The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?

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Having the opportunity to deliver the John H. Tucker Lecture is indeed an honor. Although I did not know Colonel Tucker personally, I was quite aware, from the time that I was a law student, of his many contributions to the advancement of the civil law in Louisiana. When Professor Litvinoff called me to extend the invitation to be the Tucker lecturer, I wondered what I could possibly offer to such a knowledgeable and distinguished group of civil law scholars. As I sat in my office contemplating this question, one of my students came in and introduced herself as the daughter of a former student whom I had taught in 1976, my first year of teaching at Loyola Law School. It struck me that I was actually beginning to teach another generation of lawyers about the law of successions in Louisiana. I thought about what a different course it would be for the daughter than it had been for her mother twenty-five years before. I also pondered whether I would be around for another twenty-five years to teach another generation and what in the world that course would be like.

Tonight I want to share with you some of my thoughts regarding those questions and ultimately, regarding the civil law in Louisiana as we begin the twenty-first century. Rather than attempt to speak to the "system" of law in Louisiana, which Professor John Merryman defined as the "operating set of legal institutions, procedures and rules," I will more accurately address the civil law "tradition" in the state; that is, the "set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught." I suspect that some of you will disagree with some of my conclusions; my hope is that all of you will not disagree with all of them and that a portion of what is said this evening will enure to the benefit of the civil law tradition of our state. As I

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2. Id. at 2.
consider Professor Merryman's definition of legal tradition and think about the changes in Louisiana over the last quarter century, I am sad as I recount some of the revisions that lead me to believe we have indeed lost some of that proud tradition of Roman origin that links rights with responsibilities, where "the individual is more often envisioned in a social context."  


In continental law, rights tend to be seen as naturally paired with responsibilities. The individual is more often envisioned in a social context. There also seems to be more recognition in the Roman-Germanic systems that law, along with other social forces, can contribute in its own small but not insignificant way to the construction of the world of meaning with which beliefs, feelings, and attitudes are formed.

Id. See also Robert Anthony Pascal, Of the Civil Code and Us, 59 La. L. Rev. 301, 310 (1998):

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 (of his share?).

Id.


5. A. N. Yiannopoulos, Civil Law System: Louisiana and Comparative Law 96 (2d. ed., 1999) [hereinafter "Yiannopoulos, Civil Law System"] (stating that "... in civil law countries judges and lawyers alike start their judicial reasoning from statutes as embodying general principles capable of covering any conceivable fact situation." Id.).

Agreeing that Louisiana is truly a mixed jurisdiction, possessing qualities of both the common and civil law traditions, I address my comments this evening to the retention and enhancement of the civil law portion of that mixture, as it so directly affects the private law and lives of our citizenry.

I. ARCHAIC OR PROPHETIC?

Is what remains in Louisiana of the civil law tradition, archaic or prophetic? Are the concepts mutually exclusive or are there aspects of the archaic that render it classic and thus appropriate for prophesying what lies ahead? The word archaic, derived from the Greek word ἀρχαϊκός (archaikos) is defined as "relating to, belonging to, or having characteristics of an earlier or often more primitive time;" synonyms are "old-fashioned" and "antiquated." An initial contemporary response might be that if the tradition is archaic, we should discard it since anything old-fashioned is not worth keeping. Yet, as we contemplate the state of the American family today, we may wonder if some of the older ways might be preferable to today's trends, where over one-half of marriages end in divorce and twenty-eight percent of children under the age of eighteen live with only one parent, usually the mother, and often in poverty.

order to be capable of receiving a donation mortis causa. Previous La. Civ. Code art. 1473 (1870) required only that the donee "exist" at the opening of the succession of the testator. Similarly, La. Civ. Code art. 953 (1870) required an heir "exist" at the moment that the succession becomes open and La. Civ. Code art. 957 (1870) provided that two things must be proved in order to vest the child with the right of inheriting, i.e. that the child be conceived at the moment of the opening of the succession and that the child be born alive. None of the earlier articles required actual implantation in utero. For a discussion as to the distinction and its relevance to assisted reproductive technologies, see Kathryn Venturatos Lorio, From Cradle to Tomb: Estate Planning Considerations of the New Procreation, 57 La. L. Rev. 27, 49-50 (1996).


11. Id. In 1998, 20 million (28%) of children under the age of eighteen lived
Prophetic, from the Greek προφητικός (prophetikos) is defined as "foretelling events; tending to indicate what is going to happen." It connotes looking into the future and perhaps offering new promise. If indeed prophetic, will our civil law tradition be our entrée to yet unknown or undiscovered possibilities that lie ahead? Will it shepherd us into an international arena where our legal heritage will provide us an advantage for communicating with others around the world?

This questioning of the efficacy of our civil law tradition is not new and can be traced back to discussions following the Louisiana Purchase. Having been under both French and Spanish rule prior to this time, the new territory was deeply rooted in the civil law tradition. When Congress divided the Louisiana territory into two parts, the new Territory of Orleans essentially became the State of Louisiana. Subsequently, the first Legislative Council of the territory met in 1806 and proposed that the Territory of Orleans be governed by the Roman and Spanish laws in effect at the time of the Louisiana Purchase. The veto of this act by Governor Claiborne marks the first official questioning of the wisdom of retaining the civil law tradition in Louisiana. In protest to the Governor’s veto,
the Legislative Council adjourned. Following the publication of a manifesto a few days later, expressing strong support for the civil law, the legislature reconvened on June 7, 1806, and authorized James Brown and Louis Moreau-Lislet to draft a civil code for the territory. The Governor acquiesced and the Digest of 1808 came into being, followed by the Civil Codes of 1825 and 1870.

