Of the Civil Code and Us

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I. PREFATORY REMARKS

It is a joy and satisfaction to me to have been asked, so many years after my retirement, to give one of the annual Tucker Lectures. I hope my faculties have not so deteriorated with age that my effort will be found wanting.

Colonel John H. Tucker, jr., and I had a stormy relationship. For each of us the Louisiana Civil Code proved to be a consuming interest. We, however, had different opinions on the historical origins of the substance of the law it projects, he thinking wishfully of it as French and I knowing it to be Spanish. We also differed on a number of projects amending the Code or contradicting its principles, he and I having different conceptions of the legal order proper for the common good, conceptions based on different appreciations of the relationship of human beings to each other in the ontological order. I have no doubt that, were he alive today, Colonel Tucker would not like my having been asked to deliver a lecture in a series dedicated to his memory. But if he now enjoys the Beatific Vision—as I hope he does—he will have come to understand that I was right all along and will approve of what I have to say tonight.

My first encounter with the Civil Code came in the spring of 1936, during my last year in bachelor of arts studies at Loyola University in New Orleans. I had just learned that my mother's ancestors once owned half of Vermillion Parish and all the shell islands in the bay. Wondering if any could be left for the current generation, I thought it well to inform myself of the legislation relating to land transfers, successions, and acquisitive prescription. Shortly thereafter, while walking on the campus, I saw Paul M. Hebert and Joseph Dainow, the one then dean and the other assistant professor at the Loyola Law School. I introduced myself and inquired how I might go about my task. They responded very kindly, even though they must have thought me naive to think I could learn in short order all I needed to know about land titles. Professor Dainow even invited me to his office and showed me a copy of the Louisiana Civil Code, explained its general content and organization, and took particular pains to call my attention to the articles on acquisitive prescription. I went to work reading the Civil Code.

A passion for logic and order and simplicity of statement had been instilled in me at Jesuit High School and at Loyola. It was not long, therefore, before I
was able to appreciate the logic, coherence, unity, simplicity, and clarity of the Civil Code's statement of the substantive private law under which Louisianians lived. If my intention to study law had not yet become irrevocable, it became so at this point. Appreciation of the quality of the substantive law described in the Civil Code, of course, had to await its systematic study, which I began the following fall. To speak in metaphor, the shape of Miss Louisiana Civil Code was enough to make her my mistress. Once I learned of her ancestry and character, I found her all the more attractive.

Tonight I shall try to describe the shape of Miss Louisiana Civil Code when I first met her and note some of the changes in her appearance wrought by the attentions of men. Then I shall describe the elements of her character in her pristine purity and note how they too were altered in time. Finally, I shall speculate on what we may do to heal and rejuvenate her and to teach ourselves to show her more respect.

II. THE FORM OF THE LOUISIANA CIVIL CODE

No part of a people's law is more reflective of its culture than what traditionally is known as its civil law, that is to say, its domestic, private, non-commercial, substantive law. A civil code is an attempt to express the general scheme of this civil law in a reasonably brief, would-be complete, orderly, coherent, and integrated fashion. To accomplish this there is of necessity a certain degree of abstraction, even to the point that sometimes a principle will be stated as a rule, permitting its application to a myriad of life situations readily recognizable as occasions in which the principle should prevail. Language becomes extremely important here. Simplicity of sentence structure and use of layman's non-technical vocabulary, rather than legalese understood by law professionals alone, should characterize it. Indeed, a civil code should be so well written—not drafted—that even the layman reader should be able to recognize that the legal regime described there conforms to and reinforces an order consistent with a proper understanding of the relation of human beings to each other in the ontological order and consistent with the culture of the people and the physical environment in which they live.

In all these respects, we in Louisiana have been blessed by our Civil Code. That we have had such a good one can be attributed principally to two factors, that the French and Spanish peoples in Louisiana at the time of their coming under United States domination were determined to retain the Spanish civil law under which they had lived,¹ and that by 1806, when it became necessary to

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1. Louisiana was under Spanish domination and law from 1769 to 1803, when the Territory was acquired by the United States. Most of what is now the State of Louisiana was carved out of the Louisiana Territory by the United States Congress in 1804 and designated the Territory of Orleans. The determination of the residents of the Territory of Orleans to retain the civil law portion of the Spanish law in force is manifest in the Orleans Legislative Council's Act of 1806, vetoed by Governor W.C.C. Claiborne, identifying the laws in force in the Territory of Orleans, and the
prepare a digest of that Spanish law in French and English in order to be able to preserve it, the French Code Civil of 1804 and its last preliminary draft, the Projet of 1800, were in existence to serve as models of organization and verbiage.

I do believe that it would have been impossible for our local jurists to compose an adequate digest or codification of the Spanish civil law, in the short time available to them, if the French models had not existed. Spain itself had nothing of the kind at that time. Indeed, it is a tribute to Louisiana's jurists that the first Spanish Civil Code, in 1889, in some respects imitated their work. But using the French Code Civil and its Projet as models of form or organization and taking the very texts of these documents where they expressed Spanish law as well as French or could be altered to do so, our commissioners produced A Digest of the Civil Laws in force in the Territory of Orleans in 1808. This “Spanish girl in French dress” was the forerunner of our Louisiana Civil Code of 1825 and the Louisiana Revised Civil Code of 1870, which retained the French form and essentially Spanish character.

The organization of the Louisiana Civil Code proper, then, is similar to that of the French Code Civil. After a Preliminary Title on Law in General, the entire subject matter of the civil law is divided into three main parts, or Books. Book I treats of persons, the subjects of the law; Book II, of permissible interests in things, or patrimonial goods, the objects of the law; and Book III, of the acquisition, transfer, and loss of rights to things. Today, a Book IV, on the Conflict of Laws, has been added, asserting Louisiana’s understanding of its jurisdiction and that of other states and nations to have their laws apply to particular persons, things, and events. I must note the inappropriateness of making this subject a part of the Civil Code, even though its Preliminary Title always contained a few articles on it. That inappropriateness lies in this, that jurisdiction between the States of the Union properly is a matter of United States Constitutional law, though neither the Congress nor the United States Supreme Court is very ready to provide the norms; and jurisdiction between Louisiana and foreign nations is a matter of international law, not of federal law or of Louisiana law. It is well for Louisiana to specify legislatively what it believes those jurisdictional norms to be; but the subject matter does not belong in a code specifying Louisiana's civil law. Miss Louisiana Civil Code, then, has been

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3. U.S. Constitution, Article 4, Section 1, the “full faith and credit” clause.

4. The advent of nationalism and positivism in the 19th Century brought with it the tendency to reduce international law to national law applicable to international situations. This is an unacceptable notion. Finding the appropriate norms for legislative and judicial jurisdiction in international matters is no different from finding the legislative or judicial norms for national or state law in the absence of legislation.
fitted with a disfiguring bustle. Here I will ignore the bustle and comment on her shape proper.

