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John J. Cerullo

University of New Hampshire, Manchester, John.Cerullo@unh.edu

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The Legal Subject and the Judicialization of French Civic Culture: *Fin de Siècle* Roots of Contemporary Controversies

John Cerullo

University of New Hampshire – Manchester

To speak of a "juridical turn" in contemporary France is, essentially, to describe a reversal of juridical values that had shaped republican legal theory and the republican legal universe from 1789 until well after World War II. In short, what seems to be turning is the relationship that had long prevailed between *la loi* and *le droit*.

As legal scholar Alec Stone has observed, since the Revolution *la loi* has mainly denoted specific enactments emerging from somewhere within the political order (legislative statute, executive order, etc.), while *le droit* has evoked "the complex interaction of legal institutions, jurisprudence, and legal scholarship" by which abstract juridical principles are generated, refined, and applied.¹ In short, *la loi* is imprinted with the hurly-burly of democratic political processes, *le droit* with disciplined, abstract juridical reasoning.

That distinction was a sharp one in republican legal theory throughout most of the nineteenth century, when the supremacy of *la loi* over *le droit* was all but unchallengeable. The former embodied the sacrosanct principle of popular sovereignty, with the legislature its

¹ Alec Stone, *The Birth of Judicial Politics in France* (New York: Oxford University Press, 1992), 31.

much-preferred organ, while the latter connoted elites' perceived inclination to check, qualify, or even subvert that sovereignty through judicial action. It was, in fact, an article of faith on the left for over a century that judges and jurists must be denied anything resembling the institutional autonomy and interpretive latitude enjoyed by the law courts of the Old Regime. Hence the implacable resistance of liberals and republicans not only to any semblance of judicial review, but even to the notion that constitutional provisions stand above legislative action.²

In the 1880s and 1890s, however, theoreticians of French public law began to break with that wisdom, providing the first theoretical spurs to a juridical turn that would not take institutional form for generations. The situation those jurists confronted was one in which the republican state, attempting to maintain a visibly tenuous social order, was called to intervene more and more regularly and deeply in social and economic affairs but with questionable legitimacy, since the skeletal constitution of 1875 contained neither a clear delineation of the scope of state administration nor a formal declaration of citizens'

² Stone notes the famous Paulin decision of 1833 to illustrate the force of this anti-judicial norm. In it, the newspaper *Le National* appealed an adverse court judgment on the grounds that the 8 Oct. 1830 law denying it a jury trial clearly contravened the Charter of 14 Aug. 1830. The Court of Cassation, however, found that the 8 Oct. statute, not the 14 Aug. "constitution," bound the courts, i.e., that there was no "fundamental" or constitutional law by which courts could overrule statutory provisions (Stone, *The Birth of Judicial Politics*, 26). I should also note, however, the influence of a dissenting, counter-Rousseauist tradition among progressive jurists as well. Benjamin Constant, in particular, vigorously defended the notion of rights anterior to the state and promoted a jurisprudence dedicated to their defense against legislative and executive encroachments.

fundamental rights.³ In fact, a set of legal scholars (Léon Duguit, Gaston Jéze, Joseph Barthelémy, and others) felt the times had left them no choice but to undertake a long-tabooed enterprise: the elaboration of extra-political – in fact, metajudicial – principles by which the legitimacy of state actions through its political branches could be determined.⁴

Focused especially on the role of the Council of State, these *fin de siècle* figures were the first moderns to theorize the ascent of *le droit* over *la loi*.⁵ It is hardly surprising that some of these jurists, forced outside the written constitution

³See David Bates, "Political Unity and the Spirit of Law: Juridical Concepts of the State in the Late Third Republic" *French Historical Studies* 28 (2005): 69-102.