While the civil law tradition prevailed, it was not long before its efficacy was challenged. Critics from the halls of academe and from the chambers of judges began to question the true civil law nature of the law in Louisiana in the early 1900s. A major challenge came in the form of a “reappraisal” of Louisiana’s civil law system which appeared in an article by Professor Gordon Ireland in the Tulane Law Review in 1937. Alleging adoption of the common law concept of stare decisis, citing areas of the law which had clearly adopted the common law tradition, and lamenting the “notorious” declining use of the French language, Professor Ireland made a case for his conclusion that “Louisiana is today a common law State.” He noted that each of the law schools of the state offered “three times as many courses on common law subjects as it offers on the Code or civil law” and claimed that “[a]ll instruction is given by the case method.”

The reaction by civil law enthusiasts to these accusations was adamant and included a collaborative effort by four giants of the

21. Yiannopoulos, Civil Code, supra note 19, at XLVIII; Herman, supra note 19, at 24; Hood, supra note 20, at 12.
22. The Digest of 1808, entitled “A Digest of the Civil Laws now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present Form of Government,” was adopted on March 31, 1808. Yiannopoulos Civil Code, supra note 19, at IL; Herman, supra note 19, at 24; Hood, supra note 20, at 13.
23. See A.N. Yiannopoulos, Louisiana Civil Law: A Lost Cause?, 54 Tul L. Rev. 830, 980 (1979) (observing that Professor Charles Payne Fenner (Professor of Civil Law at Tulane University), noted that much of our jurisprudence was common law. Id. at 833) (citing Charles Payne Fenner, The Jurisprudence of the Supreme Court of Louisiana, in The Celebration of the Centenary of the Supreme Court of Louisiana, 133 La. lxi, lxv (1913) quoting Judge Pierre Crabites’ comments to the effect that Louisiana had lost its civil law character, as cited in Crabites, Louisiana Not a Civil Law State, 9 Loy. L.J. 51 (1928)).
25. Professor Ireland concluded that “[t]he civil law method in which the judge yields to the text has here completely given way to the common law method in which the text yields to the judge.” Id. at 592.
26. Id. at 592-95.
27. Id. at 595.
28. Id. at 596.
29. Id. at 595.
30. Id.
31. See Leonard Greenburg, Must Louisiana Resign to the Common Law? 11
civil law, Harriet Spiller Daggett, Joseph Dainow, Paul M. Hebert, and Henry George McMahon to refute the conclusion reached by Professor Ireland. A number of significant points were made by these scholars, which could easily be made today to educate those who marginalize the significance of the civil law tradition in Louisiana. First, as previously noted, the parameters of the civil law are limited to areas of private law and do not extend to public law, commercial law, or penal law. Second, granted that Louisiana has borrowed heavily from the common law, it has not rejected the civil law tradition. Third, the analysis of case law in Louisiana does not equate to adoption of the common law concept of *stare decisis*, where a single case dictates the outcome of a later dispute, but may be perfectly consistent with the doctrine of *jurisprudence constante*, where a case may be used to discern a pattern that may aid in interpretation.

Despite their defense of the civil law tradition in Louisiana, the law professors acknowledged "many deficiencies of civil law education in Louisiana," but optimistically anticipating additional financial support, predicted a brighter future on the horizon for the civil law tradition. The "wake-up" call provided by Professor Ireland served to galvanize other civil law advocates as well. Dean Paul M. Hebert of the Louisiana State University Law School and John H. Tucker, Jr. who wrote the enabling act for the creation of the Louisiana State Law Institute in 1938, were among the leaders of the movement to strengthen the civil law tradition in this state. The purpose of the Louisiana State Law Institute, as stated in the statute creating it, was "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs; to secure the better administration of justice, and to carry on scholarly legal research and scientific legal work." In 1948, the legislature charged the Institute to prepare a projet for the
revision of the Louisiana Civil Code. In 1960, the Civil Law Section of the Institute was formed with the mission of promoting civil law studies and revising the Civil Code. The promotion of civil law studies, which would in turn provide necessary doctrinal writings, was implemented by the creation with West Publishing Company in 1965 of the Louisiana Civil Law Treatise series. Additionally, to promote the reading of doctrinal sources, as knowledge of the French language became less common, the Institute sponsored translations of numerous French writers, such as Planiol, Geny, and Aubry and Rau. In 1967, the Institute for Civil Law Studies was chartered by the Board of Supervisors of Louisiana State University to promote research in the civil law. With all these developments to support his thesis, Justice Mack Barham, in a 1972 article in the Louisiana Law Review, proclaimed a veritable “renaissance” of the civil law in Louisiana. The judiciary contributed to this reawakening with supportive law review articles and scholarly opinions, reflecting the civil law identity.

As we begin another century, perhaps another reappraisal is in order. Has the civil law tradition in Louisiana slowly faded away? Are we clinging hopelessly to a moribund ideal? Or are we embarking on an era when another revival is on the horizon? I choose to analyze these queries in the context of two topics, the time-honored institution of forced heirship and the recent developments associated with assisted means of reproduction. Each speaks to the core concepts of family and, I submit, that the civil law tradition offers the best alternative for dealing with these two, rather controversial, subjects.

41. Id.
47. Id.
II. FORCED HEIRSHIP—A PILLAR OF THE PAST

Forced heirship, the civil law concept which guarantees certain heirs a portion of a decedent’s estate was once considered almost sacred in Louisiana and was protected from abolition by both the Louisiana Constitutions of 1921\(^49\) and 1974.\(^50\) Yet, ironically, shortly after the beginning of the “renaissance” of the civil law in Louisiana in the 1970s, forced heirship came under attack as being outmoded, being a “primitive kind of socialism,” “unsound in theory and . . . unsound in practice.”\(^51\) Louisiana defenders of the institution, such as Thomas B. Lemann eloquently replied:

Certainly times have changed, but it does not follow that all ancient institutions are *ipso facto* obsolete. Are the Ten Commandments outmoded? They may be violated, but society still considers them worthy goals. Is the family archaic? Some indeed think so, but most do not. Parents still have a moral and civic duty to their children. . . . \(^52\)

