Louisiana Law Review

Volume 65
Number 2 *Winter 2005*

Article 6

2-1-2005

The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation

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The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation

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This Article provides a contemporary and comparative examination of the sources of law and the value of precedent in Louisiana, a state whose judicial system resembles those of common law judicial systems of the United States, but whose private civil law is rooted in the civil law traditions of France and Spain, which were prevalent in the territory of Louisiana in the late eighteenth century and early nineteenth century. The Article examines the doctrines of "stare decisis" and "jurisprudence constante" and the value of precedent in select common law and civil law jurisdictions, then focuses on Louisiana as an example of a jurisdiction which, like many jurisdictions worldwide, has valued precedent in such a way that it is extremely influential, but not always binding on the courts. The Article refers to this practice as "systemic respect for jurisprudence" because the value of a precedent is directly related to the status in the legal system of the court deciding the prior case. An empirical study of the Louisiana judiciary on the sources of law and the value of precedent in Louisiana complements a discussion of these issues based on scholarly works on Louisiana law and Louisiana judicial opinions. The author concludes that many jurisdictions, both common law- and civil law-based, are gravitating to "systemic respect for jurisprudence" and away from strict use of the traditional stare decisis and jurisprudence constante doctrines. The Article then proposes law to codify the principle of systemic respect for jurisprudence.

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* Professor of Law, Loyola University New Orleans School of Law. The author expresses deepest gratitude to the 150 members of the Louisiana judiciary who responded to the *Survey of Louisiana Judges Regarding Sources Relied on To Decide Cases*, which the author distributed in 2003. The results of this survey were invaluable in the research and writing of this article. The author gratefully acknowledges the research assistance of Brandi White, Jennifer Englander, and Maggie Dierker, which was made possible by the support of the Alfred J. Bonomo, Sr. family and the Rosaria Sarah Lanasa Memorial Scholarship Fund. The author also thanks Professors Katherine Venturatos Lorio and Monica Hof Wallace for commenting on drafts of this Article.

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The conditions of society, and men's attitude towards them, are slowly but constantly changing, and the law must do its best to keep in harmony with contemporary life and thought.[1]

I. INTRODUCTION

Louisiana has a rich legal history, with its law and legal tradition rooted primarily in French, Spanish, and Roman traditions.[2] In 1803, the United States purchased the territory of Louisiana, which included the land that is now the State of Louisiana. Early attempts to set up a common-law-based system in the territory failed; advocates for creating a legal system based on the civil-law tradition similar to the laws and tradition with which most of the French and Spanish

1. Theodore F. T. Plucknett, A Concise History of the Common Law 307 (5th ed. 1956).

2. Shael Herman, The Louisiana Civil Code: A European Legacy for the United States 9–11 (1993); Ferdinand F. Stone, Louisiana Tort Doctrine §§ 1–8, *in* 12 Louisiana Civil Law Treatise 1–16 (1977).

residents were familiar prevailed.[3] Inhabitants of Louisiana were allowed to maintain civil law for private law; however, the court system and public law were based on the American common law model.[4] In France, *le Code civil des francais*, which later became known as the Code Napoléon, was promulgated in 1804, and it provided an excellent model for those scholars in Louisiana who drafted a code to govern this new state.

Over the next two hundred years, Louisiana's legal system and legal doctrines developed and benefitted from influences from the federal and state legal systems throughout the United States, the French and Spanish legal systems, and other legal systems from around the world.[5] Because of its civilian tradition, Louisiana scholars and judges often looked beyond the borders of the United States in developing and interpreting Louisiana law and shaping the methodology that would be applied in the legal system.

This article examines the sources of Louisiana law and the methodology used to interpret that law today. Empirical data, as well as a review of scholarly works on Louisiana law and judicial opinions discussing Louisiana law, indicate that Louisiana's legal system has adapted in a way that draws upon the strengths of the civil law tradition while taking advantage of the availability of accurate reports of prior judicial decisions. With its sources of law being enacted law and custom, its great respect for judicial decisions, and yet its flexible doctrine of jurisprudence constante to deal with precedent, Louisiana's legal system is well-equipped to maintain the consistency and predictability valued in a strong legal system while at the same time keeping that law from becoming stale and outdated.[6]

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3. Herman, *supra* note 2, at 28–32.