⁴A good overview of the movement's aims can be found in F. Larnaude's "Notre Programme," *Revue du droit public et de la science politique en France et à l'étranger* 1 (1884): 1-14. The individuals who composed the movement were jointly committed to a number of principles: that the state ought to derive its mandates from an understanding of anterior conditions that had supplied its reason for being; that it was the function of *le droit* to interpret those conditions; that the legislative branch, as the most politically mercurial level of government, was the least reliable defender of fundamental national values. They differed, however, in their descriptions of those values that ought properly to check and channel state action, as well as in their degree of support for judicial review and other tangible means of institutionalizing their shared goal. It should also be noted that one of France's ablest public-law theorists of the time, Raymond Carré de Malberg, remained decidedly ambiguous toward the movement.

⁵While the emphasis here is on public law theorists, it should be noted that there were similar currents among civil law theorists as well (e.g., F. Geny's endorsement of "free scientific research" to fill in the inevitable gaps in statutory language; the movement for "teleological" interpretations of civil law provisions). See René David's *French Law: Its Structures, Sources, and Methodology* (Baton Rouge: Louisiana State University Press, 1972) for a good discussion of these currents, which remained rather modest.

in their quest for norms by which quotidian political life could be regulated, would look favorably on the core of the natural law argument: the claim that positive law is legitimate to the degree that it is consistent with a trans-historical moral order inferred from the structures and processes of nature itself.⁶ In fact, several produced either updated, secularized versions of natural law theory or palimpsests of its classical articulations.

Léon Duguit, perhaps the single most influential figure in the movement at the time, can serve as an interesting representative of it for us now.⁷ Duguit, like a good many republicans of the time, disliked classical natural law theorizing for its clerical associations and its "metaphysical," un-scientific reasoning. He found its treatments of subjective rights, for instance, little more than a hypostasized representation of the Christian soul. Yet Duguit, too, needed some delineation of the "natural" or its functional equivalent, some sort of extra-political polestar by which the work of the entire political order could be normatively templated. He would simply turn to social

⁶ Stone declares that, with all due allowance for its diversity, "No violence is done to this doctrinal movement by describing it in terms the physiocrats would recognize – in terms of natural law. It is, in essence, a natural law renaissance" (Stone, *The Birth of Judicial Politics*, 36).

⁷ Duguit was translated into English and rather well known in the U.S. His "The Law and the State," *Harvard Law Review* 31 (Nov. 1917): 1-184, is an excellent overview of his juridical thought. Harold Laski, "A Note on M. Duguit," in the same issue of that journal (186-192) testifies to Duguit's influence both within and outside France. For an interesting recent analysis of him, see Miguel Herrera's "Duguit et Kelsen: La Théorie juridique, de l'épistémologie au politique," in *La Science juridique française et la science juridique allemande de 1870 à 1918*, eds. Olivier Beaud and Patrick Wachsmann (Strasbourg: Presses Universitaires de Strasbourg, 1997), 325-45.

science rather than to theology to find it. Himself a trained sociologist, he would use the findings of his own and related disciplines to make a case for "solidarism" as the metajudicial standard by which the legitimacy of positive law could be measured, arguing that human beings are endowed with an ineluctable or "natural" sociality and that legislation tending to strengthen social bonds can in fact be distinguished from that which does not.

One wonders what Duguit and like-minded public law theorists of his day would think if they could survey French jurisprudence today. In a sense, it would appear that they have won. Certainly, the assertiveness of both what is now the Constitutional Council and the Council of State in public law (and, perhaps, the assertiveness of the Court of Cassation in private law as well) suggests that the relatively modest expansion of judicial power those *fin de siècle* figures sought has been realized.⁸ But some analysts argue that something else is happening, that the arc the juridical turn has actually taken is quite unlike the one its original prophets imagined.