Outside observers such as Professor Mary Ann Glendon were actually recommending that other jurisdictions consider adoption of this institution which offered “great promise for approaching some of the most challenging contemporary family law problems,”\(^53\) brought on by our changing society characterized by “serial polygamy.”\(^54\) Yet, despite the support, forced heirship was fighting a losing battle. Even the revisions, developed in a spirit of compromise during the 1980s to render the institution more palatable to its critics,\(^55\) failed to save the doomed institution.\(^56\)

\(^{49}\) La. Const. Art. IV, § 16 (1921).
\(^{56}\) For an account of the many changes, redefinitions, and indeed restructuring of this institution, see K. Lorio, *The Changing Face of Forced Heirship: A New Louisiana Creation, in Louisiana, A Microcosm of a Mixed Jurisdiction* (Vernon
Unfortunately, the very fact that it was part of the civil law tradition made forced heirship an easy target for criticism. Since Louisiana law was different from that of the other forty-nine states, it could be attacked as somehow out-of-step, parochial, and backward.\textsuperscript{57} Actually, the opponents to the institution could have cared less about the historical origins of forced heirship. Rather, they reflected a trend in Western legal thought that is endemic to both civil and common law nations, i.e., that the individual and his desires are paramount or as stated by Alain Benabent:

Instead of the individual belonging to the family, it is the family which is coming to be at the service of the individual. The permanent place of the family among our institutions is retained, but not for the same reason. No longer is it because the family serves society, but because it is a means for the fullest development of the individual. When it no longer fulfils its role, the bonds diminish and disappear.\textsuperscript{58}

“Free testation,” “individual liberty,” and “it’s mine and I should be able to do with it as I please” became the mantra of those opposing forced heirship.\textsuperscript{59} This attitude was buttressed by surveys which, not surprisingly, indicated that most testators did prefer to make choices without limitations from the state and those choices favored the surviving spouse over the children.\textsuperscript{60} Certainly, the results of the 1995 popular vote approving the constitutional amendment which altered forced heirship so fundamentally, whether fully understood or not,\textsuperscript{61} supported the argument that this is what the people desired.

\textsuperscript{57} See Gerald Le Van, Alternatives to Forced Heirship, 52 Tul. L. Rev. 29, 40 (1977) (noting that “[t]hose who oppose forced heirship in general take considerable delight in poking fun at exaggerated situations that seem to run contrary to common sense.” Id.).

\textsuperscript{58} Alain Benabent, La liberte individuelle et le marriage, 1973 Revue trimestrielle du droit civil 440, 495 cited in Mary Ann Glendon, supra note 58, at 292-93.

\textsuperscript{59} Nathan, supra note 55, at 6 (stating “... my approach to this issue is not altogether negative, in the sense that I oppose forced heirship: it is also positive in that I strongly favor freedom of testation. A testator should have the right, subject to appropriate limitation as to public policy and morality to dispose of his property as he pleases.” Id.).

\textsuperscript{60} Mary Ann Glendon, supra note 58, at 242 (noting a Bar Foundation survey conducted in 1978 in which the surviving spouse was clearly the preferred legatee).

\textsuperscript{61} James Welsh, Heirship in Louisiana: A Trust of Wills, The Times-Picayune (New Orleans), Oct. 31, 1995 F1 (quoting Carole Neff as saying, “... [m]any voters were voting on the basis of misconception at what this change in the law will accomplish. . . Forced heirship has not been eliminated by the law.” Id.).
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Yet, despite the fact that I have been termed a "Diehard" when it comes to forced heirship, an appellation I must say I am proud to hold, and that I continue to "mourn" the loss of a useful institution which offered protection to children of first families marred by divorce, my purpose tonight is not to revisit the battle of forced heirship. Rather, it is to commend our civil law methodology for providing our state with a way to salvage some degree of order after the significant alteration of a time-honored concept that was so intricately woven into the fabric of our civil law. Once a constitutional amendment was passed by the people of this state, which withdrew the protection for forced heirship as originally contemplated by the Code, that is, one protecting all children from disinherittance, regardless of age or infirmity, a major overhaul of Civil Code provisions dealing with forced heirship was essential. Anticipating the approval of the constitutional amendment, the legislature had passed the summer before the vote on the constitutional amendment, an implementation act to take effect contingent on the passage of the amendment. Ambiguities in that act and confusion over its application abounded. Had all the potential controversies been left to the courts for resolution on a piecemeal basis, estate planning in this state would have been a quagmire of unpredictability. Thus, despite strong opposition to the "new" forced heirship by some, most would agree that a methodical, studied approach as to how to integrate this altered concept into the laws of Louisiana was essential. The Louisiana State Law Institute, a body which had never voted approval of the abolition of forced heirship, advised the legislature of the critical need for such an

64. On October 21, 1995, the voters of Louisiana approved an amendment to Article XII, § 5 of the Louisiana Constitution which provided:
To abolish forced heirship, except to require forced heirship for children twenty-three years of age or younger and to authorize the legislature to classify as forced heirs children of any age who are incapable of taking care of their person or estate due to mental incapacity or physical infirmity.
Thus, protection of all children from disinherittance, regardless of age or infirmity, was no longer to be a part of Louisiana law.
66. For a discussion of some of the problems with this legislation, see K. Lorio, The Citadel has Fallen—Or Has It?, 44 La. B.J. 16, 17 (1996).
67. A vote recommending the abolition of forced heirship was never passed by
approach\textsuperscript{68} and provided the vehicle for revision. With strongly held opinions on both sides of the issue as to the wisdom of abolishing forced heirship, members of the Louisiana State Law Institute deliberated, often in heated debate, as to the best way to implement the constitutional amendment approved by the people of this state. Working to address the questions raised by the confusing implementation act, the Institute examined the entire area of forced heirship and offered a comprehensive treatment that anticipated potential problem areas.

Lest I sound too rosy in my painting of the picture, I must note that the product is not perfect.\textsuperscript{69} It was not accompanied by a thorough exposition of the law, but was somewhat hurriedly prompted by the passage of the constitutional amendment which shook the very foundation of forced heirship.\textsuperscript{70} However, despite the imperfection in the end product, our civil law methodology was certainly the preferred way to deal with the situation.