4. Symeon Symeonides, *The Louisiana Judge: Judge, Statesman, Politician, in* Louisiana: Microcosm of a Mixed Jurisdiction 89, 91–92 (Vernon Valentine Palmer ed., 1999); Nina Nichols Pugh, *The Structure and Role of Courts of Appeal in Civil Law Systems*, 35 La. L. Rev. 1163, 1188 (1975). The present article primarily focuses on private law, as opposed to public, administrative, or criminal law.

5. *See* Ferdinand Fairfax Stone, *Tort Doctrine in Louisiana: From What Sources Does It Derive?*, 16 Tul. L. Rev. 489, 506–09 (1942), and examples cited therein.

6. *Accord* A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 Tul. L. Rev. 830, 848 (1980) ("Not necessarily at the expense of certainty, Louisiana has always enjoyed, and will continue to enjoy, flexibility in the administration of civil justice."); Albert Tate, Jr., *Civilian Methodology in Louisiana*, 44 Tul. L. Rev. 673, 678 (1970) (noting that legislation provides consistency, but judges are free to reinterpret legislation that they find has been incorrectly interpreted by a court in a prior decision). Judge Tate explained,

> While we should always strive for consistency in treatment of similar interests and for coherency in the development of doctrinal concepts, we are free in so doing to disregard prior judicial interpretations and to return

Louisiana's legal system has struck a balance or has found a middle ground to which other civil law systems and common law systems seem to be gravitating. This middle ground works well in a society in which we cannot always predict or even contemplate the legal theories or actions that will be developed,[7] but in which we can obtain recent judicial opinions from around the world with just a few keystrokes.

The Louisiana legal system is rooted in enacted law, at least a portion of which is written in general terms.[8] This strong foundation of law provides a solid base from which courts work to decide cases. This foundation is enhanced by a strong respect for precedent, especially for the decisions of the Louisiana Supreme Court, but also a responsibility to independently examine the interpretation of enacted law and the power to reject precedent when it is erroneous.[9]

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to the initial legislative concepts and to the basic considerations of social utility and fairness which underlie them.

Id. at 680.

7. *See, e.g.*, Gulf Oil Corp. v. State Mineral Board, 317 So. 2d 576 (La. 1975) (applying longstanding property law principles to a dispute over ownership interest of oil royalties, which industry had not been contemplated when the code provisions were written); *see also* John H. Tucker, Jr., *The Code and The Common Law in Louisiana*, 29 Tul. L. Rev. 739, 758–59 (1955):

> Louisiana decisions on subjects of the law not comprized [sic] in the Civil Code contain frequent references to common law decisions . . . .
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> . . . .
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> The commissioners who drafted the Louisiana Civil Code in 1825 realized that they could not foresee every possible situation that might arise and could not make appropriate provision to meet these contingencies. In their preliminary report to the Legislature they suggested that in such cases the court would decide "according to the dictates of natural equity, in the manner that 'amicable compounders' are now authorized to decide, but that such decisions shall have no force as precedents until sanctioned by the legislative will."

Id.

8. Reference is to the more general provisions of the Louisiana Civil Code. *See* William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law*, 60 La. L. Rev. 677, 703 (2000) (explaining that civil law codes provide the fundamental law, or general principles, and statutes further explain the codes, followed by interpretation by the courts, while in a common law system, common law statutes merely complete the case law, which is a primary source of law); Tucker, *supra* note 7, at 757–58:

> The essential difference between the civil and the common law lies in the generating force of authority. In the common law it rests wholly in the decisions of the court; in the civil law it is legislation. A code is not intended to provide for every contingency that might arise. It is a statement of general principles that are to be applied by deduction or analogy to particular cases. It is the function of the court in the common law jurisdictions to make the law. In the civil law the function of the court is one of interpretation.

Id.

9. *See* Tate, *supra* note 6, at 677–78.

Articles and texts on law often indiscriminately identify the two types of legal systems or traditions as civil law and common law. Civil law systems are usually associated with Roman law traditions, while common law systems are usually associated with English tradition.[10] A civil law system is considered by many to be based on law that is written down or "codified," although a written code is not required,[11] while a common law system is considered to be based on law that is primarily created by the judiciary as it renders decisions in cases that come before it, although many common law jurisdictions have enacted laws.[12] When enacted law exists, civilian codes tend to be written in "relatively abstract" terms such that they can be applied to many circumstances, even those that are unforeseen, while enacted law in common law jurisdictions tends to be written in more specific terms, meant to cover more particular circumstances.[13] Traditionally, in civil law systems respect is paid to prior judicial decisions though they are not considered to be law under such doctrines as the doctrine of jurisprudence constante, while the doctrine of stare decisis is applicable in common law systems.[14]

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10. See Yiannopoulos, *supra* note 6, at 831–33, for a discussion of the terms "civil law" and "common law."