To understand the organizational genius of the Civil Code, the content of each book may be examined briefly. Book I, on persons, contains the legislation on the general capacity of persons to act for themselves; their representation if under the age of majority or found by judgment of a court to be incapable of acting for themselves by reason of a disability of mind or body; the laws on marriage and divorce; those on filiation and adoption; and the laws on the personal obligations of those related to each other by marriage, blood, or adoption. All these laws, with few exceptions, are imperative laws, that is to say, laws that may not be waived or modified by unilateral will or by agreement because it is in the interest of good order or good morals that they be observed. Book II describes the interest in things permissible by law: ownership, the personal servitudes like usufruct, use, and habitation, and servitudes over land. These laws, too, are imperative, for it is in the interest of good order that the forms of property be uniform and as simple as possible.

Book III is far more complex than Books I and II, but it has unity in that its many legal institutions have a common denominator: all relate to the acquisition, transfer, and loss of patrimonial things. Purely interpersonal rights and obligations are not within its province. Accordingly, its principal theme is liberty. One may act juridically as he pleases, subject to restrictions by imperative law only in the interest of good morals and the common good. Thus a testator may do as he pleases with his assets as long as he disposes only of lawful kinds of interests in things and realizes, for example, that a disposition violating a descendant's right of forced heirship will make it possible for that descendant to claim his legitime. But Book III not only provides rules on testaments, it also provides suppletive laws on intestate succession, that is to say, laws that relieve a person of the task of making a will if he or she is satisfied with that distribution of his assets the law considers just and in keeping with the wishes of most persons in the circumstances of the deceased. In a similar fashion, one has the maximum liberty to contract in patrimonial affairs, subject only to restrictions in the interest of good morals and the common good. Spouses, for example, may enter into a marriage contract specifying what interests each shall have in their assets on hand at marriage or acquired thereafter and which of them can manage or dispose of them; but if they fail to contract, or to the extent they do not provide differently by marriage contract, the suppletive law on the community of gains will apply, specifying rules presumably just and hopefully in keeping with the culture and probable wishes of the spouses. And similarly again, there are suppletive laws on contracts in general and on sale, lease, loan, and all the usual contracts, which fill in the details of contracts executed in more general terms. The seller, for example, is presumed to warrant the object's fitness for the use intended if he and the buyer do not agree otherwise; and the lender who does not demand interest when making the loan is, by suppletive law, deemed to have intended to lend gratuitously, unless there is a usage to the contrary. These suppletive laws render lengthy instru-
ments unnecessary, but lawyers and notaries tend to want to create the illusion their fees are justified.

The remainder of Book III is largely of imperative character. The obligations arising from lawful voluntary acts in the interest of another, from unlawful acts causing injury or damage, and from displacements of patrimonial assets without legal cause, are all subject to imperative laws. Imperative also are those laws on preferences among creditors, and those pertaining to the acquisition of un-owned things by occupation, the acquisition of things owned by others by possession for a period of time, and the loss of rights to things by the passage of time.

The Civil Code, then, brings order to complexity, and does so very economically, in a short and relatively well written book. The Louisiana Civil Code is not unique in this virtue, but it does possess it. Having the opportunity to consult a relatively short and well written book containing an official authoritative statement of the essential principles and rules of a major segment of the legal order is an advantage that our brethren of the Anglo-American legal world have not experienced with regard to their traditional civil law, evidenced as it is by a multitude of judicial decisions in Common Law and Equity from which one must extract at his peril the law's principles and rules.

Indeed, whereas the Anglo-American lawyer, when dealing with unenacted Common Law and Equity, seeks always to find in his sources—the previous decisions—a way to contend the "law" is as he would wish it to be, and thus is seeking always to re-invent the law, the lawyer working with codified civil law should inquire how his situation already has been ordered by the enacted law. If he finds the rule applicable to his situation unjust, his remedy is not through the judiciary, but through the legislature. The lawyer and the judge ought not to participate in the making of law, though they of necessity participate directly in its application and incidentally in its interpretation.

This requires that a civil code be written simply, clearly, with internal unity, and as free as humanly possible of all ambiguity. Here, the language clarity, style, and simplicity of our Civil Code must be appreciated. As mentioned before, the French texts of the articles of the Digest of 1808 often were copied or adapted from the French Code Civil or its Projet, whenever they expressed, or could be altered to express, the Spanish law; and the elegance and directness of the French Code Civil is acknowledged universally. The articles added to the Civil Code in 1825 often were taken from other French sources and usually of good style. The articles written in French by our codifiers often were less well done, but graceful enough, and the English translations of the French texts generally have been quite clear if less worthy in style.

The Civil Code, indeed, was written to be a book for the people, not simply for lawyers and judges. This was true for the French Civil Code, where a major purpose of codification was the proclamation of a new uniform legal order to replace the vast multiplicity of local customs. It was hoped every poilu would carry a copy in his pocket, to read it during wine-breaks, and thereby learn and appreciate the new civil law. Here in Louisiana our original objective was to state the Spanish civil law in force clearly and simply, in French and English, the
languages in predominant use, so that all the population might know what it was. Published as they were originally, without titles to articles, without cross-references, case references, comments, and notes of various kinds, our Digest and Codes were eminently readable documents.

The official edition of the Revised Civil Code of 1870 was a relatively small hard bound volume of 514 pages in all, of which 438 were devoted to the Code's Table of Contents and the text of the Code itself, and 73 to an index. The volume contained nothing else. Not only could it be carried and held in hand easily, but its articles in any Title or Chapter could be read continuously, as a whole, as they should be, so that the relationship of each article to the others as parts of the whole could be understood.

Since 1980, however, the bulk, the format, and the extraneous material content of the only available one-volume edition of the Louisiana Civil Code have increased steadily. It is terribly bulky. There are 1424 pages in the 1998 edition. The pages are large, measuring 9 13/16 inches by 7 5/16 inches. The texts of the Civil Code proper, with extraneous material between those articles recently revised by the Louisiana State Law Institute, occupy 742 double-columned pages. They will occupy more pages as the Louisiana State Law Institute continues its work of revision. In addition to a Table of Contents for the entire volume, which includes a complete Table of Contents for the Civil Code, there is a so-called Numerical Analysis of the Civil Code, really nothing more than the Civil Code's table of contents expanded by listing each article by number and its unofficial, editorially added title. This uselessly takes up fifty pages. Then there are other features too numerous to detail completely: a table of changes made by the last legislative session; a preface; two guides on the use of the publisher's research tools; a foreword; a discourse on the Civil Codes of Louisiana; a reprint of Title 9 of the Revised Statutes, the so-called Civil Code Ancillaries; and various tables ad infinitum.