Responding to what they perceived as a political malaise that left widening social fissures unattended, Duguit and his associates had sought a legal theory through which judicial bodies, and especially the Council of State, would more effectively focus and channel political

⁸ It should be noted that, institutionally, judicial review remains weaker in France than, for example, in the US. The constitutionality of legislation can be challenged in the Constitutional Council only prior to its passage and only if a significant minority of deputies or senators (sixty of either) supports the challenge. Nonetheless, in interpreting that particular body's power, we should factor in its role as conduit for evolving European Union jurisprudence. It does consider case-specific tests of the constitutionality of particular statutes in cases where French law is held to contravene EU law or decisions of the European Court of Human Rights.

energies. Today's juridical turn, however, seems less a strategy for energizing or directing the political branches of government than a transfer of authority from them to the judicial. Marcela Iacub, for instance, describes the current moment as "this period of intense juridification of political problems," and others echo her claim that juridical categories and modes of reasoning are assuming salience in public discourse once cast entirely in conventional political terms.⁹

Lucien Karpik, in fact, goes so far as to describe a transformation of the old, politically engaged citizen into a new, increasingly judicialized one, and he relates the latter's emergence to two coterminous processes.¹⁰ On the one hand, there is the seemingly inexorable triumph of the market-based society and its favored form of social relationship: the formalized contract, with rights and responsibilities neatly stipulated ("the contract has become

⁹ Marcela Iacub, *Penser les droits de la naissance* (Paris: Presses Universitaires de France, 2002), 2. Iacub goes so far as to propose that "one can only participate freely in the collective and negotiated creation of the political and moral norms of our common life, if one understands the meaning of the juridical rules through which it is increasingly essential to pass in order to construct that common world." In a similar vein, Alec Stone Sweet argues in his *Governing With Judges: Constitutional Politics in Europe* (New York: Oxford University Press, 2000) that legislative thinking itself is increasingly "judicialized" in France precisely by virtue of the tendency of parties that have lost legislative battles to challenge the constitutionality of their opponents' measures in court and, perhaps even more, by the tendency of ruling parties to frame bills in such ways as to preclude or win court challenges.

¹⁰ Lucien Karpik, "L'Avancée de justice menace-t-elle la République?" *Le Débat* 110 (2000): 238-57. This article further develops themes Karpik had presented earlier in his article "L'Avancée politique de la justice," *Le Débat* 97 (1997): 90-107.

the general form of economic and social relations").¹¹ At the same time, the economic and judicial structures of the EU, along with other factors, delimit the state's ability to arbitrate clashes among collectivities, to promote or retard group interests, through the legislative and executive modalities of old. Today, Karpik argues, the state mainly adjudicates conflicts among contractually bound parties through its judicial arm, in effect extending and perfecting formal contractualization as a social form. Indeed, in his view "a contractualized France is in the process of replacing a regulatory France, a judiciary France is substituting for a statist France."¹²

The result of these shifts, Karpik proposes, is a legal subject far more assertive in defense of his or her own interests; far less inclined to seek assistance from a political party or state agency than to bring suit as an individual against them; far more aware and protective of intrinsic, subjective rights than of social and political solidarities.¹³ It is notable, Karpik argues, that in landmark cases like the "Drac affair" (involving officials' responsibility for unleashing a flood that took several children's lives) and especially the "affair of the contaminated blood" (involving responsibility for contamination by the AIDS virus of blood reserved for surgical transfusions) plaintiffs demanded –

¹¹ Karpik, "L'Avancée de la justice menace-t-elle," 247.

¹² Ibid., 248.

¹³ Ibid., describing the enormous expansion of sexual prosecutions in France in recent years, notes French courts' new willingness to find for plaintiffs claiming inner, psychic trauma as a result of sexual violation, even in the absence of the visible, physical signs of violence or coercive action once thought essential before damages could be assessed. This represents, in his view, the assumption by individual plaintiffs in these cases of something heretofore reserved to the authorities, and to *la loi*: the right to help determine just what constitutes legally reparable loss.

and courts granted – nothing less than a reconfiguration of the compact between governors and governed, with a much heavier burden of court-enforced responsibility distributed across a much wider range of government administrators than anything previously known.¹⁴

The new "judicialized" citizen Karpik describes would seem to bear little resemblance to the one imagined by the original prophets of judicial empowerment.¹⁵ Oriented toward state initiatives, they envisioned the individual citizen as object, not subject, of *le droit*. But historian of law Yan Thomas, surveying the current scene, finds nothing less than a "subject juridically armed for mastery of himself and of the world, and bidding fair to realize that mastery on the technical field as well as the political."¹⁶