11. Robin M. White & Ian D. Willock, The Scottish Legal System 95–96 (2d ed. 1999); Tate, *supra* note 6, at 673 n.4; 1 A.N. Yiannopoulos, Louisiana Civil Law Systems Course Outline 74 (1971) (noting that Germany was without a civil code before 1900, France did not codify its laws into a civil code until 1804, and Greece was without a civil code until 1946).

12. *See* Yiannopoulos, *supra* note 11, at 74; Tate, *supra* note 6, at 673 n.4. For example, all of the legal systems in the states that compose the United States have enacted laws. *See generally* Robert S. Summers, *Statutory Interpretation in the United States*, *in* Interpreting Statutes: A Comparative Study 407, 408 (D. Neil MacCormick & Robert S. Summers eds., 1991).

13. Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 Yale J. Int'l L. 67, 78, 82 (1996) (explaining the need for codal provisions to be sufficiently abstract so that they will be "intertemporal" and not obsolescent, yet be concrete enough to provide adequate guidance to judges who must apply them to concrete situations). *See also* Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 Duke J. Comp. & Int'l L. 195, 195–96 & n.4 (2003); Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 La. L. Rev. 1, 2 & nn. 4 & 5 (2002); A.N. Yiannopoulos, Civil Law System: Louisiana and Comparative Law 96 (2d ed. 1999).

14. See James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L. Rev. 1 (1993), for a concise description and explanation of the legal methodology as a means of evaluating judicial decisions as precedent in civil and common law systems. Judge Dennis notes:

> In the common law, judicial precedent plays a leading role, serving both as a source of law and as an example of a prior judge's methodology in reasoning from the case-law materials. On the other hand, a civil-law judicial precedent plays only a supporting role. The Civil Code is the

These generalizations about the two systems or traditions make it relatively simple to discuss the different systems in general terms; they may also make it simpler to classify legal systems or traditions. The reality is that legal systems are not so precisely and easily classified. For example, a third classification, "mixed jurisdiction" or "bijural jurisdiction" has been used to describe jurisdictions such as Louisiana, which are primarily rooted in the civil law tradition, but have several attributes that come from the common law tradition.[15] Further, legal systems worldwide influence each other daily as individuals and entities do business and otherwise interact across jurisdictional lines, and courts across the world are called upon to interpret each other's laws and procedures.

This article focuses on the sources of law and the value of precedent in the Louisiana legal system today, 200 years after the Louisiana Purchase and the enactment of the Napoleonic Code, which so heavily influenced the development of law in Louisiana. Louisiana seems to have followed a course similar to many jurisdictions around the world, both civil and common. While statutory law, or law written by a legislative body, takes precedent over other sources, the value of prior court decisions has increased in Louisiana. Louisiana Supreme Court decisions are considered "binding" authority to lower courts in Louisiana, despite Louisiana scholars' commentary and commentary by some courts to the contrary and despite the fact that judicial decisions are not recognized in the Louisiana Civil Code as a source of law. With regard to the decisions of intermediate appellate courts and trial courts and with regard to the Louisiana Supreme Court considering its own prior decisions, the doctrine of *jurisprudence constante* still applies, that is, a consistent line of judicial decisions on a particular issue is entitled to great weight and

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primary source of law, and precedent serves merely as an example of a prior judge's interpretation and application of legislated law.

Id. at 3. *See also* Tetley, *supra* note 8, at 702.