To illustrate the chaos and confusion when matters are not handled in an orderly fashion, one need look no further than the law of collation, a concept related to forced heirship, but one which basically assumes that a parent wishes to treat all his children equally.\textsuperscript{71} To implement this objective, all descendant forced heirs had the right under provisions of the Code of 1870, to bring an action demanding that any earlier gifts given to the forced heirs by the decedent be considered as advances on the final inheritance. This concept, being somewhat of a corollary to forced heirship, could not function as originally contemplated once healthy children over the age of twenty-four were eliminated as forced heirs. If the concept of collation were to be retained within the context of the “new” forced heirship, there would have to be some amendment to the existing articles to assure that even non-forced heir children

\textsuperscript{68}. See Katherine Shaw Spaht, Forced Heirship Changes: The Regrettable “Revolution” Completed, 57 La. L. Rev. 55, 82 (1997) (quoting the Council of the Law Institute in its plea to include forced heirship within the call of the First Extraordinary Session of 1996).

\textsuperscript{69}. Some argue that once the major restructuring of forced heirship was mandated, a cohesive integration with other parts of the Code would be impossible. Others criticize that the comprehensive revision went much further than the mandate of the constitutional amendment to emasculate forced heirship. One example is the three-year limitation put on donations inter vivos in order to include them in the active mass of a decedent’s estate for purposes of calculating the legitime. See La. Civ. Code art. 1505, \textit{amended by} 1996 La. Acts 77 § 1.


\textsuperscript{71}. For a comprehensive look at the history and current status of collation in Louisiana, see Ronald Scalise, Jr., The Chaos and Confusion of Modern Collation: A Critical Look into an Institution of Louisiana Succession Law, 75 Tul. L. Rev. 411 (2000).
would be subject to the demands of equality. Perhaps due to the difficulty of conceiving such an amendment, or perhaps believing that equality among children is an old fashioned aspiration, the Louisiana State Law Institute, when making its recommendation for amendment to the forced heirship provisions following the approval of the constitutional amendment, made no suggestions for the co-ordination of the concept with the new forced heirship provisions, but rather recommended the repeal of collation altogether.  

At the legislature, the House accepted the recommendation of the Law Institute and the Senate rejected it. A compromise was agreed upon in Conference Committee, but, rather than send this complicated matter back to the Law Institute to co-ordinate the recommended compromise with other parts of the Code, an amendment was made “on the spot,” during the legislative session, to only one article of the Code, permitting only forced heirs of the first degree who were coming to the succession the right to demand collation. Without amending the remaining sixty articles of the Civil Code dealing with collation, a last sentence was added to the single amended article to the effect that “any provision of the Civil Code to the contrary is hereby repealed.”

The chaos that has ensued has elicited uniform negative criticism, leading one scholar to comment that “the present doctrine of collation apparently is at sea with neither compass nor rudder.” Such confusion could have been, if not avoided, perhaps alleviated, if the matter had been referred back to the Law Institute for proper integration into the Code.

Thus, once the decision was made to alter a basic civilian concept, the best way to finesse such a major change in

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74. See Katherine Shaw Spaht, supra note 72, at 128-29 (stating that the “omnibus repealer in the second sentence that repeals provisions of the Civil Code to the contrary can only pertain to these three items: . . . (1) who can demand collation, (2) to what does collation apply, and (3) the value to be used.” Id.).
76. Fredrick Swaim & Kathryn Venturatos Lorio, Louisiana Civil Law Treatise on Succession and Donations 29 (West Supp. 2001). Although the author would like to claim credit for this observation, the comment is vintage “Admiral” Swaim.
77. Rather than illustrating the “archaic,” some might argue that the illustration of forced heirship could more appropriately be categorized in the “prophetic”
substantive civil law was through the use of civil law methodology, allowing for the deliberative study and integration of the new provisions into the Code. Additionally, despite fundamental objections to the "new" forced heirship, even we "Diehards" may be heartened by the fact that Louisiana remains proudly isolated from all other states in its protection from disinheriting of children, albeit only the young and disabled. 78

III. ASSISTED REPRODUCTION—AN ISSUE FOR THE FUTURE

In addition to adapting an ancient institution to contemporary society, civil law methodology may also afford the superior process for ushering in a coherent legal response to a relatively new phenomenon—the rapidly developing world of assisted reproductive technology. In this complicated arena, couples who are trying to create families, but need medical assistance to do so, are ironically raising issues that threaten traditional definitions and concepts of the family. As the number of people availing themselves of these technologies escalate and as medical science offers previously unthought-of scenarios for doing so, the legal issues will proliferate.

Statistics reveal that 6.1 million people in the United States, or about 10% of all people of reproductive age are infertile. 79 Although adoption may be an option, it is not as easy as in the past. Partially due to the legalization of abortion and partially to the removal of the stigma of single motherhood, there are fewer

78. See the following which commend Louisiana for its uniqueness and social utility: Brian C. Brennan, Disinheritance of Dependent Children: Why Isn't America Fulfilling its Moral Obligation?, 14 Quinnipiac Prob. L.J. 125 (1999); Ralph C. Brasher, Protecting the Child from Disinheritance: Must Louisiana Stand Alone?, 57 La. L. Rev. 1 (1996); Deborah A. Batts, I Didn't Ask to be Born: The American Law Of Disinheritance and a Proposal for Change to a System of Protected Inheritance, 41 Hastings L.J. 1197 (1990); Ronald Chester, Should American Children Be Protected Against Disinheritance?, 32 Real Prop. Prob. & Tr. J. 405 (1997).

