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ARTICLES

A CIVILIAN FOR OUR TIMES: JUSTICE ALBERT TATE, JR.

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Justice Albert Tate, Jr. was born in 1920 into a family that resided in the Ville Platte area for eight generations. He received a Bachelor of Arts degree from George Washington University in 1941. After serving with distinction during World War II in the Counter Intelligence Corps in the Far East, he returned to his education at Yale University, receiving his L.L.B. degree in 1947. In 1948, he received a certificate for Civil Code studies from the LSU School of Law. Justice Tate practiced for six years in Ville Platte before his election to the Louisiana First Circuit Court of Appeal. He became the presiding judge of the Third Circuit Court of Appeal in June, 1960 and served in that circuit for ten years. In 1970, he was elected Associate Justice of the Supreme Court of Louisiana to replace the retiring Chief Justice Fournet. He served on the supreme court until his retirement from that court and his appointment to the United States Fifth Circuit Court of Appeals on July 30, 1979. Justice Tate's nine years of service on the Supreme Court of Louisiana came at a crucial time for the highest court of this State.

In the 1960's and early 1970's, the United States Supreme Court, under the leadership of Chief Justice Earl Warren, was moving rapidly in protecting the constitutional rights of individuals. Landmark decisions were coming out of that Court, overturning jurisprudence regarding searches and seizures, confessions, line ups, arrests, guilty pleas, and nearly every other area of the criminal law process. While most of this paper concerns Justice Tate's views as a judge in the civil law area, it would be remiss not to point out the great impact that he had as a member of the court by demanding adherence to the new legal principles of the Warren Court, and by recognizing the binding authority of the United States Supreme Court decisions in the area of criminal law.

The views expressed in these opinions of the Warren Court were not readily received by the lawyers or the general public in Louisiana.

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It was difficult for the elected judges of Louisiana to adopt these principles and abide by the decisions of the United States Supreme Court. In fact, the Louisiana Supreme Court itself was slow to feel compelled to follow the highest court of the land. A review of the Louisiana Reporter shows that from 1968 to 1970 the Louisiana Supreme Court decided numerous criminal cases by a six-to-one vote, this writer being the lone dissent. With Justice Tate's addition to the court in 1970, these types of cases were more often decided by a five-to-two voting posture. Upon Justice Dixon's arrival, the resistant majority was weakened to four votes. Finally, the addition of Justice Calogero to the Louisiana Supreme Court swung the dissent into the majority which henceforth adhered to the United States Supreme Court dictates.

Justice Tate's convictions and persuasive abilities largely influenced these new members of the Louisiana Supreme Court. This writer will be ever grateful to Justice Tate for his invaluable assistance, his quality of leadership, and his ability to work with his colleagues on the court towards the goal of abiding by the United States Supreme Court. During this conflict, the morale of the minority was strengthened by the federal court cases which upheld the dissenting opinions by granting post-conviction relief to Louisiana defendants. Unfortunately, the long delay which resulted upon remand often made it impossible for a new trial to be had. Thus, the minority recognized that the more rapidly that the Louisiana courts resolved their legal issues in accordance with the federal mandate, the greater the likelihood of adjudication by the original trial and the conviction of the guilty.

Justices who stood strong in this position faced severe criticism from the electorate. In fact, one of the justices endured a bitter election battle which he won only with great effort and difficulty. It is appropriate to introduce this reflection on Justice Tate's work with a statement about his courage in carrying out his convictions and in discharging his responsibilities. Justice Tate was a man of great intellect. He was an honorable person. He was a courageous fighter. Most people who knew him would describe his as a kind and mild-tempered person. However, observing him with his colleagues in the conference room of the Supreme Court, vigorously advocating his position, gave another perspective to the persona of Justice Tate. He could be adamant, uncompromising, aggressive, and forceful when confronted with opposing and—in his opinion—invalid, legal views.

Justice Tate was similarly invaluable in creating the resurgence of the civilian tradition of Louisiana at the Louisiana Supreme Court. As both a catalyst and response to this movement, Justice Tate penned numerous articles examining civilian methodology, the influence of policy on judicial decisions, the role of the judge, and the effect of common law in Louisiana, as well as the wealth of opinions which applied the principles so carefully articulated in his scholarly works. In one of his

earliest articles, *"Policy" in Judicial Decisions*,[1] Tate discussed the considerations which influence judicial decisions when there is no positive law to resolve a dispute. In such a circumstance, according to Justice Tate, the judge should decide both what is best for the community as well as what is a fair solution to the problem at hand. By way of example, he cited the opinion of *Sanders v. Sanders*,[2] which he wrote for the First Circuit Court of Appeal, where such policy considerations were weighed to choose between two conflicting statutes.[3] According to Tate, an additional aspect of policy considerations would come into play for every decision, not just the unprovided-for case. That is, once a policy choice has been made, a judge should not apply the rule by rote, but in accordance with the rule's underlying policy.