15. *See* Vernon V. Palmer, Mixed Jurisdictions Worldwide: The Third Legal Family 5 (2001); Yiannopoulos, *supra* note 6, at 836–37, 848; Tate, *supra* note 6, at 673. The mixed jurisdiction has become identified with legal systems such as those in South Africa, Louisiana, and Quebec where civil law and the common law traditions have mixed, and still mix, to a greater or lesser extent. The term "bijuralism" has been defined more broadly: "'In its more restricted sense, bijuralism means the coexistence within a country of units of government reflecting distinctly different legal traditions, typically but not at all necessarily common law, on the one hand, and civil law, on the other.'" David Gruning, *Bayou State Bijuralism: The Common Law and Civil Law in Louisiana*, Univ. Det. Mercy L. Rev. (forthcoming 2005) (quoting George A. Bermann & Menhard Hilf, *Bijuralism in Federal Systems and in Systems of Local Autonomy*, page 1, XIIIth International Congress of Comparative Law, General Report, Topic I.B.1 (Montreal 1990)).

is considered persuasive as to what the law is.[16] Further, just one decision by a court to which a lower court's decision is appealable is often given great weight and persuasive value. Other civil law jurisdictions seem to be gravitating in a similar direction, though many have not expressly recognized that judicial decisions can have any binding force.[17]

These findings, as well as a consideration of how other jurisdictions value precedent, have led me to the conclusion that, as to the interpretation of sources of law and the use of precedent, Louisiana is among several jurisdictions that have employed a principle referred to herein as "systemic respect for jurisprudence," which is somewhat of a hybrid of stare decisis and jurisprudence constante. This term refers to a respect for prior decisions that is influenced by the legal system's court hierarchy, the accepted sources of law in the jurisdiction, a desire to maintain consistency and constancy of law, and the need to allow some flexibility to allow the law to develop. Interestingly, many common law legal systems around the world, including most if not all of the jurisdictions other than Louisiana in the United States, have placed a greater emphasis on enacting laws and have relaxed their interpretation and use of the doctrine of stare decisis.[18] At the same time, in civil law jurisdictions, the availability of reported judicial decisions has allowed precedent to become more widely known, perhaps filling the role that "custom" played in sixteenth century France,[19] thereby increasing the consideration of precedent in traditional civil law and mixed jurisdictions.

Section II of this article defines and discusses the concepts of precedent, stare decisis, and jurisprudence constante, with a brief examination of the value of precedent in England, the United States other than Louisiana, France, Italy, and Spain. Section III identifies the sources of law in Louisiana's legal system according to the Louisiana Civil Code and Constitution and discusses the role precedent has played in the Louisiana legal system according to the Louisiana Civil Code, Louisiana legal scholars, and published Louisiana court opinions. Complementing this discussion are the results of a survey of Louisiana state court judges. The survey sought to determine Louisiana judges' use of various legal sources and the use of sources by the attorneys who appear before them. Section IV

16. *See infra* sections III.D and IV.

17. See, e.g., *infra* section II.B for discussions of precedent in France, Italy, and Spain. *See also* Interpreting Precedents: A Comparative Study 1 (D. Neil MacCormick & Robert S. Summers eds., 1997).

18. *See infra* notes 41–43 and accompanying text.

19. 1 Marcel Planiol, Treatise on the Civil Law 8–9 (Louisiana State Law Institute trans.,12th ed. 1959).

provides the results of the survey and identifies what sources attorneys and judges are in fact relying on to determine Louisiana law. Finally, section V further discusses the concept of "systemic respect for jurisprudence," a practice which has served Louisiana well by allowing enacted law to remain the primary source of law and allowing Louisiana law to remain current and change with societal norms. It also proposes that an article be added to the Louisiana Civil Code codifying and clarifying the proper treatment of prior decisions by the courts.

II. PRECEDENT, STARE DECISIS, AND JURISPRUDENCE CONSTANTE

One characteristic common to most legal systems is that if a lawmaking body of some sort has enacted law, that enacted law is a source of law for that jurisdiction.[20] Beyond enacted law, jurisdictions tend to vary the respect paid to precedent and other potential sources of law. "Precedent" has been defined as follows: "Precedents are prior decisions that function as models for later decisions."[21] "Applying lessons of the past to solve problems of the present and future is a basic part of human practical reason."[22] In day to day life we often consider precedent, or what we have done in the past, to help us make decisions and create rules, whether we do so consciously or unconsciously. We strive to bring some consistency to our actions in dealing with our coworkers, students, children, and friends so that we will be fair in our dealings with others and will be recognized as such.[23] These same motivations are at work in judicial systems around the world, whether the systems are grounded in the civil law tradition, the common law tradition, or some other tradition; a reliance on precedent creates certainty and stability for those parties operating in a jurisdiction, and precedent is valued in legal jurisdictions worldwide.[24]

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20. Francesco G. Mazzotta, *Precedents in Italian Law,* 9 Mich. St. U.-DCL J. Int.'l L. 121, 123 (2000); Interpreting Statutes: A Comparative Study 10 (D. Neil MacCormick & Robert S. Summers eds., 1991).