Featuring prominently in the "technical field" Thomas refers to is biotechnology and especially procreative technology, developments in which have catalyzed a series of legal decisions in France that may demonstrate better than anything else the full measure of today's juridical turn. Marcela Iacob, in particular, stresses the juridical consequences of advances in pre-natal diagnostic tools and treatment methods, in fertility treatments and the technology of third-party fertilization, and even, looming

¹⁴ Ibid., 243-7. See also Laurence Engel, *La Responsabilité en crise* (Paris: Hachette, 1995), and on "the affair of the contaminated blood," Olivier Beaud, *Le Sang contaminé* (Paris: Presses Universitaires de France, 1999).

¹⁵ David Bates describes the *fin de siècle* ideal as an "'administrated' citizen, no longer a vital participant in the sovereignty wielded by the state but the subject of a complex web of social and political forces, adjudicated by judicial institutions" (Bates, 73).

¹⁶ Yan Thomas, "Le Sujet de droit, la personne et la nature," *Le Débat* 100 (1998): 85.

on the horizon, in cryogenics and cloning techniques.¹⁷ Extensions of procreative choices for everyone – and especially their extension to those like menopausal women and gay and lesbian couples once without any procreative options at all – have represented something larger: an emancipation of human will and spirit over confines nature once firmly enforced. The implications for law and legal theory have been substantial. As willing subjects shed the shackles of the natural, they announce their triumph in the language of subjective rights: abortion rights, surrogacy rights, adoption rights, perhaps one day cloning rights – claims to the entire range of options biotechnology can provide. With each subjective right secured, of course, the gap between what is naturally and what is juridically ordained widens.

When we consider the new "judicialized" citizen in these terms – prepared, in effect, to pit the juridical against the natural – we can see that the juridical turn stands today in oddly ambiguous, perhaps even openly antagonistic, relation to the *fin de siècle* theorizing that arguably initiated it. It seems entirely fitting that we would find that relation cast into boldest relief by a case involving rights-claims within the procreative process: the strange, and strangely gripping, Perruche affair of just a few years ago.

The facts of the case are straightforward enough.¹⁸ In 1982, a pregnant Josette Perruche discovered symptoms of

¹⁷ Iacub describes the new "culture of procreation" in some detail and attributes to biotechnology, which increasingly liberates individuals from the constraints of the body itself, the impetus behind laws that ended legal recognition of limitations imposed by gender, sex, and age on individuals' rights (Iacub, ix-xxix). See also Olivier Cayla and Yan Thomas, *Du Droit de ne pas naître* (Paris: Gallimard, 2002), 91-4.

¹⁸ See the discussions of it in both Iacub and Cayla and Thomas.

what proved to be rubella on her four-year-old daughter. She told her physician that, if she too were infected, she would have an abortion rather than run the risk of giving birth to a severely handicapped child. Her physician arranged for two blood tests with a local lab and after reading the results informed Josette that she was in fact immunized against rubella. Both physician and lab were, in varying ways, quite wrong. About a year after his birth, Nicolas Perruche began manifesting major neurological deficits: deafness, partial blindness, and severe brain damage. For their part, his parents, Josette and Christian, initiated legal action against both the physician and the testing lab that had misdiagnosed Josette's condition and effectively nullified her right to an abortion.

The question was just what could they claim damages for under the terms of the 1974 law legalizing abortion? Courts were prepared to indemnify women in Josette's position for their loss of choice. But Josette and Christian Perruche went further, first seeking compensation to themselves for the medical liabilities Nicolas had suffered, and later acting for Nicolas himself in a separate suit and seeking direct compensation to their child, rather than to themselves. In choosing that course, however, they encountered a formidable juridical obstacle: the principle of "respect for the dignity of the human person."