Justice Tate believed that an unjust result in a particular case was more than likely due to misapplication of the law, not to a law itself unjust. He frequently used Louisiana Civil Code article 21 to reach a fair result when a forced and mechanical application of another law might have resulted in inequity. Such a course was justified by his belief that one aspect of the civilian judge's duty is to harmonize an isolated statute with the rest of the codal scheme.

In his article, *The Law-Making Function of the Judge*,[4] Tate outlined four such functions, having concluded that "law-improvement functions are an inescapable part of the duties of an appellate court."[5] He describes those functions as choosing the law or rule in the unprovided-for case, synthesizing the new law with the rest of the Code, revising the law to reflect social changes, and interpreting the law to reflect legislative will. The first function, choosing the law-rule, is necessary in the unprovided-for case, as discussed in *Sanders*.[6]

The judge must also synthesize new legislation within the established body of law.[7] This second function recognizes that many issues are often

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1. 20 La. L. Rev. 62 (1959).

2. 85 So. 2d 61 (La. App. 1st Cir. 1955).

3. *Sanders* involved a contest between two heirs, one of whom sought reimbursement of their mother's funeral expenses from the estate. His brother opposed the claim, arguing that it had prescribed under La. Civ. Code art. 3538 (1870) (current art. 3494, 3-year prescription of open accounts). The first brother urged that funeral debts are substantially different from open accounts as they are a charge on the estate. From this perspective, prescription does not run as long as the estate is not settled. Another alternative facing the court was the prescriptive period for personal actions of ten years under art. 3276 (1870) (current art. 3499). The court felt it would be unjust in both the instant and future cases to require an heir to sue the estate within three years to recover funeral expenses.

4. 28 La. L. Rev. 211 (1968).

5. Id.

6. Id. at 216. See supra notes 1-3 and accompanying text.

7. 28 La. L. Rev. at 218-20. In his article, Tate points out several revised areas of the law which have raised new issues for the courts. For example, the married women's

affected by a new law, but are not directly controlled by it. Without direction from the legislature, the courts must decide these incidental issues based on the intended policy of the new law. To do anything less, Tate believed, "would abdicate the judicial function by simply applying the later legislation on some mechanical rule that the latest enactment must always supersede all earlier statutes even arguably affected, without attaching any relevance to whether this later enactment was really intended to apply."[8]

The third function of the appellate judge, according to Justice Tate, is law revision.[9] This activity is most prevalent in the area of private law doctrines which must be updated as the *mores* of society change. One reason for the courts' performance of this task is that the legislature simply does not have the time or inclination to continuously update every area of the law. Instead, the courts revise the law, if necessary, to resolve the dispute at hand, and the legislature reacts either by not acting or by passing a statute to reverse a judicial revision. One of the foremost areas of law revision associated with Judge Tate is that of tort and strict liability, as illustrated by his decision in the landmark case of *Loescher v. Parr.*[10] By expanding the notion of fault to include liability for damages caused by defects of which the owner was not aware, Tate significantly broadened the grounds on which plaintiffs could sue. This outcome was justified by a thorough and meticulous exegesis of Civil Code article 2317. The result was to imbue that article with a utility demanded by social and technological advances.

In a more recent work,[11] Tate discussed another case where he believed that law-revision would have been appropriate. In *Loyacano v. Loyacano*,[12] he joined the majority on original hearing and adopted the opinion by Justice Dennis on rehearing as a concurrence. *Loyacano* involved a challenge to the constitutionality of Louisiana Civil Code article 160 which granted alimony to a divorced wife in need. The husband claimed that the article was blatantly gender-based and violated the equal protection guaranteed by both state and federal law, although he did not seek alimony for himself. The original majority considered

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emancipation acts called into question the tort liability between spouses and/or to third parties. Another example arose out of the 1960 legislation which revised La. Civ. Code art. 2103 (1870) (current art. 1804, 1805) to provide for the enforcement of contribution among joint tortfeasors. The new article did not address the situation where the other spouse had been the joint tortfeasor, invoking interspousal immunity.

8. 28 La. L. Rev. at 220.

9. Id. at 221-22.

10. 324 So. 2d 441 (La. 1975).