The various features mentioned above can have some utility, and thus the volume is a useful single-volume research tool. But they complicate the effort to read the Civil Code as the simple, direct, comprehensive, and readily understandable work it is intended to be. No doubt having a big book, updated and republished every year, coupled with a failure to publish a supplement with recent changes that would make older editions usable, is to the financial advantage of the publisher and to that of the editor, for then the number of volumes sold, the price, and the royalties all increase.

The most objectionable features of this book from a theoretical point of view, however, are two, and blame for them can be placed at the feet of the Louisiana State Law Institute for recommending them and at those of the Louisiana state legislature for adopting them. As the Institute proposes revisions of portions of the Civil Code, it provides an unofficial title for each article and an extensive commentary on such things as the history of the text, the reason for

5. Louisiana Civil Code 1998, one of "West's Louisiana Deskbooks."
the changes in wording, judicial decisions applying or interpreting the previous text, and so forth. The legislature enacts revisions of the Civil Code in bills that contain not only the articles' texts as revised, but also those distracting and sometimes inaccurate article titles and revisors' comments. These titles and comments are declared not to constitute part of the law, but are published with them, and often their language would limit or expand the meaning that the text of an article seems to have. Thus in fact the articles themselves often no longer convey exactly the intended meaning of the legislated law. I know from my own experience, in the seventies, as a member of the Council of the Louisiana State Law Institute, that often the objection that a proposed article did not convey its full intended meaning was countered with the decision to "take care of that in the comment." This is a sloppy way to write a civil code. Indeed, when the Louisiana State Law Institute completes its revision of the Civil Code it will be necessary to rewrite it so that its full meaning can be derived from its texts, at least if we wish to have that great benefit of codification, the restriction of positive law to the legislated texts (except for the rarity of custom).

III. THE CHARACTER OF THE LOUISIANA CIVIL CODE

My inquiry into the character of the Louisiana Civil Code will seek answers to three questions: First, what institutions of our civil government may specify the rules of the legal order we know as the civil law? Second, what norms should inspire this specification of the civil law? Third, what norms or principles of order do we find explicitly or implicitly in the law specified in the Civil Code? Answers to the first two of these questions can be discovered from an examination of the articles in the Preliminary Title of the Civil Code on Law in General. The answer to the third question must be extracted from the articles in Books I, II, and III.

A. What Governmental Institutions May Specify the Law?

Under the Civil Code only legislation and custom may be considered (positive) law. Neither the Digest of 1808 nor the Civil Codes of 1825 and 1870 permit the decisions of judges to be considered declarative of authoritative rules of law. True, a judicial decision must operate as a definitive interpretation and application of the law for the particular parties in the particular controversy. That is its function. It also may serve as a guide to what should or should not be considered a proper interpretation or application of the law in future similar cases; but it may not be considered to project an authoritative rule for the future.

Very clearly then, according to the Civil Code, authoritative positive law is always either legislation, a product of the judgment and will of the people's

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6. See, for example, Article 1575 as amended by Act 1421 of 1997 and Comment (c).
elected representatives in legislative assembly, or custom, a product of the judgment and will of the people themselves expressed implicitly and informally by their general acquiescence in actions and solutions practiced uniformly over a period of time.

Of course legislation cannot be expected to be infallibly complete. It is a human product. Custom sometimes arises to fill a gap, but often neither legislation nor custom will supply the rule of order. In that event the Civil Code directs a resort to equity.  

B. The General Norms for Legislation and Custom

Are there any particular norms that legislators are to follow when specifying the law? The Civil Code does not answer the question explicitly, but I suggest it does implicitly. If judges are expected to appeal to equity when the positive law is silent, then it must be because that is the proper source of norms for the legal order. It would be inconsistent to require judges to appeal to equity in deciding an unprovided for case and to free the legislature of the same norms. Custom, too, being a form of law, must be subject to the same norms.

What, then, is the content of “equity”? The Digest of 1808, the Civil Code of 1825, and the Revised Civil Code of 1870 as enacted all defined “equity” as an appeal to “natural law,” “reason,” or “received usages.” The text came into existence for us with the Digest of 1808, which, it is to be remembered, was a digest of the Spanish law in force. It should be correct, therefore, to assume that “natural law” was intended to have the meaning attributed to it in Spain, judgments about proper human order both consistent with Spanish culture and based on the understanding that all men ontologically—by creation—form a community of mankind under God and, being a community, are obliged morally to respect each other and to live and act cooperatively with each other for the common good. It is to be distinguished from the “natural law” of Enlightenment thought, which had not reached Catholic Spain in 1803. This Enlightenment “natural law” did not acknowledge the ontological community of mankind. On the contrary, it regarded each person as an individual unrelated to others in the order of being, capable of association, but not members of an ontological community. Thus respect for others and cooperation for the common good were not morally obligatory, but only dictated for individual selfish concerns. Positive law and other conventions thus were deprived of morally obligatory force. Certainly it was the Spanish conception of natural law and not that of the Enlightenment that the Civil Code recognized.

9. The Article was numbered 21 in the Digest and in the Civil Codes of 1825 and 1870 as enacted.
10. The classic formulations are those of Hobbes and Locke. Modern versions are those of Rawls and Dworkin. For an excellent appreciation of the latter two philosophers, see Jindal, Relativism, Neutrality, and Transcendentalism: Beyond Autonomy, 57 Louisiana Law Review 1253 (1997).
In 1986, however, in revising the Preliminary Title of the Civil Code, the Louisiana State Law Institute substituted the term “justice” for “natural law” in the definition of “equity.” The revisors’ comments state the change in wording does not change the law and that it was made because “natural law . . . has no defined meaning in Louisiana jurisprudence.” This should not have been surprising, for “natural law” is a philosophical concept, not one of positive law. Yet neither does “justice” have a “defined meaning” in Louisiana jurisprudence. But these comments do not themselves constitute law, and hence the change in wording may be regarded as a change in the law. Indeed, I am compelled to suspect that a change in the law was intended because the revisors wished to render Louisiana law more secular. With “justice” not having a definition in Louisiana law, it may be inferred that the revisors wished to limit the content of “justice” to notions to be found explicitly or implicitly in the positive law. The entire legal order, therefore, would have to be considered the creation of legislators not bound by any norms exterior to their collective will and “justice” equated with the positive law and its implications. This positivistic notion is very prevalent in other legislations. It is, however, an insult to human dignity and to the Creator who gave men their dignity by giving them free will and the intellectual capacity to discover norms for its exercise.