This principle owed its increasing prominence in modern French jurisprudence to the reconsideration of legal positivism and concomitant willingness to subsume positive law under broader moral principles that characterized French and European jurisprudence after World War II.¹⁹ As such, it can be seen as a kind of

¹⁹ See the discussion of it in the first chapter of Cayla and Thomas. See also Thomas, "Le Sujet de droit"; and B. Edelman, "La dignité de la personne humaine, un concept nouveau," *Dalloz* (1997).

fulfillment of the goal that Léon Duguit and his colleagues had set for themselves albeit for reasons they could not have foreseen: the instantiation of an extra-political, metajudicial template for law and court actions through which state action could be channeled toward socially healthy ends. Philosophically, we might even understand "respect for the dignity of the human person" as partial heir to Duguit's "solidarism:" a means of prioritizing those benefits to which we are both collectively and anonymously entitled by virtue of our common humanity over any particular claims we might advance by virtue of our individual and particular needs, agendas, or situations.

By that reckoning, "respect for the dignity of the human person" is a principle that can, and generally does, qualify and regulate subjective rights. It certainly stood athwart the Perruches' desire to expand their own and, especially, to devolve some on Nicolas himself. The principle had been customarily invoked to preclude any French court treating any human life, handicapped or healthy, as, in and of itself, an "actionable damage" for which criminal liability must be somewhere affixed.

But the Perruches' cause was greatly boosted in the mid-1980s when decisions of the Council of State and the Court of Cassation established the theoretical possibility of distinguishing between a child's life, which clearly could not be indemnified, and a child's handicaps, which could be. At that point, the case entered a new level of disputation.

The defendants had already conceded their liability to both Josette and Christian. But to extend that liability to Nicolas, they argued, was to stretch it beyond all reason. His deficits, after all, did not trace back to anything the physician or lab had done; both Josette and Nicolas, in fact, had contracted rubella before either the physician or the lab

had even entered the picture. The real author of Nicolas' condition was, tragically but undeniably, nature. In fact, the errors of his mother's medical providers, by preventing his abortion, had (however inadvertently) saved his life. Could they possibly be penalized for this?

The final judicial act in the Perruche drama occurred in 2000, when the Court of Cassation, meeting in full plenary session, endorsed the report of Counselor Pierre Sargos and finally confirmed the defendants' civil liability to Nicolas himself for his own damages. In the meantime a torrent of commentary, mostly critical of the Court's decision, elevated the Perruche case to the status of full-blown "affair." The outcry from physicians and insurers was, perhaps, predictable enough. Less predictable, however, were protests from the handicapped community, many of whose representatives did agree with the defense's claim that the Court's decision had denoted Nicolas' very life, and by implication handicapped life in general, a civil liability. Most surprising of all was the degree of hostility to the Court's decision and its reasoning emanating from the legal community itself, including highly respected legal scholars.²⁰

The debate they conducted was multi-leveled and, in fact, a sort of extended consideration of the entire juridical turn in contemporary France. Certainly, the sheer reach of judicial action was an integral part of it, with opponents of the court's decision arguing that neither Nicolas' nor any other handicapped individual's treatment should be a matter for courts, where clashing individual interests are

²⁰ See Cayla and Thomas, 91-101. The General Counsel of the Court of Cassation itself, in fact, demurred from its action.

adjudicated; rather, it was a social question, for France collectively to decide through political processes.²¹

The question of "subjective rights" – arguably, the very essence of the juridical turn – was clearly at the heart of the tumult. Most controversially, there was the allegation by the Court's critics that, in indemnifying Nicolas for his very life, the Court had necessarily endowed him and every other handicapped individual with a new subjective right, as morally atrocious as it was materially absurd: a "right not to be born."²² The catchphrase proved incendiary. In creating such a right for the handicapped, critics charged, the Court was doing them no favor; rather, it was ominously aligning French law with a certain biological norm. There was a great deal of talk about euthanasia and, especially, eugenics as the logical culmination of the Court's action.²³ This discussion, inevitably, entailed

²¹In their article "La Vie humaine comme prejudice?," Catherine Labrusse-Riou and Bertrand Mathieu insisted that "justice is not compassion and the way of civil liability is not that of social assistance" (*Le Monde*, 24 Nov. 2000; reprinted in Iacub, 183-7). In 2002, legislation intended to prevent suits like the Perruches' from being brought before French courts ever again was passed. Senator René Garrec would lead off his report to the Senate on that legislation by asking "is it up to justice to compensate for inadequacies of national solidarity?" See coverage of the government's decision to act in *The New York Times* and the *Guardian Unlimited*, both 11 Jan. 2002.