11. Tate, The "New" Judicial Solution: Occasions for and Limits to Judicial Creativity, 54 Tul. L. Rev. 877 (1980).

12. 358 So. 2d 304 (La. 1978).

the social setting at the time Article 160 was enacted and found that there was no intent to discriminate; the idea of alimony for necessitous husbands simply did not occur to the legislators. Using Article 21, the court found that a necessitous husband would not be denied alimony in spite of the language of Article 160. The husband's request for rehearing contended that the court had impermissibly engaged in judicial legislation by providing for alimony to a necessitous husband when Article 160 specifically addressed the wife's needs. A new majority agreed with this contention and held Article 160 to be unconstitutional—effectively removing the legislative source of alimony for *any* necessitous spouse. Tate adopted the reasoning of the original majority[13] and noted that legislative silence as to post-divorce alimony for husbands would have allowed the courts to use Article 21 to provide a gender-neutral rule in accordance with the Code's general principle of equity.

The last law-making function of the judge, analysis of policy interests in spite of the literal wording of an article,[14] overlaps with the three other functions. Recognizing that the legislative will is of primary importance, Tate argued that this will must be obeyed even if the words of a statute dictate otherwise. According to Tate,

> the words of legislation contain a principle of regulation intended by the legislators to apply to contemplated norms of their own and succeeding times. But if there is a substantial change in the social conditions the statute is designed to regulate, the mechanical adjudication by reference to the statute's literal wording alone may, under the changed conditions, amount to an irresponsible application of a legal rule devised neither by legislative intention nor by the deciding court.[15]

Despite this seemingly broad and sweeping language, Tate also believed that this type of interpretation must be used sparingly and with restraint—and never as an excuse to thwart the legislative will. That is, the policies and preferences of the judge, under the guise of interpretation, cannot be substituted for those of the legislature.

Fidelity to the above-stated principle does not guarantee unanimous agreement among judges as to the legislative will. For example, in *Tannehill v. Tannehill*,[16] Justice Tate, then sitting on the Third Circuit, was faced with the issue of whether a father could allege sterility as ground for disavowal. At that time the Civil Code listed five grounds for disavowal, none of which were sterility. This list of grounds had been held to be exclusive in the supreme court decision of *Williams v.*

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13. Id. at 317.
14. 28 La. L. Rev. at 227.
15. Id. at 229.
16. 226 So. 2d 185 (La. App. 3d Cir. 1969).

Williams.[17] On the other hand, several scholars, including Justice Tate, had under different circumstances, criticized the rigid construction of the paternity and disavowal articles. In this instance, however, Tate concluded, "[t]he general statutory intent . . . is to protect helpless children born during a marriage from illegitimation by one or both of their parents or by others for their own selfish aims."[18] Tate rejected this type of application in another case where the child would be deprived of his right.[19]

The supreme court affirmed Tate's decision in *Tannehill*, agreeing with his opinion as to the legislative will.[20] This writer, however, dissented, finding that the legislative intent was to allow disavowal based on "unnatural impotence" by negative inference from former Article 185.[21] Having concluded that sterility due to a childhood disease was not a "natural impotence," the father was allowed his cause of action. This writer noted:

> Not only do I disagree with the result and with the historical interpretation given to Article 185 of our Civil Code, but I strongly take issue with the majority's method and technique of judicial interpretation. The use of exegetical approach in isolation does not discharge the judicial obligation when our court works to and through the Code. While exegesis is certainly helpful, often very enlightening, it can entomb the court and the law in the darkness of the past. The combination of the exegetical, the empirical, and the functional methods of interpretation is required in order that the law serve the people, that the law be a reflection of the people's understanding, desires, and needs. Moreover, the more comprehensive approach is required under the mandate of our Code itself:
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> 'Art. 18. The *universal* and most *effectual* way of discovering the true meaning of a law, when its expressions are dubious, is considering the *reason and spirit of it*, or the cause which induced the Legislature to enact it.'
>
> 'Art. 3. Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.'

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17. 87 So. 2d 707 (La. 1956).

18. *Tannehill*, at 189.

19. Id. (citing George v. Bertrand, 217 So. 2d 47, 49 (La. App. 3d Cir. 1968) (Tate, J., dissenting)).

20. 261 So. 2d 619 (La. 1972).

21. That article read in pertinent part: "The husband cannot by alleging his natural impotence, disown the child. . . ."

> 'Art. 21. In all civil matters, where there is no express law, the judge is *bound to proceed and decide according to equity.* To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent.' (Emphasis supplied.)[22]

As it turned out, the legislature itself was the final arbiter of this debate—although not of the case. In 1976, it revised the paternity and disavowal articles to allow the husband to "disavow paternity of a child if he proves by a preponderance of the evidence any facts which reasonably indicate that he is not the father."[23] All of the opinions in *Tannehill* sought to propagate the legislature's intent, yet reached different conclusions, exemplifying the difficulty of this type of judicial interpretation and the need to use it sparingly.