The same attitude is reflected by other changes in articles already revised by the Louisiana State Law Institute. Thus “natural justice” has been eliminated; the concept of “duty” has been suppressed because of its strong philosophical overtones; and “moral obligation” has been reduced to a second class legal obligation implied by law. I may note too that “public order and good morals” and “public good” have become “public interest” or “public policy.” Both terms are in the positivistic tradition, that is to say, in which the denial of the possibility of knowing anything to be true if it is not demonstrable empirically leads to the necessity of inventing, or positing, norms of action. “Interest” is used in the positivistic vocabulary to designate a subjective advantage or preference, without concern for its justification in terms of the ontologically indicated good. Indeed, “policy” is positivism’s substitute for “principle” and “value” its substitute for “good.” “Policy” is one’s norm or suedo principle because he likes it and wills it. “Value” is what one chooses as a good for whatever reason he may have. It need not have philosophical or theological justification. The positivist posits his own criteria. He is his own god.

The implications of this substitution of this so-called “modern usage,” for words having traditional meaning consistent with an understanding that morals are discoverable through philosophy and revelation, has serious consequences.

12. Article 1760 as enacted by Act 331 of 1984, replacing former Article 1757, and Comments (d) and (e).
13. Article 7 as enacted by Act 124 of 1987, replacing in part original Article 11.
If nothing is otologically either good or bad, right or wrong, then the meaning of discussion and dialogue have changed radically. No longer are they efforts to discover what is true or good. They have become power struggles in which assumed positions are paraded about in the hope they will be accepted. And because nothing is either right or wrong, there is absolutely no criterion for anything other than selfish gratification or advantage; and then law cannot bind in conscience. Marriage, partnerships, indeed conventions of all kinds, including political societies and their laws, logically can be regarded only as arrangements for selfish concerns, to be flaunted and ignored when selfish advantage is not achieved through them. A society cannot continue long in this way without being regarded as an arena for competition and conflict resolution rather than for the specification of a cooperative just order.

Possibly we in Louisiana had been saved from this positivistic development until now because the Civil Code itself acknowledged "natural law" and "natural justice" as sources of ordering principles for the legal order. With the elimination of "natural law," "natural justice," "public good," and "good morals" from our legislation's vocabulary, however, there is danger that we too will join the ranks of the positivists.

C. Principles Explicit or Implicit in Books I, II, and III

Before attempting to elaborate on some of the main principles of order we find in Books I, II, and III of our Civil Code, it will be well to state as succinctly as possible the general criteria by which I judge they should be appraised.

In order for positive law to be morally good it must be founded on the truth that otologically persons exist, not as autonomous individuals, but as members of a community of all mankind. The source of this community is a sharing in transcendence that all can experience and that unites all in a whole of which each is a part. Accordingly each person, as a part of the whole, is obliged morally to respect all others and to live in a manner consistent with the good of all others, the common good. In short, mutual respect and the common good morally require the cooperation of all. All selfishness and exploitation of others must be avoided. The function of law is to provide an order for living that specifies how best this respect and cooperation may be realized, taking into consideration the culture of the people, the environment in which they live, and the fact that, as persons with God-given capacities for observation, reflection, and free will, they must not be denied self-determination except to the extent required by the common good.

1. Mutual Respect and Cooperation in Life the Fundamental Principles

In my judgment, the principles of mutual respect and cooperation for the common good underlie the entire Civil Code. I think of them as being the essence of what Justinian meant by his first precept of the law, honeste vivere,
or live honorably. Indeed, I believe they should be seen as including the remaining two of Justinian’s precepts, alterum non laedere and suum cuique tribuere, or harm no one and give everyone his own (or his share?). But here I shall restrict my remarks to institutions of the Civil Code falling more directly under the precept honeste vivere, or live honorably, or show all men respect and cooperate with all for the common good.

a. The Basic Institution Eliciting Cooperation

Nowhere is the principle of cooperation more clearly manifested than in the institution known to the Romans, and to the legally trained at least, as negotiorum gestio, the undertaking and management of an affair for another without obligation or authorization. I consider it the basic institution of the civil law. Under the Civil Code of 1870, the person who undertook such a performance in the interest of another was entitled to his expenses and costs, even if his endeavor was not successful, as long as his intervention and performance might be judged objectively as “useful” to the other, to use the Roman law word, or as “good management” for the other, to use the phrase of the Civil Code itself. There was no requirement that the other (“the principal”) be aware of the voluntary undertaking, or that it be in conformity with his actual wishes, unless the gestor knew them. The important criterion was the “utility” or “good management”, or, in my words, the quality of cooperation judged objectively.

Thus the law recognized that even though the mode or instance of cooperation had not been specified by legislation, custom, contract, or authorization, and perhaps actually was not desired by the principal, one was always to be encouraged to act for the benefit of another if his action could be recognized objectively as an act of cooperation.

The French Code Civil extended the same range of application to negotiorum gestio, but the advent of individualistic thought brought with it the restriction of the institution in other legislations. Thus the Austrian Civil Code of 1811 required a necessity for acting to prevent imminent damage to the principal’s interest, or an instance of evident, paramount advantage to him, and the German Civil Code of 1900 required that the intervention be conformable to the actual or presumable wishes of the principal. Recently the Louisiana State Law Institute, its reporters and council apparently being largely of an individualistic mind, have restricted the gestor to instances of “necessity” of action to protect the principal unless the gestor first obtains the principal’s consent. In the latter case, of course, there really is no case of negotiorum gestio, but
actually a contract between principal and gestor. Thus our Civil Code has been rendered less tolerant of voluntary cooperation. Perhaps we should be thankful that the lawfulness of voluntary cooperation is yet to be found at all in our new negotiorum gestio rules, even if it is limited to instances of necessary action to protect interests of the principal. The modern Anglo-American private law, being highly individualistic, though Anglo-American public law is not, does not even recognize the institution.

b. Cooperation by Agreement—Contract

Only in negotiorum gestio does one find the generation of a legal obligation otherwise than by provision of law or custom, on the one hand, or by private juridical act on the other. The objectively well-conceived intervention by the gestor, coupled with its appropriate execution, operate to convert the general moral obligation of cooperation into a specific mode of cooperation that can be given legal recognition. The Civil Code used to have an Article 1757 that testified generally to the process. It in effect declared that unspecified moral obligations were given no effect in law, but that once the moral obligation was specified in some way it could have force as a natural obligation or as a civil or legal obligation, depending on whether the requirements of the law for civil obligations had been met. Today the idea of a general moral obligation on ontological grounds has been abolished and "moral obligation" exists only where the law posits it. 21

The matter is of considerable importance. Contract, for example, derives its legal force from the consent of the parties, but it derives its moral force from the fact it specifies how the general obligation of cooperation shall be particularized in the particular instance. Unless the contract results in the specification of a previously existing moral obligation the parties are morally free to ignore it. Of course the positive law may say there is a legal obligation, but all this means is that the defaulting party may suffer consequences, usually being compelled to pay damages or to suffer a damaged credit rating. As a result, if we look to the positive law alone, a party is free to calculate what course of action is more in his selfish interest and act accordingly. Thus the certainty of transaction is lost, with attendant damage to faith and trust in people in the daily affairs of life. We all have perceived this in our time.