children available for adoption.\footnote{Michael S. Serrill, \textit{Going Abroad to Find a Baby}, Time Magazine, Oct. 21, 1991 at 86. In the United States, in 1966, sixty-five percent of babies born to single women were placed for adoption. Twenty years later, only five percent were placed for adoption. \textit{Id.}} An article in Science Magazine in July, 1998 indicated that in the United States, only about 30,000 healthy infants are available for adoption each year.\footnote{\textit{Id.}} The same article reports that about 60,000 babies are born each year with the help of artificial insemination; 15,000 with the use of in vitro fertilization, and at least 1,000 as a result of surrogacy arrangements.\footnote{ISLAT Working Group, \textit{ART into Science: Regulation of Fertility Techniques}, 281 Science 651 (July 31, 1998).}

In 1992, Congress, in an effort to protect the consumers of this modern technology, passed the Fertility Clinic Success Rate and Certification Act requiring fertility clinics to submit reports annually as to the number of assisted reproductive procedures conducted and the success of those procedures.\footnote{42 U.S.C. § 263(a) (1994).} In the 1998 report, six clinics in Louisiana submitted reports, indicating that 545 procedures were performed in that year, resulting in the birth of 143 children.\footnote{1998 ART Clinic Section Report, Louisiana, \textit{available at} http://apps.nccd.cdc.gov/art98/clinlist98.asp?State=LA (last visited Feb. 24, 2003).}

Although many of these births will raise no legal issues since the couples availing themselves of the procedures were married and used their own gametes, potential issues arise in situations involving the use of donor gametes, the freezing of embryos, and fertilization after the death of a partner.

There is very little guidance offered by our Civil Code as to how to respond to these issues. I feel confident that Moreau-Lislet and his contemporaries were not contemplating such problems when they were drafting Code articles in the early 1800's. The biggest dilemma at that time was determining who the father of a child might be, a question that can be answered today with almost certainty due to DNA testing. But the questions of this century are significantly different as we ponder, "Who is the mother and how many mothers can a child have?" The potential queries threaten the very essence of our notion of family. Some issues were addressed in Louisiana as they arose. In an effort to protect children conceived by means of artificial insemination with the consent of the husband of the mother, Civil Code article 188, dealing with disavowal of paternity, was amended in 1976 to bar the husband from disavowing the resulting child\footnote{La. Civ. Code art. 188, \textit{amended by} 1976 La. Acts 430, § 1.} born to his wife as a result of artificial insemination to which
he agreed. Ten years later, a new chapter was added to the Civil Code ancillaries to deal with legal issues involving human embryos created by \textit{in vitro} fertilization, including potential inheritance rights.\footnote{86} In 1988, following the much publicized \textit{In re Baby M} surrogacy case,\footnote{87} in which a woman agreed for compensation to be artificially inseminated, carry the resulting child to term, give birth, and then to relinquish the child to the sperm donor and his wife, the Louisiana legislature responded by passing an ancillary to the Civil Code providing that surrogate motherhood contracts would be void and unenforceable as contrary to public policy.\footnote{88} In addition to these generic responses, statutes have been passed to deal with individual cases involving specific Louisiana citizens. A few years after the passage of the statute declaring surrogate motherhood contracts to be against public policy, a case involving gestational surrogacy elicited the empathy of Louisiana legislators who passed a statute providing that a child born to a gestational surrogate who carried and delivered a relative’s genetic child be given the name of the genetic mother and her husband.\footnote{89} A later statute grants legitimate status to a child conceived by a woman after her husband’s death, using sperm which the husband had specifically designated for that purpose.\footnote{90}

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\item In re Baby M, 537 A.2d 1227 (1988).
\item La. R.S. 9:2713 (1991) provides:
  \begin{enumerate}
   \item A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.
   \item “Contract for surrogate motherhood “ means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.
  \end{enumerate}

It should be noted that the definition seems to include only the case where a woman is both the contributor of the egg and the carrier of the child, i.e. the biological mother in the complete sense. Thus, it could be argued that the statute has no application to gestational surrogacy arrangements.

\item See La. R.S. 40:32 (2001) (dealing with gestational surrogacy where the “resulting fetus is carried and delivered by a surrogate birth parent who is a blood relative of either the husband or wife”) and La. R.S. 40:34 (2001) (regarding the name to be placed on the birth certificate of such child).

\item See La. R.S. 9:391 (1991) which provides:
  \begin{enumerate}
   \item Notwithstanding the provisions of Civil Code Articles 184 and 185 to the contrary and in addition to the provisions of Civil Code Article 179, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the legitimate child of such decedent, provided the child was born to the surviving spouse, using the gametes of the decedent, within two years of
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\end{footnotesize}
How will all the reactions to assisted reproductive technologies be co-ordinated? For example, does the Louisiana in vitro fertilization law which prohibits the sale of human embryos, but allows for their prenatal adoption, announce a policy to protect fertilized embryos? If so, can we allow the embryos to remain frozen for indefinite periods of time, cognizant that, after a certain period of time, they will perish if not implanted? More troubling, if adoptive parents are not readily available for these embryos, should artificial wombs be considered a viable alternative? We can only imagine the filiation and inheritance issues raised by these questions.

There are obvious difficulties in dealing with such issues in a piecemeal fashion as an individual crisis arises. There is also, understandably, a reluctance to tackle such a controversial subject area. Yet, the technology advances, people continue to use it, and legal problems will inevitably arise. In contemplating the potential legal issues raised by these technologies, the Honorable Jean-Louis Baudouin, at the last Tucker lecture, warned that “[H]astily drafted legislation, adopted in response to a particular crisis situation or sudden political pressure usually makes bad law.” He advocated the use of the civilian methodology with its logical deductive model, as a means of approaching these legal issues. He wisely advised that in order to have a cohesive, logical response, it is first necessary to articulate some “fundamental principles” and then to be flexible in applying them, leaving the judiciary to play a “creative role,” interpreting the legislative intent in the context of the general precepts articulated in the legislation.

Concerned with the proper legal response to the questions raised by assisted reproductive technologies, the Senate of the Louisiana legislature in 1999 passed a resolution, creating a cross-disciplinary task force to study the issues of assisted conception and to

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the death of the decedent.