Justice Tate also authored a body of work expounding upon those aspects of the judicial function that are uniquely civilian.[24] Acknowledging the obvious similarities between Louisiana and common law judges, he went on to examine the subtle differences between the two philosophies.[25] For example, a civil law judge is less hesitant than a common law judge to overrule a precedent. At least in theory, a lower civilian court could even overrule a higher court decision if it believed that decision to be erroneous. Although Tate believed in this distinction and expounded on it in his articles, he could not escape the influence of his common law training. More often than not, he would distinguish a case rather than overrule it, and when he sat on the court of appeals, he acknowledged the authority of a supreme court decision.[26]

Another attribute of Louisiana jurisprudence is its ability to develop an entire body of law using the Codal principles, yet following the case-by-case method. This writer collaborated with Justice Tate in an article which made this point, citing the body of mineral law which was formed almost entirely prior to the adoption of the mineral code.[27] We opined:

> The evolvement of the mineral law over the years indicates the court's awareness of new developments in that field and of the need for flexible rules of law which could be adapted to changing

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22. 261 So. 2d at 627 (Barham, J., dissenting).

23. La. Civ. Code art. 187.

24. See, e.g., Tate, Civilian Methodology in Louisiana, 44 Tul. L. Rev. 673 (1970); Barham & Tate, Jurisprudential Development in Louisiana Civil Law, 34 La. L. Rev. 953 (1974); Tate, The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience, 20 Loy. L. Rev. 231 (1974).

25. Tate, Civilian Methodology in Louisiana, 44 Tul. L. Rev. 673, 677 (1970).

26. For example, in *Tannehill*, 226 So. 2d at 189, he stated, "We are unwilling to depart from this settled guiding principle, in the absence of direction from our Supreme Court to the contrary."

27. Barham & Tate, supra note 24.

> conditions. . . . This jurisprudence is a good example of the civilian tradition of looking not only to the Code, but through and beyond the Code. It has to date kept that Code and the mineral law alive and viable.[28]

This type of faith in and adherence to the Code as a tool to facilitate justice distinguished Tate from most of his colleagues, who preferred to abandon the civilian methodology in favor of common law practice. According to Tate, the Louisiana judge possesses the best of both worlds.[29] On the one hand he is not bound by case law if he feels that a Code article has been misinterpreted or if no article exists at all. The general codal principles remain available to him. On the other hand, the body of opinions are invaluable sources of reasoning which guide the judge in reaching a decision. Perhaps Justice Tate struck a balance between these two competing systems by realizing the full power of civilian methodology, yet reserving that power when a common law approach would suffice. As with the constitutional concept of judicial review, the strength of the concept is preserved by its sparing use.

In addition to Justice Tate's contributions of judicial opinions and scholarly articles,[30] he was also a prominent source of the written law. As a delegate to the Convention which drafted the 1974 Louisiana Constitution, he served as the chairman for style and drafting. He was recognized by the Convention as having great constitutional expertise, and he was a persuasive member of the Convention. Additionally, Justice Tate served the Louisiana State Law Institute and was responsible for many contributions to the revisions of the Civil Code of Louisiana. He was a member of the American Law Institute and a director of the American Judicature Society. He was chairman of the Judiciary Commission of Louisiana and chairman of the Louisiana Conference of Court of Appeal Judges. He served as chairman of the executive committee of the National Appellate Judges Conference and as chairman of the American Bar Associate Committee on Appellate Advocacy. He has contributed much to the national court system of state judges, to the American Bar Foundation and the National Appellate Judges Seminar. In recognition of these achievements, the legislature passed a concurrent resolution by 106 representatives and 39 senators, during its 1986 Regular Session "to express the condolences of the Legislature upon

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28. Id. at 954.

29. Tate, The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience, 20 Loy. L. Rev. 231 (1974).

30. He was the author of more than fifty major articles published in law reviews, bar journals and books. He authored a textbook on Louisiana Civil Procedure. He served as a Professor of Law at LSU on a leave of absence from the Third Circuit Court of Appeal. He continued over the years to lecture, not only at LSU, but at other law schools in the state.

the recent death of Judge Albert Tate, Jr., one of Louisiana's greatest sons."[31]

Justice Tate has received many honors, both while he was alive and posthumously. However, the highest honor and that of which he would be most proud, would be to remember him in practice by striving for excellence with the same vigor and dedication that he displayed.

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31. House Concurrent Resolution No. 134, Regular Session 1986.