. 59 (1949) and 23 TUL. L. REV. 478 (1949); Morrow, *Current Prospects for Revision of the Louisiana Civil Code*, 33 TUL. L. REV. 143 (1958); Smith, *Law Revision in Louisiana in Retrospect*, 19 LA. L. REV. 34 (1958).

82. E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).