B. Any heir or legatee of the decedent whose interest in the succession of the decedent will be reduced by the birth of a child conceived as provided in Subsection A of this Section shall have one year from the birth of such child within which to bring an action to disavow paternity.

94. Id. at 429.
95. Id. at 430.
96. Id. at 430.
recommend principles for the drafting of a legal response.\textsuperscript{97} The goal was to bring together doctors, lawyers, religious leaders, legislators, geneticists, the fertile, and the infertile to discuss these issues and recommend some general policies for the state. The actual drafting of responsive legislation was most likely to be left to the Louisiana State Law Institute, particularly with regard to issues of filiation and inheritance. The Louisiana Task Force on Assisted Conception and Artificial Means of Reproduction was created and held its first meeting on April 25, 2000.\textsuperscript{98} Prior to any discussion of policies, three preliminary matters needed to be addressed. First, since the matters were of such a highly technical nature, a general educational session was held to inform the group as to the procedures now being used in this state and to discuss possible technologies on the horizon.\textsuperscript{99} The next order of business was to discuss the charge of the task force and to attempt to reach a consensus as to the goals of the group. At first impression, this appeared to be a particularly formidable challenge. As each member of the task force and each interested observer in attendance introduced himself or herself (revealing particular predilections, many in direct opposition to those of his fellow panelist), I wondered whether this diverse group could even begin to articulate a common general objective for these deliberations, let alone agree on a comprehensive report. At that time, I was reminded of the words of Professor Mary Ann Glendon in her prizewinning book, \textit{Abortion and Divorce in Western Law}: "Whether meant to or not, law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which it in turn helps to shape; stories about who we are, where we came from and where we are going."\textsuperscript{100}

In determining our goals, we inevitably would be painting a picture of the kind of society we wished to perpetuate. Ultimately, after some discussion, the task force members were able to agree that the primary goal of our deliberations should be to afford legal protection to the children born as a result of the use of assisted reproductive technologies. Thus, despite the fact that some task force members possessed extremely contradictory opinions as to the propriety of the use of certain technologies, the members collectively agreed that our state policy should reflect a compassion and concern for the best interests of the innocent children. Third, the task force

\begin{thebibliography}{9}
\item 97. Senate Concurrent Resolution No. 141 of 1999, Regular Session.
\item 98. At the initial meeting, Senator Don Hines was elected Chair and Professor Kathryn Ventuatos Lorio was elected Vice-Chair of the Task Force.
\item 99. On May 30, 2000, Dr. Bobby Webster oriented the Task Force on the medical issues.
\item 100. Mary Ann Glendon, \textit{Abortion and Divorce in Western Law} 8 (1987).
\end{thebibliography}
was informed as to the work of the Marriage-Persons Committee of the Louisiana Law Institute regarding the filiation of children.101

Deliberations, limited basically to policy issues regarding filiation and recognition of civil contracts, ensued, culminating in the submission of both a majority and a minority report to the legislature. Once the legislature has reviewed and decided upon its basic policy approach, the recommendations will presumably be submitted to the appropriate committees of the Louisiana State Law Institute for drafting legislation. Then, particularly in an area of such controversy, the steps advanced by Colonel Tucker as “important and essential” in codification should be followed, i.e., careful preparation of a projet, thorough discussion of the projet, adoption by the legislature, and post-codification development by doctrine and jurisprudence.102

In these new areas of law, the approaches of French doctrine will prove of little assistance. Rather, the law professors of this emerging era, many of whom may still be in law school, will offer the aid needed to work with the new laws and to co-ordinate them with old laws. As predicted many years ago by Justice Albert Tate, “new legislation often reflects principles different from those expressed by older statutes, so that the meaning of former legislation must often be reinterpreted constantly in the light of the principles expressed by the newer enactments.”103

The role of the judiciary in this endeavor to deal with new technologies will be to start with articles in the Code and to apply them directly where feasible. However, due to the rapid developments in reproductive medical technology, such as cloning and the development of artificial wombs, Code articles should not, by necessity, be too specific, but rather should reflect general principles which could be applied to later developing situations. As pointed out by Justice James Dennis when he delivered the Tucker lecture a decade ago, “the court must use the code as its source of guiding values in formulating a rule for the situation, either by analogy or by rulemaking.”104

If Justice Tate were here to guide us in dealing with these new technologies, he would probably recommend the use of the “objective” method of interpretation where “the meaning of the application is determined in the light of the circumstances as they

101. Professor Katherine Shaw Spaht, Reporter of the Marriage-Persons Committee of the Louisiana State Law Institute addressed the group.
103. Albert Tate, Jr., Techniques of Judicial Interpretation in Louisiana, 22 La. L. Rev. 727 (1962).
exist at the time the interpretation takes place, perhaps many decades after the enactment.” The interpretation would also be “functional” in the sense that the legislation would be applied to new situations “by considering whether the legal precept was intended to regulate that general type of conflict of interest and by considering the purpose for which the statute was enacted.”

Thus, the civil law tradition, substantively emphasizing the interests of children and the preservation of the family, with a methodology adaptable to constant change, offers a workable framework for dealing with the legal issues that may arise in the highly-technical area of assisted reproductive technology. This controversial subject matter elicits precisely the formula which Professor Pascal described as he defined a model Code, “a formal consensus, to serve as a major premise,” “expressed largely in abstract terms,” making it “usually easier to appreciate how they [terms] apply to new unforeseen circumstances and conditions.”