21. Interpreting Precedents: A Comparative Study, *supra* note 17, at 1. *See also* Mazzotta, *supra* note 20, at 121. For a further discussion of the concept of precedent see Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987).

22. Interpreting Precedents: A Comparative Study, *supra* note 17, at 1. *See also* William Thomas Tête, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 Tul. L. Rev. 1, 6 (1973) ("If someone else has already considered a similar problem, it is only logical to look to the prior reasoning.").

23. *See* Schauer, *supra* note 21, at 57–73.

24. Interpreting Precedents: A Comparative Study, *supra* note 17, at 2; *see also* Interpreting Statutes: A Comparative Study, *supra* note 20, at 487 (concluding that, together with any applicable statutes, "precedents are the most frequently used

Modern legal systems, whether generally labeled "common law systems" or "civil law systems," employ different doctrines to determine the value placed on precedent, among other differences. Typically, common law legal systems have been associated with the doctrine of stare decisis, under which courts are bound by precedent, and civil law systems have been associated with doctrines such as the French doctrine of jurisprudence constante, which, in simple terms, recognizes that a line of prior, consistent decisions may be persuasive evidence of the proper interpretation of the law.[25]

A. Precedent in Common Law Systems

The doctrine of "stare decisis et quieta non movere," which translates as "to stand by things decided and not disturb settled law,"[26] in its broadest sense, commands judges to apply the law as it has been set out in one prior case when the prior decision was made by a court that is higher than, and sometimes equal to, the court rendering the present decision.[27] The only part of the decision that is binding is the "ratio decidendi" or the rule of the decision, as opposed to extraneous comments of the judges that are not necessary to the court's decision.[28]

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materials in judicial opinions,"regardless of whether precedents are considered to have the force of law or not).

25. See Valcke, *supra* note 13, at 83–85 & n.106, in which the author denounces any similarity between the doctrines of stare decisis and jurisprudence constante, explaining that in a civil law system the repetition of a particular interpretation of a code article may simply reinforce the rationality of the earlier decisions, but it in no way creates or changes the law or lessens the burden on judges to interpret the code. She explains that stare decisis is necessary in a common law system to maintain consistency when judges are filling in gaps in the law, thus exercising a lawmaking function. This gap-filling is not necessary in a civil law system in which the source of law is a code that is "gapless" and judges' primary duty is to apply that law logically, rather than try to create consistency of interpretation. *Id.* at 79–80, 83, 85 & n.106. But see Dennis, *supra* note 14, at 7–8, in which Judge Dennis opines that the Louisiana Civil Code, as well as the French Civil Code, were not intended to be a "gapless system of legal rules." *See also* Mazzotta, *supra* note 20, at 141 (discussing the Italian doctrine of *giurisprudenza constante*).

26. Bryan A. Garner, A Dictionary of Modern Legal Usage 827 (2d ed. 1995).

27. *See* Alvin B. Rubin, *Hazards of a Civilian Venturer in Federal Court: Travel and Travail on the Erie Railroad*, 48 La. L. Rev. 1369, 1371 (1988); *see also* Dennis, *supra* note 14, at 4–5 (giving a clear and concise description of the common law doctrine of stare decisis).

28. Zenon Bankowski et al., *Precedent in the United Kingdom*, *in* Interpreting Precedents: A Comparative Study 325, 336 (D. Neil MacCormick & Robert S. Summers eds., 1997). *But see id.* at 336–37 (recognizing that other parts of a precedent that are not considered part of the *ratio decidendi* are frequently cited to and considered by the courts).