²²The phrase originated in the decision of the Court of Appeal of Bordeaux on 26 Jan. 1995 [*Juriclasseur périodique* IV (1995): 1568]. Its public currency was much broadened by the writings of Jean Hauser, including "Encore le droit subjectif de ne pas naître: l'autodestruction de l'homme par l'inflation des droits subjectifs," *Revue trimestrielle de droit civil* 4 (1996), cited in Cayla and Thomas, 102.

²³Counselor Sargos, who authored the Court of Cassation's report (extracts of which are reprinted in Iacub), took particular pains to address this charge. Describing it as "a certain form of demagoguery," he argued that "eugenics implies a collective dimension, necessarily

reconsideration of another subjective right: the right to an abortion. Just how strong a right was it to be in France?²⁴ Was it evolving into a legal **compulsion** to abort when the fetus carried any risk of handicap? Was this right, like other subjective rights conferred through the juridical turn, horizonless?²⁵

criminal," which would in fact relieve individuals facing difficult decisions in matters of life and death of precisely the personal responsibility the Court was determined to locate and reinforce (in Iacob, 175).

²⁴ Obviously, abortion rights were a special dimension of the Perruche case. Whether the 1974 law had produced an unqualified "right" to an abortion or a more encumbered and qualified "tolerance" of it in specified circumstances (i.e., mere "depenalization") is still a debated question. It seems clear, however, that court actions, including the 17 Nov. 2000 judgment of the Court of Cassation on the Perruche case, have tended toward the former interpretation. Counselor Sargos addressed the abortion question with some asperity, suggesting that only a judicial idiot could possibly imagine that any hint of compulsion, under any circumstances, could ever be reconciled with the 1974 abortion law, which explicitly underscored the woman's liberty to make a difficult choice for her own reasons.

²⁵ This accommodation, or overt encouragement, of an ever-expanding range of subjective, essentially self-generated rights is what Marcel Gauchet and many others find most disquieting in the ascent of *le droit*. See, for instance, Gauchet's "Quand les droits de l'homme deviennent une politique," *Le Débat* 110 (2000): 257-88 or, better yet, his *La Révolution des droits de l'homme* (Paris: Gallimard, 1989). Gauchet's claim is that "human rights" have been inflated into "the central reference and daily touchstone of our societies," "the organizing norm of the collective conscience and the yardstick of public action" (Gauchet, "Quand les droits de l'homme," 259, 260). But, he continues, this has occurred at precisely the historical moment when the idea's utility has passed. The powerful collectivities – nation, class, church – that had once so severely circumscribed personal autonomy and against whose prerogatives "human rights" had once been defined are now, by virtue of the entire socio-political dynamic of modern history, enfeebled and "hollowed-out." Without those negative empirical

Supporters of the Court's decision argued with mounting exasperation that the entire question of a "right not to be born" flowed from a misunderstanding of fundamental features of legal reasoning itself. The claim that a finding of civil liability on the part of physician and lab necessarily entailed such a right conflated civil responsibility with biological causality. But, insisted the pro-Perruche camp, those are two different things: the latter is determined in scientific laboratories on the basis of scientific method, the former in courts of law on the basis of established rights.²⁶ In abstracting the rights-bearing legal subject from the organic person, Sargos had been guided immediately by Council of State and Court of Cassation decisions of the 1990s, but more generally, claimed his defenders, by a tradition that can be traced all the way back to Roman jurisprudence.²⁷ Indeed, argued pro-Perruche forces finally, to hold either judicial action or

referents, Gauchet claims, "human rights" have lost both definitional clarity and moral force, serving as little more than easy rationales for exploding whatever remains of collective discipline and responsibility.