IV. RECOMMITMENT TO THE CIVIL LAW TRADITION

It was about thirty-five years after Professor Ireland’s message “rallied” Louisiana citizens to work toward the preservation of their civil law tradition that Justice Barham re-examined the civil law tradition in Louisiana and proclaimed its “renaissance.” Now, almost thirty-years after that “renaissance,” it may be timely to re-check the pulse of that tradition and to recommit ourselves to its healthy survival. At least two good reasons exist for such a course of action. First, the civil law tradition is suited to the private law needs of Louisiana. Second, by educating others as to our tradition, we prepare for our inevitable transition into the global community that will characterize the new millennium. Because Louisiana offers a working mixed system to examine, the state affords students an aspect of legal education that cannot be duplicated by the mere

105. Tate, supra note 107, at 732.
106. Id. at 733. Justice Tate warned that “[t]he judge must think of himself as the legislators’ colleague, not as a super-legislator; sometimes he merely echoes the legislative rule, sometimes he completes or extends it so as to govern conflicts of interest within its scope but not specifically provided for; and even when the judge finds the formal working of the legislative rule does not furnish the legal principle appropriate for decision of the instant case, he does so only in the spirit of cooperation and of doing what he thinks is the intention of the legislation, not in a spirit of opposition or dissent.” Id. at 737.
offering of comparative courses in an Anglo-American jurisdiction. In Louisiana, a student of the civil law deals with legal issues with a greater degree of detail within the confines of a viable, functioning system rather than being relegated to vague comparisons in a vacuum of academic hypotheticals. The unique value of a Louisiana legal education has not been ignored by the Louisiana law schools as they compete for students in a market influenced by national rankings based on LSAT scores and the number of faculty publications in top twenty law reviews. At a time when the percentage of civil law, as opposed to common law students, is decreasing in the law schools of Louisiana, the very existence of civil law programs may be threatened unless they may be linked to a more expansive concept. One answer to balancing the retention of the civil law tradition, while keeping competitive in this new arena, is to capitalize on the civil law tradition as a vehicle to the international and comparative arena.

Tulane Law School, which reports in its catalog that only fifteen percent of its students come from Louisiana, proclaims that "Everything old is new again." Pointing to its teaching of both civil and common law courses for over 150 years, it posits, that "this mingling of intellectual thought has evolved into a highly sophisticated comparative and international law program that is primed and ready for the complex legal issues of the 21st century." Apparently what is "old" is the civil law tradition, but what may have been viewed as archaic before is now new and prophetic of a modern world view. Similarly, Loyola Law School, proudly states in its bulletin that "[B]ecause it is located in Louisiana, . . . Loyola is one of the few law schools in the world offering both curricula,” civil law and common law. As a credential verifying exposure to both traditions, Loyola offers a Certificate in Civil Law studies to its common law students who complete a prescribed program of civil law courses, two required of all certificate applicants, and a certain

109. My thanks to Professor Raphael Rabalais who made this observation in a conversation on February 25, 2002.
110. Of the law schools in Louisiana offering both civil and common law degrees, both Loyola and Tulane report a drop in the number of entering students registered for the civil, as opposed to the common law, in 1998 as opposed to 2001. Loyola indicated that in 1998, 54.23% of the entering students registered for the civil law curriculum, as opposed to only 47.84% in 2001. (Statistics reported by Shirlene Muckelroy, Loyola Law Records). The difference at Tulane was more dramatic with 17.4% classified as civil law at entry level in 1998 and only 9.9% in 2001. (Statistics confirmed by Tulane University School of Law Dean's Office).
111. Tulane Law School catalog at 7.
112. Id. at 17.
113. Loyola University New Orleans, School of Law International Programs Bulletin at 3.
A similar offering is available to Civil Law Students who wish to as well obtain a Certificate in Common Law Studies. In addition, a Certificate in International Legal Studies is available for those "preparing for professional careers in the emerging global economy." Effective in the Fall of 2002, Louisiana State University Law Center, offers a "simultaneous conferring of a Juris Doctor and Bachelor of Civil Law Degree, reflecting its "bijural" tradition. After completing a mandated first year curriculum composed of civil and common law courses, the students in their second and third years must complete designated hours of Civil law, Common law, global law and public law courses from a "basket," rather than a "pool." All of these programs are commendable and can only expand the horizons of the students availing themselves of them. However, lest we forget in our zeal for international accommodation, the foundation upon which our Louisiana claim to comparative, bijural, or mixed distinction rests, is that we offer a living laboratory. It is that unique experience that prompted Professor Mathias Reimann to recommend the recruitment of Louisiana civil law scholars such as Professors Saul Litvinoff, A.N. Yiannopoulos, and Symeon Symeonides to aid in the codification of private law for the European Union, as he observed that "these scholars have gone beyond just thinking about codifying rules in mixed jurisdictions—they have actually done it." Thus, the teaching of

114. The courses of Civil Law Property and Civil Law of Obligations are required of all certificates applicants. Additionally, the applicant must complete one of the following courses, Civil Law of Persons, Successions, Donations and Trusts, Sales and Leases, Community Property, or Security Rights. Loyola Law Bulletin, 2001-2002, at 30.
115. Required courses for the Common Law Certificate are Common Law Property II and Commercial Transactions. Additionally, the students must complete one of the following courses: Contracts II, Common Law Property I, Trusts and Estates, or Secured Transactions. Id. at 30-31.
116. Id. at 31.
117. LSU Law Center Catalog, 2001-2002, at 5.
118. Id. at 14.
Illustrations of how civilians in the mixed jurisdictions have worked toward the goal of bringing civil and common law together are not hard to find; Louisiana can provide some examples. Codifiers in the bayou state have always worked comparatively. Leading representatives are Athanassios Yiannopoulos mainly in property law, Saul Litvinoff in obligations, and, more recently, Symeon Symeonides in conflict of laws. In drafting and revising
the civil law tradition within the Louisiana context of its Civil Code, doctrinal writings, and jurisprudence must be nurtured in order to foster the environment which distinguishes our law schools from those functioning under only one system and merely offering comparative and international courses with no laboratory component for actual experimentation.

Some of the alleged obstacles to the strengthening of the civil law tradition remain, long after the critique of Professor Ireland in 1937. One is that the fluency in the French language has diminished over the last sixty-five years. Fewer of our students are bilingual, and of the few who are, their second language is usually not French. Although scholars in the past would deem the civil law tradition in Louisiana doomed due to this situation, two developments offer an alternate prediction. First, translations of many of the French doctrinal writers are readily available. Additionally, with the revision of the Civil Code, those writings are less relevant than they were in the past. This may explain the interesting finding that in court decisions of the past ten years dealing with forced heirship, modern doctrinal writers, contemporary professors teaching civil law courses, were cited at least twice as often as French doctrinal sources.