Recent developments in contract law here and internationally reflect a consciousness of the essential necessity of making contracts fairer and of demanding more good faith in agreement and performance. Recent changes in the Civil Code's articles on obligations reflect that. 22 But in my mind, this is not enough. Persons will be well advised to abide by the new norms for selfish reasons, but, unless the law emphasizes that the law binds morally as well as

21. Articles 1756 and 1760, as enacted by Act 331 of 1984, and Comments thereto.
22. See for example, Articles 1759 and 2003 as enacted by Act 331 of 1984.
legally, we can expect to continue to encounter avoidance of the law or its breach whenever selfish interests are strong enough, and the chance of being made to suffer consequences remote. This is why I believe that the Civil Code should state clearly the moral bases of negotiorum gestio, contract, and all other institutions of which it treats. The law should teach, as the Spanish law formerly in force emphasized.23

c. Required Cooperation—Intra-Family Obligations

The instances of negotiorum gestio and contract are instances of voluntary cooperation among men. There are areas of life, however, in which cooperation is required. Rarely is this true among strangers. But among family members it is the general rule.

Thus the law imposes imperatively the general personal obligations of husbands and wives to each other, and, in earlier days, did not recognize divorce. Marriage, after all, is the foundation of family life, and family is the foundation for civilization; but now divorce is easy. Similarly, because children must be reared properly in terms of support, discipline, and education in matters divine and secular, and their assets administered, not only must parents do their part, but, in their absence, blood relatives, even collaterals, are obliged to accept the tutorship of children if the parent dying last has not appointed one.24 Originally the appointment of a tutor and his administration in principle required the assent of a family meeting, that is to say, a meeting of members of the minor's extended family,25 and thus emphasized the cooperation expected of family members. Beginning in 192626 the family meeting could be dispensed with, and in 1950 it was abolished, only a judge's approval being required.27 Thus the extended family's role in the rearing of children has been reduced. Until 1972 ascendents and descendents were obliged to render to each other all services (even personal ones) required in the event of insanity,28 but now under the civil law insanity calls for support only, not personal care, and then only if funds are not obtainable from other sources, another sign of the relaxation of required family cooperation.

The principle of cooperation among family members was evident also in the way in which the Civil Code provided for a sharing of wealth among them. Although under Spanish law, evidenced by the Digest of 1808, the matrimonial regime between husband and wife was primarily a matter of contract, as it remains today, the community of gains—a sharing of their earnings, fruits, and revenues, and things acquired therewith—was a "necessary part" of every such

23. Las Siete Partidas de la Ley (1348) 1.1.1, 4, 10.
26. Act 319 of 1926 was the first of several.
28. Article 229, par. 2, now repealed.
This remained in effect in Louisiana only until 1825, however, when for the first time the community of gains could be avoided. This was the first blow against family sharing of wealth. 

Among blood relatives—and one must remember that in Louisiana the notion of family was limited originally to legitimate relatives by blood and only later expanded to include relatives by adoption—wealth was indeed familial. Thus fathers and mothers by the general rule even today enjoy inalienably the fruits and revenues of the unearned capital of their minor unemancipated children, which revenue thus becomes available to the parents for their and their other children's needs. Parents have always owed support and education to their children, of course, out of any means they have; but over and above this, by the general rule until 1979, as I interpret the Civil Code, ascendants and descendants of every age owed each other alimony when one was relatively in need and the other enjoyed more income from property than he needed for himself.

Both need and ability to pay were relative to the circumstances of the parties, and the legitimate person seeking alimony did not have to show inability to provide for himself. No legitimate person was to be expected to earn his living if his or her ascendants or descendants enjoyed income from capital assets in excess of what they required for their own living. Thus a young man or woman might very properly choose to forsake money-making and devote his or her time and talents to other purposes, perhaps to charitable service, to free legal advice to the poor, to theological, philosophical, literary, or scientific studies, or simply to observing the beauties of nature along the beaches. Wealth indeed was familial. Illegitimate children also could demand alimony from their fathers and mothers and, after the death of either, from the heirs of the deceased parent, out of the revenue of property inherited by them, though only to the extent necessary to supply basic necessities of life and only if they could not earn their own living and had not been provided with capital sufficient for the purpose. But today much has changed, even legitimates are restricted in

29. Digest (1808) 3. 5. 10.
31. Article 223.
32. Article 227.
33. Article 229 must be interpreted against Article 227 and others. If the two are interpreted alike, then there was no need for Article 227, for fathers and mothers, as parents, are also ancestors. On the other hand, the Civil Code does not seem to have favored giving one person rights to the earnings of another. Thus the parental right of enjoyment in Article 223 never has extended to the minor's earnings. Similarly, Article 160, providing alimony for the divorced wife, originally limited her claim to amounts "out of the property of her husband." Here certainly "property" was understood to mean income from property, and not to include earnings, as is evident from the article's amendment by Act 247 of 1916 to read "property and earnings."
34. Article 231.
35. No article so required.
alimony claims to what is not otherwise obtainable for minimal needs.\(^{37}\) This, however, is only part of the shift of Louisiana civil law from a very Catholic position on family wealth to a more secular, individualistic one.

Perhaps we see the same thing in changes that have come about over the years in our laws on successions and donations. There can be no doubt that the succession laws in force in Louisiana during our Spanish days and until 1825 were designed to keep wealth in the legitimate blood family. If a deceased died with even only one descendant, that descendant—or descendants—could claim four fifths of all the deceased had acquired during life and not alienated for value. If he left no descendants, but only ascendants, they were entitled to one third of all the deceased had acquired during life.\(^{38}\) In the latter case, the inheriting ancestors eventually passed most of the property on to their descendants, collaterals to the original deceased and members of his extended family. Beginning in 1825, in spite of an impassioned plea by Governor Roman to retain the old law, our legislators reduced the forced portion.\(^{39}\)

Over the years it was reduced more and more and ancestors were deleted from the ranks of forced heirs. Then in 1996 forced heirship was abolished except for children under twenty-four years of age or incapacitated and certain grandchildren.\(^{40}\) Otherwise there is complete liberty of testation. Family property has given way to individual property.