²⁶ The Court's defenders argued that by anti-Perruche reasoning there would have been no civil liability in the "affair of the contaminated blood," since after all, it was not corrupt or inept officials who (biologically) caused the problem but the AIDS virus.

²⁷ Iacub, 190 (from her article "Il faut sauver l'arrêt Perruche," reprinted in *Penser les droits de la naissance* from *Libération*, 8 Jan. 2002). Iacub notes that "by two celebrated decisions in March 1996, the French Court of Cassation became the first supreme court in the world to also admit actions denoted in a strongly suggestive – but quite mistaken – manner 'wrongful life' in American law" (6). Yan Thomas, "Le Sujet du droit," has provided the fullest account of the pedigree of this notion, which, he argues, even Christian jurists of the medieval era never fully abandoned.

juridical logic hostage to the mandates of biology is "antithetical to the very idea of law."²⁸

But what about holding them hostage to a principle like "respect for the dignity of the human person?" Or, perhaps, to any other metajudicial limitation on auto-generated, subjective rights? Here, it seems, we approach the real significance of the Perruche affair. For the case confronted defenders of the contemporary juridical turn, and of the expansion of subjective rights it has entailed, with the ghost of their own *fin de siècle* forebears. Those forebears had understood that the articulation of some sort of extra-political, metajudicial principle was necessary to even a hypothetical elevation of *le droit* over *la loi* – and they hoped that judicial practice, i.e., a full juridical turn, would follow. In effect, the Perruche case compelled that turn's contemporary champions either to reconcile their current thinking with that conceptual legacy or to reject it outright. Each response was in fact attempted.

We find the first in the report of Counselor Sargos himself. Accepting "the dignity of the human person" as legal imperative, he argued with passion that granting Nicolas the right to sue on his own behalf for his own damages was in fact the only conceivable way to act on it. Would **Nicolas'** dignity be better served by denying him any agency in the eyes of the law? By acknowledging him only as a source of someone else's tragedy (his parents') and passing over his own?²⁹

²⁸ Yan Thomas writes "In the very long judicial tradition which leads from Roman texts to modern law through scholasticism, all intuitive and immediate access to nature, to the nature of things and to the equity that governs them, is antithetical to the very idea of law" (Thomas, "Le Sujet du droit," 118-9).

²⁹ Sargos (in Iacub, 170-80).

But there is another way to reckon with "respect for the dignity of the human person," and some supporters of the Court's decision may be prepared to take it. It is to deny the constraints of metajuridical principles in general – in effect, to sever fully any lingering connection with *fin de siècle* theory by repudiating all semblance of a natural law approach. By these lights, the rights *le droit* articulates are not doled out by lawmakers with an eye to their compatibility with some broader social good. Rather, rights are demanded by individuals confronting the specific range of problems and opportunities their own historical moment provides: the technologies, economic resources, and cultural and political options that characterize it will determine which rights individuals decide they need and which they do not. And law properly follows. By this reckoning, Nicolas Perruche's suit asserted not a "right not to be born" but rather the "right to be born healthy and safe" that modern technology and culture promise and that was quite rightly demanded for him.

The future of today's juridical turn may well be determined by which path is chosen.³⁰

³⁰ The 2002 law permits handicapped children to sue if the handicap was provoked or worsened by actions or decisions of medical providers, but it specifies that providers' failure to detect a fetal handicap or deformity is actionable only by the mother. Passage of the 2002 law was certainly aided by Perruche-like court actions that awarded damages to children born with Down's syndrome, a condition that, awful as it is, was held to be of a lower order than the massive neurological damages Nicolas Perruche had suffered. Legislators certainly feared that French law in this area was on a slippery slope, with doctors all but required to counsel abortion in cases where there were any indications at all of pre-natal problems.