Doctrinal interpretation of codal provisions remains today an essential component of the civil law tradition. In order to continue

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122. See Palmer, supra note 8, at 43 in which Professor Palmer that, “[F]or better or worse, and it is difficult to decide which, a state of linguistic independence seems within reach.”

123. Since March 14, 1992, in cases dealing with forced heirship, Louisiana federal and state courts cited Aubry and Rau a total of three times; Planiol, five times; Nathan, six times; Samuel, eight times; Spaht, twenty times, and Swaim and Lorio, eight times each.

124. See Albert H. Tate, Jr., Techniques of Judicial Interpretation in Louisiana, 22 La. L. Rev. 727, 739-40 (1962) in which Justice Tate quotes approvingly of Planiol’s observation as to legal doctrine, stating that “its role is considerable; it gives orientation; it prepares from afar many changes in legislation and in case
such scholarship, the law schools must actively encourage, support, and certainly not marginalize the work of the Louisiana scholars, despite the fact that the top twenty law reviews will most likely not choose to publish the commentary.\textsuperscript{125} Otherwise, touting our civil law laboratory, the very foundation upon which our claim to a unique position bridging two legal systems is based, becomes mere rhetoric. To support these endeavors, the law schools as well as institutions such as the Louisiana State Law Institute and the Center for Civil Law Studies should dedicate resources to the continued development of these doctrinal materials and also to the creation of teaching materials especially designed for our “microcosm of a mixed jurisdiction,”\textsuperscript{126} as national publishers understandably show little interest in publishing materials for such a limited market.

The perpetuation of any tradition mandates that it constantly be replenished. Thus, as I start to teach my second generation of Louisiana law students, our law schools should be searching for those who will begin to teach their first generation. The candidates should reflect a sincere interest in preserving and nourishing, through legal scholarship and teaching, that precious civil law tradition which is clearly distinguishable from mere generic state legislation. Similarly, the Louisiana State Law Institute should be seeking out new members with outstanding credentials, from diverse backgrounds, who will help to draft legislation reflective of a consensual, deliberative body. Pursuant to the By-Laws of the Institute, the Council should review its membership annually, determining which members are eligible for

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\item [By it,] scientific principles and juridic ideas are developed and come to dominate the thought of judges and of the legislator himself.” \textit{Id. See also} 1 Planiol, Civil Law Treatise \textit{supra} note 47, § 127.

Writing in 1962, Justice Tate also noted that due to the French language impediment, doctrine had played a “relatively small part” in the development of Louisiana’s law, but in the two decades preceding his writing he saw a “great increase in Louisiana doctrinal writing,” partially due to translations of French materials, but also because of the treatises in English of Louisiana scholars. \textit{Id.} at 740-41.

125. \textit{See} Reinhard Zimmermann, \textit{Law Reviews: A Foray Through a Strange World,} 47 Emory L.J. 659 (1998). Professional Zimmermann notes that doctrinal scholarship, which he defines as “the analysis of legal problems in a manner conducive to facilitating the practical application of the law” is viewed with “a certain amount of condescension or even disdain at the elite universities.” \textit{Id.} at 689. Professor Zimmermann also notes that comparative law in general “plays the role only of an outsider.” \textit{Id.} at 690. And also that rankings of law reviews are based on the “frequency of citation.” \textit{Id.} at 692.

Since only a limited audience has an interest in, or need to consult, the Louisiana civil law doctrine, it is logical that Louisiana doctrinal writing would pose little interest to the top twenty law reviews.

Senior Officer status and elevate such individuals. This would not only serve to honor members who have devoted years to the Institute, but it would also allow for the election of additional members to the Council who could work and learn with the experienced seniors, offering fresh insight to the deliberations and preparing themselves for future leadership within the Institute. The constant renewal would serve to enhance the credibility of the Institute, which must be cautiously mindful of the constituency it serves in this state, and would also provide the seeds for future leadership to insure the continued viability of the Institute.

In conclusion, our challenge, while revising the Civil Code and while providing completely new sections to deal with contemporary technology, will be to modernize, without discarding the classic ideology and methodology which is characteristic of our proud civil law heritage. If we truly wish to preserve our legal tradition, whether for its own sake or as a springboard to international aspirations, it is

127. See By-Laws of the Louisiana State Law Institute, adopted Nov. 13, 1998:

IV. Council of the Institute

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B. Membership, § 4 provides "All members of the Council and all Administrative and Non-Administrative Officers of the Institute shall have the privileges of the floor and the right to vote at all Council meetings."

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VI. Officers of the Institute

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N. The Council may elect as Chairperson Emeriti those persons who have served as Chairpersons of the Institute.

O. The Council may elect as Senior Officers attorneys who have served not less than sixteen years in the Louisiana Legislature and not less than four years as members of the Council, members who have served not less than twelve years as members of the Council, members of the Council who are elected to the judiciary after having served not less than eight years as members of the Council, and members of the judiciary who have served no less than eight years as ex-officio members of the Council. The Coordinator of Program and Research, Civil Law Section, and the Secretary, Civil Law section, are Senior Officers during their terms of office as officers of the Civil Law Section.

* * *

Q. Chairpersons Emeriti and Senior Officers, as non-administrative officers, shall have the status, rights, and privileges of officers, shall have tenure for life, and shall perform such duties as may be assigned to them by the Council.
incumbent on us to take the initiative to reinforce its foundation within our state. I am hopeful that we will succeed in this endeavor and that we will retain our civil law tradition which has served us well for so long. Hopefully, if I am blessed to be teaching in another quarter century, I will enter my classroom at that time and instruct a third generation of law students of Louisiana in our revered civil law tradition.