1. England

Stare decisis was not always the doctrine employed in common law legal systems. Perhaps due to poorly organized court systems and the lack of available and reliable case reports, prior to the seventeenth century, cases were not considered binding by the courts in common law systems.[29] In fact, a description of the value of precedent in England during the "Year Book" period, from approximately the thirteenth century to the sixteenth century, sounds like a description of the doctrine of jurisprudence constante: "A single case was not a binding authority, but a well-established custom (proved by a more or less casual citing of cases) was undoubtedly regarded as strongly persuasive."[30] However, in the seventeenth century, the binding force of a decision of the Exchequer Chamber was recognized.[31] Referring to the seventeenth century, Plucknett notes, "Here we find for the first time the principle that a single case may be a binding precedent, but such high authority attaches only to decisions of the Exchequer Chamber."[32]

In other courts in England, the citation of precedents became more commonplace over the next century, though one case on its own still lacked precedential value.[33] Then, in nineteenth century England, the reorganization of the courts, the professionalization of judges' positions, and improvements in the system of reporting prior decisions made it possible to have a system in which precedents received much greater respect.[34] English courts became strictly bound by the decisions of the courts above them in the court system.[35]

Today, decisions of the High Courts, which are somewhat comparable to trial courts in the United States, do not bind any other courts, but serve merely as persuasive authority for other High Courts and inferior courts.[36] Decisions of the Courts of Appeals bind the

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29. Plucknett, *supra* note 1, at 342–50.
30. *Id.* at 347.
31. *Id.* at 348.
32. *Id.*
33. *Id.* at 348–49. Plucknett explained:
> Printing and the later abridgements obviously made it possible to assemble a large number of citations, and so an increase in the number of cases cited is easily explained. Their very number is significant: under a developed system of precedents one case is as good as a dozen if it clearly covers the point. The eighteenth century, however, still seems tempted to find safety in numbers, and to regard the function of citations to be merely that of proving a settled policy or practice.

Id. at 349.
34. *Id.* at 350.
35. *See* Bankowski, *supra* note 28, at 325.
36. *Id.* at 326.

High Courts below them in the same hierarchy and, absent unusual circumstances, bind the Court of Appeals rendering the decision.[37] Finally, decisions of the House of Lords, which is roughly equivalent to the United States Supreme Court, are strictly binding on all lower courts and on the House of Lords itself, though, the Court has established a practice of overruling precedents when they are determined to be unsatisfactory, especially when they can be distinguished.[38] In this system, precedent is considered a source of law, whether it is based on one decision or one hundred decisions.[39]

2. The United States, Other Than Louisiana

The forty-nine states in the United States, other than Louisiana, as well as the United States federal court system follow a version of the doctrine of stare decisis that is similar to the English respect for precedent and its consideration of precedent as a source of law. The doctrine of stare decisis, as well as the hierarchical structures of the court systems, typically require the lower courts in those jurisdictions to be bound by the decisions of the courts to which the lower courts' decisions are appealable.[40] In these jurisdictions, judicial decisions

37. Bank of Credit & Commerce Int'l SA v. Ali, [2002] C.P. Rep. 11, ¶ 13 (Eng. C.A.); Bankowski, *supra* note 28, at 325–26.

38. The House of Lords issued a notice in 1966 stating its position on stare decisis and the use of precedent, which changed the practice that had been in existence since 1898:

> Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. The use of precedent provides some degree of certainty upon which individuals can rely in conduct of their affairs, as well as a basis for orderly development of legal rules. Their lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

House of Lords Notice, 2 Lloyd's Rep. 151 (July 26, 1966). *See* Bankowski, *supra* note 28, at 326, 348–49; *see also* Interpreting Precedents: A Comparative Study, *supra* note 17, at 5 (explaining that today highest courts around the world are "universally empowered" to correct their own errors). *But see* Bankowski, *supra* note 28, at 329 (noting that although the House of Lords has the power to overrule its prior decisions, it has done so infrequently.)

39. Bankowski, *supra* note 28, at 323; David M. Walker, The Scottish Legal System: An Introduction to the Study of Scots Law 438–39 (8th ed. 2001).

40. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 251, 118 S. Ct. 1969, 1977 (1998). In *Hohn*, the Court stated, "Stare decisis is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (quoting Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991). The Court in *Hohn* further explained that its decisions "remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing

have the force of law—judge-made law or common law. Despite the apparent rigidity of this doctrine, the United States Supreme Court has the express power to overrule its own decisions,[41] as do most of the state supreme courts.[42] Moreover, United States courts typically venture from strict adherence to precedent when the precedent appears to be outdated, when "the existing rule has produced undesirable results," or when "the prior decision was based on what is now recognized as poor reasoning."[43]