The attacks on forced heirship began in 1920, when the first trust legislation provided that the forced heirship laws would not apply to assets placed in trust.\(^{41}\) The Constitution of 1921 forbade the “abolition of forced heirship,” but not its modification.\(^{42}\) Thereafter gradual modification was the rule. Opposition to forced heirship increased after 1981, when illegitimates were given the same inheritance rights as legitimates.\(^{43}\) The final blow, however, came after a determined and well-financed campaign on the part of three groups in the population. Persons of highly individualistic thought insisted on freedom to do what they wished with “their” property, on freedom of testation in order to control their heirs through threats of disinheritance, and on the possibility of using the trust device to avoid taxes. Then second spouses often wished to make certain their partners in marriage could leave all their property to them and not have to leave any to their children by prior marriages. Finally, there were those less concerned with family property than with the profits they could gain from


\(^{38}\) Digest (1808) 3.2.19 and 20.

\(^{39}\) Civil Code of 1825, Articles 1480, 1481.

\(^{40}\) The current legislation is in Articles 1493 and 1495 as enacted by Act 77 of 1996, 1st Ex. Sess.

\(^{41}\) Act 107 of 1920, Sec. 8.

\(^{42}\) Constitution of 1921, Art. IV, Sec. 16.

\(^{43}\) The rules on intestate succession contained in Articles 880-901 as enacted by Act 919 of 1981 for the first time made no distinction between legitimates and illegitimates.
the new law: the banks, institutions seeking large donations, the attorneys for all involved, legislators seeking re-election, and paid lobbyists. The good of the family, the primary institution of society, was given second place to high individualism and greed. Power over people replaced cooperation in life. The common good lost ground, for it was not being recognized as the end of the law.

Forced heirship, it should be pointed out, when available to descending heirs regardless of age, and especially when it covered most of the deceased's patrimony, gave offspring a certain immunity from parental and ancestral tyranny. Societies in which forced heirship does not exist are notorious as places in which children are threatened with disinheritaence if they fail to comply with the wishes of their elders in such matters as marriage, education, and vocation in life. By being assured of a goodly portion of the parent's or ancestor's wealth on his or her death, offspring can feel more free to act and live in accordance with their own aptitudes and judgments. This enforces human dignity as well as the family character of wealth.

In spite of the Spanish civil law's emphasis on wealth being familial, however, children were not permitted to sue for a dowry, marriage settlement, or other advancement on eventual inheritance. The provision to that effect, yet in our Civil Code, is testimony to the cultural recognition of a moral obligation to make such advancements to children during the life of the parent. This attitude, however, even before the increasing reduction and final elimination of most instances of forced heirship, had lost ground to a tendency to deny children the enjoyment of what they had inherited even as legitime or forced portion. Thus as early as 1844, by intestate succession law, the surviving spouse was given a usufruct, until remarriage, over community assets inherited by children of the marriage, no matter what their ages. In our own time, the spouse dying first was given the right to award the surviving spouse a usufruct for life over community and separate property inherited by any child of the deceased, whether or not a child of the survivor. Similarly, under the law on private trusts, the heir's inheritance might be placed under the control of a trustee and the revenues from the legitime only paid to the forced heir. Of course, the current abolition of forced heirship for most instances goes far beyond that.

I may mention briefly some of the other ways in which the familial character of property once was evident in the law of succession on death and donations. First of all, ancestors on death were presumed to have intended to distribute their assets among their legitimate descending heirs equally by roots, so that, unless the ancestor had expressed a contrary intention, all property given during life to

44. Article 228.
45. Act 152 of 1844, sec. 2; Article 916 as enacted in 1870, now replaced by Article 890 as enacted by Act 77 of 1996, 1st Ex. Sess.
46. Article 890 as amended by Act 1075 of 1990.
such heirs had to be added to that remaining to the ancestor at death in order to determine the mass to be divided among all the heirs. Those who received more during the ancestor’s life would receive proportionately less at his death.48 Secondly, until 1844 spouses were not ordinarily heirs of each other, the succession of a deceased intestate going always to legitimate blood relatives if any existed.49 Thus, family property did not cross over to the surviving spouse’s family by intestate succession, whether land, businesses, or heirlooms.

Recalling that the community of gains was a necessary part of every marriage contract until 1825 will help one understand this, together with the fact that, inasmuch as in those days wealth usually meant land or family enterprises, neither the family wealth nor the family’s peace could be protected if part of it were to be inherited by another family. For the same reason illegitimate children were not allowed to inherit with legitimate children, but, if in need, they were always entitled to claim alimony from the heirs of the parent out of the revenue produced by the inheritance.50 Over the years all these notions have changed, but I think to the detriment of families. Illegitimate children now share intestate succession with legitimate children,51 even if this results in a partition destroying a family’s home or economy. Surviving spouses inherit deceased spouses’ shares of community property if there are no descendants.52 Thus parents and other ancestors and collaterals never succeed to a deceased intestate’s share of community property. As to separate property, the intestate inheritance of parents when brothers and sisters exist has been reduced to a mere usufruct.53 The presumption that an ancestor wished to treat his descendants equally has all but vanished.54

One result of all this, to the benefit of attorneys and notaries, is that almost everyone now must think seriously of writing a will. Formerly our suppletive laws on matrimonial regimes, successions, and donations were such that most people did not have to think of express marriage contracts and wills. The suppletive laws provided for results that were fair and in keeping with family responsibilities, sensibilities, and expectations. Now there is much uncertainty and much tension, and certainly an opening to injustice to heirs by reason of rash action by people in old age or under the influence of second spouses, unmarried partners, or donation-seeking institutions.

48. Articles 1227-1241 as enacted originally.
49. See Digest (1808) 3.2.1. 43-57; Civil Code (1825) Articles 911-927. The change was made of Act 152 of 1844, sec. 2, cited in footnote 45.
50. Articles 917-924 and 241-245.
51. Article 888 as enacted by Act 919 of 1981.
52. Article 889 as enacted by Act 919 of 1981.
53. Article 891 as enacted by Act 919 of 1981.
54. Article 1235 as enacted by Act 77 of 1981 restricts the demand for collation to descendants of the first degree who are forced heirs (thus excluding grandchildren when forced heirs) and to donations made within three years of the death of the ancestor.
Respect for the Person

The Civil Codes originally showed tremendous respect for the individual person as a creature with God-given capacities of intellect, judgment, and will. Indeed, these capacities of intellect, judgment, and will, themselves a consequence of the human being's consciousness of his own consciousness, define personhood. And whereas the membership of each person in an ontological community of mankind obligates each to seek the common good, it is the fact of individual personhood that requires the community of mankind to respect each individual's capacities for self-determination to the extent the common good does not dictate otherwise. Thus it is that, under the Civil Code, a person of the age of majority, and not declared incapable of acting for himself by a judgment based on criteria declared in the legislation, may not be denied the management and disposition of his assets by other persons of their own volition. There simply is no provision in the Civil Code allowing this. Minors' and interdicted persons' affairs are controlled by parents, tutors, and curators whose representations and administrations must follow general laws on the subject. Under the laws on trusts, however, anyone transferring property (the settlor) to another (the beneficiary) may place a third person (the trustee) in charge of the administration of that property and the disbursement of its revenues in accordance with the express wishes of the settlor with few restrictions in law. In this way, the judgment and will of the beneficiary or his legal representative are superceded by those of the settlor. A person of age, therefore, might be hampered in the integration of the management of his affairs, and so might the tutor or curator of an incapable person be unable to integrate the incapable's assets to best advantage. Moreover, property given a minor in trust does not become subject to the enjoyment of his parents for the good of the family as a whole. The private will of the settlor is permitted to supercede laws established to strengthen the family for the common good.