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vitality." *Id.* at 252–53. *See also* Gavin v. Chernoff, 546 F.2d 457, 458–459 (1st Cir. 1976) (invoking stare decisis to follow an earlier opinion when "appellants essential arguments remain much the same as those considered and previously rejected . . . . [and there were] no compelling new reasons and no change in circumstances justifying reconsideration of the previous decision"); Mountain View Coach Lines, Inc. v. Storms, 476 N.Y.S.2d 918 (N.Y. App. 2d Dep't 1984) (appellate division is single statewide court divided into departments for convenience, therefore trial courts are formally bound to follow precedents in another department); People v. J.R. Cooperage Co., 485 N.Y.S.2d 438 (Sup. Ct. 1985) (in absence of appellate ruling from that department, Supreme Court criminal term is formally required by stare decisis to follow prercedents of another department).

41. *Hohn*, 524 U.S. at 252–53, 118 S. Ct. at 1978. But see Justice Scalia's dissent in *Hohn*, with whom Chief Justice Rehnquist and Justices O'Connor and Thomas joined, in which the justices explained: "[A] doctrine of stare decisis that is suspended when five Justices find it inconvenient (or, indeed, as the concurrence suggests, even four Justices in search of a fifth) is no doctrine at all, but simply an excuse for adhering to cases we like and abandoning those we do not." *Id.* at 263. In *Payne v. Tennessee*, 501 U.S. 808, 809, 111 S. Ct. 2597, 2600 (1991), Justice Rehnquist reasoned that the doctrine of stare decisis did not require the court to follow prior precedent. He further explained, "Although adherence to the doctrine of stare decisis is usually the best policy, the doctrine is not an inexorable command. This Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned . . . ." 501 U.S. at 809, 111 S. Ct. at 2600.

42. *See, e.g.*, Johnson Controls, Inc. v. Employers Ins. of Wausau, 665 N.W.2d 257, 286 (Wis. 2003) (citing Schwanke v. Garlt, 263 N.W. 176, 178 (Wis. 1935) (expressly recognizing the power of a jurisdiction's highest court to "repudiate its prior rulings" and depart from a prior precedent)).

43. Helene S. Shapo, Marilyn R. Walter, & Elizabeth Fajans, Writing and Analysis in the Law 13–14 (4th ed. 2003). *See also* James F. Spriggs, II & Thomas G. Hansford, *The U.S. Supreme Court's Incorporation and Interpretation of Precedent*, 36 Law & Soc'y Rev. 139, 140 (2002) (examining the Supreme Court's use of precedent); *see, e.g., Hohn*, 524 U.S. at 251, 118 S. Ct. at 1977 (overruling the Court's earlier decision in *House v. Mayo*, 324 U.S. 42, 65 S. Ct. 517 (1945), and explaining that "stare decisis is a 'principle of policy' rather than 'an inexorable command'"); People v. Blehm, 983 P.2d 779, 788 (Colo. 1999) (explaining that under the stare decisis doctrine, courts should follow an established rule of law, "unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come from departing from precedent"); Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003) (reversing appellant's conviction because the jury relied upon an erroneous definition of burglary as the basis for the felony murder conviction; thus, the

B. Precedent in Civil Law Systems

On the other hand, in legal systems based on the civil law tradition, cases are not formally recognized as a source of law, and the doctrine of stare decisis is not recognized. When considering precedent, courts are likely to look at prior decisions as mere interpretations of the law, and the courts are often free to decide consistently with the prior court's interpretation of the law or reject the prior interpretation.[44] In some civil law systems, the doctrine of "jurisprudence constante" or "giurisprudenza constante" calls on these courts to recognize the persuasive value of a long line of precedents. For example, in Louisiana, this doctrine has been described as follows: "[W]hen, by repeated decisions in a long line of cases, a rule of law has been accepted and applied by the courts, these adjudications assume the dignity of Jurisprudence constante; and the rule of law upon which they are based is entitled to great weight in subsequent decisions."[45] Nevertheless, although many civil

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appropriate application of the stare decisis doctrine required the court to recede from a decision when the application of that decision plainly demonstrated that it was wrongly decided.); Smith v. Dep't of Ins., 507 So. 2d 1080, 1096 (Fla. 1987) (Ehrlich, J., concurring in part, dissenting in part) ("[p]erpetuating an error in legal thinking under the guise of stare decisis serves no one well and undermines the integrity and the credibility of the Court."); *Johnson Controls*, 665 N.W.2d at 287–88 (departing from stare decisis and overruling prior precedent, explaining, "This court has no apprehension about being a solitary beacon in the law if our position is based on a sound application of this state's jurisprudence. But when our light is dim and fading, then this court must be prepared to make a correction."; identifying the following circumstances in which overruling prior precedent may be justified: (1) "changes or developments in the law have undermined the rationale behind a decision;" (2) "there is a need to make a decision correspond to newly ascertained facts;" (3) "there is a showing that the precedent has become detrimental to coherence and consistency in the law;" or (4) "the prior decision is unsound in principle, . . . it is unworkable in practice, [or] . . . reliance interests are implicated").