I would like to note that my most fundamental objection to the trust as introduced into Louisiana law is that the beneficiary or his legal representatives may not modify or terminate it. Had modification or termination of the trust by the beneficiary been accepted by the Louisiana State Law Institute and our Legislature, that objection would have been removed. The trust, in that case, would have amounted to no more than a plan for investment and management that, in most cases, probably, the beneficiary or his legal representative would have been well advised to honor. This is, and always has been, the general rule in England, the origin of the trust. It does more honor to the dignity of the human being by allowing him to make patrimonial decisions for himself. It is true that some income tax advantages would have been lost by giving the beneficiary or his

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55. Articles 216, 221, 246, 354, and 389.
57. No provision of legislation so provides expressly, but it follows from Sec. 1724 of the Trust Code (La. R.S. 9:1724) under which neither the Civil Code nor other legislation may be invoked "to defeat a disposition sanctioned . . . by this Code."
legal representative such control, but I for one see no reason to allow a tax
advantage to those who are given assets in trusts. The tax burden should fall
equally on all with equal revenue, whether realizable immediately or not. 58

My second objection to the trust as enacted in Louisiana is that the trust was
defined in Anglo-American law terms—placing "legal title" in the "trustee" and
"beneficial interest" in the transferee or "beneficiary"—whereas the same result
could have been accomplished by acknowledging that property given to one
person could be subjected to management and control by another. 59 Indeed the
trust was so defined in Louisiana's first trust legislation 60 and in effect was so
defined in the Uniform Gift to Minor's Act. 61 The argument for the Anglo-
American definition was one toward uniformity with the trust definition in other
States, and generally I favor uniformity in laws from State to State. But as long
as we retain our traditional concepts of ownership and its modifications we
should use a definition of trusts compatible with them. Probably the motivation
of those who prevailed was not simply uniformity of law, but the prospect of
rendering easier the introduction of other concepts of Anglo-American property
law that, indeed, have been introduced gradually over the last thirty-four years.
I shall speak of them later in this lecture.

e. Wealth is for the Living

The Civil Code contains or contained a number of rules that may be
classified under a general principle that "wealth is for the living." On reflection,
you will agree with me that this principle is in reality one demanding respect for
the living person and thus cooperation with him.

The first rule that I should like to mention is that even now under the Civil
Code no one is permitted to make a donation of all his property that will be
effective before he dies. 62 He must reserve to himself an amount sufficient to
provide sustenance for himself.

The second rule, related to the first, is that one may not dispose of future
assets, except by marriage contract. 63 One might indeed regret such a disposi-
tion.

The third rule, theoretically yet in effect, is that all testamentary disposi-
tions remain revocable. 64 No one during life is to bind himself irrevocably as
to the manner in which his patrimonial assets will be disposed of at his death.

58. All this was discussed at length in the lecturer's article, Of Trusts, Human Dignity, Legal
59. Ibid.
60. Act 107 of 1920.
61. La. R.S. 9:735 et seq. Replaced by the Uniform Transfers to Minors Act, La. R.S. 9: 751
et seq., which, however, uses the Anglo-American trust formula.
62. Article 1498.
63. Articles 1528, 1532.
64. Article 1469.
Similarly inspired was the fourth rule, that one might not dispose of the naked ownership of any asset while retaining its usufruct, that is to say, its use and its revenues.\textsuperscript{65} Such a disposition, after all, would be the equivalent of an irrevocable legacy. But this rule no longer is in effect. Its first diminution came through the Trust Code of 1964, under which one establishing a trust might give another the naked ownership or principal interest and reserve to himself the usufruct or the income interest.\textsuperscript{66} Finally in 1974 the Civil Code itself was amended to permit one to donate the naked ownership of particular things to another and reserve the usufruct to himself without employing the trust.\textsuperscript{67} Thus, one is now permitted to make the equivalent of irrevocable legacies. Having been given this power, one might, by making a number of donations of the naked ownership of particular things, effectively achieve the equivalent of an irrevocable will. Is this for the common good? Or will it give power to second and third spouses, to avaricious children, to the detriment of the donor?

Next, under this rubric of “wealth is for the living,” I should like to mention that our Civil Code yet provides a fifth and most important rule, that only persons already in being, that is to say, born or at least conceived, may receive things by donation.\textsuperscript{68} Perhaps this is the strongest rule evidencing the principle “wealth is for the living.” But here again the Trust Code has come to the rescue of those who believe they should be able to do with “their property” what they wish and thereby impose their own schemes of order on their transferees in perpetuity. Thus the Trust Code of 1964 provided that a “class” of persons, consisting of one’s children or grandchildren, or both, born and unborn, might be designated beneficiaries of the income or principal, or both, of assets in trust.\textsuperscript{69} This was bad enough. Such a trust might last for many years, for it could continue until the last member of the class, whether child or grandchild, died. Thus if one of my good friends, who already has eleven children and thirty-three living grandchildren, and undoubtedly will have more by birth or adoption, established a trust for them as a class, the trust would last until all his children and grandchildren, born or yet to be born or adopted, had died. But our gifted legislators now have managed to give settlors of trusts yet more power to dominate the future. Under legislation of 1997—not sponsored by the Louisiana State Law Institute in this instance—a settlor may establish a trust for a class of persons consisting of all his “descendants in the direct line,” whenever born to the end of time, or all his “descendants in any collateral line” (yes, that is the language) whenever born to the end of time, or any combination of these persons, as long as at least one member of the class is in existence on the creation of the trust.\textsuperscript{70} How many centuries or millennia will trusts of this kind

\textsuperscript{65.} Article 1533 before amendment by Act 210 of 1974.
\textsuperscript{66.} La. Trust Code, La. R.S. 9:1804 and 1771.
\textsuperscript{67.} Article 1533 as amended by Act 210 of 1974.
\textsuperscript{68.} Articles 1472-1474.
continue? What computer will be able to determine the interests of the perhaps thousands or millions who eventually will be beneficiaries of the settlor? Will banks, who usually become substitute trustees if not named original trustees, be happy with this legislation? Of course they will, as long as the trusts can pay their fees.

Finally, under this same rubric, I should like to mention a sixth rule of the Civil Code, that one transferring ownership of a thing to one person may not provide that, at some time in the future, ownership should shift to a third person. This in our law has been called a prohibited substitution. In the Equity side of the Anglo-American law such shifting interests have been recognized provided that, as of the time of the act of disposition, it can be known certainly that the shift will occur, if at all, within the life of a person in being and identifiable through the instrument of disposition plus twenty-one years. There are various modifications of this “Rule Against Perpetuities” in various Anglo-American jurisdictions, but this is the classic rule, settled by judges “as a matter of convenience.” Wags rationalize this rule by asserting every Englishman believes his children unfit to manage and preserve property, but has great faith that his grandchildren will be fully capable, rational, and prudent on reaching twenty-one years of age. We do not have such a rule in the Civil Code because the Code does not allow shifting interests.

From the very beginning, however, the Trust Code allowed the settlor to provide for some substitutions. Thus it allowed the settlor to direct that in the event a beneficiary died intestate and without descendants, his or her interest would belong to the other members of the class. Today, however, the settlor may provide for substitute beneficiaries in certain cases, and sometimes the substitute beneficiary need not be identifiable until the death of the principal beneficiary. We have gone beyond the limits of the Anglo-American Rule against Perpetuities.

Is it not correct to say, now, that the notion “Wealth is for the living” has been transformed into “Wealth is for the dead to control to the end of time”? Have our legislators thought of human dignity? Have they thought of the common good?

IV. CONTRITION AND REDEMPTION

The picture I have painted of the changes wrought in the form and substance of our Revised Civil Code of 1870 is not a pretty one. But the disorder introduced into our civil law, and therefore into our lives, is real, and I have wanted to note it particularly so that some might realize we must redeem ourselves.

71. Article 1520 as enacted originally. As amended by Act 45 of 1962, the article now asserts substitutions in trusts are allowed to the extent provided in the Trust Code.
Some of the changes I referred to as matters of form could be remedied easily by legislative action. Certainly it would be easy to remove from the Civil Code the new Book IV, on the Conflict of laws, and give it separate existence as the Louisiana Conflict of Laws Code. It would be easy to publish revisors' comments separately from the Civil Code, if they are to be preserved at all, and to delete all titles to articles, in order to emphasize that only the texts are law. Of course I realize we might not be able to prevail upon publishers and editors to do this, for they see financial profit in the present practice. We must do what we can, too, to reduce the detail often found in some recent amendments to the Civil Code. A well written Civil Code should concentrate, as nearly as possible, on reducing all statements of rule to fairly simple specifications of principle so as to permit intelligent application according to circumstances and not bind judges to detail that can hinder the accomplishment of justice. In short, we should seek to do what we can to make the Civil Code the people’s law book and give laymen, students, lawyers, and judges a better opportunity to appreciate our basic plan of civil order and have it realized in action.

Of great concern to all of us, however, should be the fact that so many of the amendments to the Revised Civil Code of 1870 have demonstrated a triumph of individualism and its corollaries, selfishness, greed, and power over the lives of others. The spirit of cooperation in living, proper to a legal system meant to order the lives of men to their common good, has been all but eliminated, as has been all reference to moral norms for the law. Our Civil Code has been rendered profoundly secular, positivistic, and individualistic.

A. Whose Fault Is It?

The fault is ours, collectively to be sure, and individually in particular degrees. Often the Louisiana State Law Institute, created to provide guidance to the Legislature, has proposed this legislation, and on occasion it has done the Legislature’s bidding even after it had judged what the Legislature demanded to be inconsistent with the common good. Some law professors collaborated in these bad reforms and attorney members of the Louisiana State Law Institute Council often have acted as lobbyists for their clients in spite of knowing the common good to lie elsewhere. I have had personal experience of what I say here.

None of this should surprise us. Generally speaking, in all aspects of society individualism has replaced the community of mankind in the thinking of most persons, and thus selfishness has come to replace the sense of moral obligation to cooperate with others for the common good.

B. What Can We Do?

This virus of individualism and selfishness will not be overcome except to the degree we can bring people at large to recognize that we are ontologically a community of mankind under God and for that reason have the moral obligation
to seek the common good. This is a formidable task in an age in which each person, regardless of intelligence and education, has a voice—or vote—in the direction of formulating the plan of order we call law. In retrospect, the Irish monks who brought civilization back to continental Europe after the destruction of the Christianized Roman Empire had an easier time, for by convincing the elite in power they could bring proper order to the lives of their subjects. Now we must convince the people at large so that they will demand good order from their law-making representatives.

We must start somewhere, however, and I suggest that law faculties could do much. Our graduates, after all, dominate the law-teaching process, the law-making process, the judicial process, and the executive offices as well. We may not be able to control effectively the pre-law-school preparation of those who would wish to study law, though I suggest we could go so far as to make certain all who enroll have had something approaching a liberal education, that is to say, one in which they have been required to become familiar with what people have learned over the ages of the nature of man and the relation between God and men and among men in the ontological order. Studies in business, economics, engineering, the natural sciences, agriculture, and music are all very well and good, but I wonder how much such studies help one to understand humanity, the basis of morals, and the nature, function, and purpose of law.

I do not believe we could attain such an objective in the foreseeable future, but we could insist on a program of study in law school that would help students, the future lawyers, legislators, judges, and executives, understand the necessity of working with law as an instrument for ordering the form of cooperation for the common good and resisting every effort to regard law as an arena for competition for selfish interests. Today too little attention is given to that. The concentration of academic effort often seems to be mainly on the manipulation of legal materials to reach objectives of the client or those of the judge. It is legal rhetoric neutral as to truth and purpose. The emphasis is not on the structure of the legal order, its underlying principles, its fitness for its proper purpose, and the roles of the legislator, lawyer, and judge as priests of good order.

Finally, I would like to suggest that the law faculties should demand a reform of the Louisiana State Law Institute. Probably no other group in our society is in a better position to do so. And the Institute must be reformed in several ways. First, it must not be allowed to remain a self-perpetuating entity. Second, the governing council should be re-composed to include educated non-lawyers: philosophers, theologians, social workers, economists, educators and ordinary people. By all means lawyers on the Council must not be allowed to vote when their clients’ affairs would be affected by the legislation proposed. Third, the Institute must be required to publish its proposals a reasonable time before it gives them its final approval so that the public will be able to voice its approval or disapproval and make recommendations. Fourth, the Institute must be forbidden by law to alter its recommendations once they have been made to the Legislature. Once its recommendations have been made, its work on the
project should be considered at an end. Colonel Tucker helped create the Institute to help the Legislature enact better laws. It must not permit itself to become the servant of the Legislature for the enactment of laws less good than those it has proposed.