But see Welby Gardens v. Adams County Bd. of Equalization, 71 P.3d 992 (Colo. 2003) (explaining that while the state supreme court is not bound by decisions of the court of appeals or by the interpretations of a statute provided by an administrative agency that misapplies or misconstrues the law, the court is hesitant to overrule the sole appellate construction of a statute that has been in place for many years and that has been incorporated into the state-wide administrative standards without a compelling reason to do so).

44. See *infra* this section and sections III and IV for a more specific discussion of the use of precedent in the French, Italian, Spanish, and Louisiana judicial systems.

45. Johnson v. St. Paul Mercury Ins. Co., 236 So. 2d 216, 218 (La. 1970). *See also* Mazzotta, *supra* note 20, at 141 (discussing the Italian doctrine of *giurisprudenza constante*); Valcke, *supra* note 13, at 84 n.106 (explaining that under the doctrine of jurisprudence constante in a civil law system, the repetition of a particular interpretation of a code article may simply reinforce the rationality

law jurisdictions have recognized some form of the restrained doctrine of jurisprudence constante, the prevalence and availability of reported decisions and the hierarchical nature of modern court systems has led to the recognition that even a single decision by a highly ranked court may carry great weight or even serve as a *de facto* binding authority.[46] A consideration of the value of precedent in France, Italy, Spain, and Louisiana reveals this practice.

1. France

Commenting on precedent in France, one commentator explained: "There is no formal bindingness of previous judicial decisions in France. One might even argue that there is an opposite rule: that it is forbidden to follow a precedent only because it is a precedent."[47] Article 455 of the French Code of Civil Procedure requires courts to explain the reasoning behind their decisions and makes a judicial decision based solely on a precedent illegal.[48] Despite the lack of bindingness of "precedents," the decisions of higher courts in the

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of the earlier decisions, but it does not create or change the law); Dennis, *supra* note 14, at 15.

46. Michel Troper & Christophe Grzegorczyk, *Precedent in France*, *in* Interpreting Precedents: A Comparative Study 103, 119, 122–23, 130–31 (D. Neil MacCormick & Robert S. Summers eds., 1997); Pugh, *supra* note 4, at 1202 (recognizing pressure upon lower courts in civilian jurisdictions to follow decisions of higher courts); *see also infra* notes 113–17, 121–24, and accompanying text on Louisiana law.

47. Troper & Grzegorczyk, *supra* note 46, at 115. *See also id.* at 111–12 (quoting F. Zenati, *La Jurisprudence*, Paris: Dalloz 102 (1991)) ("'[T]he very idea that a judge could search for the base of his decision in a prior judgment is literally unthinkable in a legal system based on statutory Law.'"); Valcke, *supra* note 13, at 84 ("A lower court in France has no formal duty to follow a higher tribunal's decisions, and the highest court, the *Cour de cassation*, enjoys full power to renounce its own decisions."). *But see* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L.J. 1325, 1326, 1403–05 (1995) (recognizing the tension in France between the fact that the legislature can be the only "source of law" and the fact that judges create "judicial norms" that function as law; explaining the "grammatical discourse" as the official role of the French judge, that is the role of mechanically applying statutory law, and the "hermeneutic discourse" as the unofficial role of the French judge, that is the role of engaging in policy analysis, considering the statutory law as well as rules of jurisprudence, social and economic policy considerations, and equity arguments).

48. Troper & Grzegorczyk, *supra* note 46, at 115, 117–19 (citing N.C.P.C. art. 455). The article provides: "The judgment must state succinctly the respective claims of the parties and their arguments (*moyens*); it must be reasoned (*motivé*)." N.C.P.C. art. 455 (George A. Bermann & Vivian Grosswald Curran trans., Juris Publishing, Inc. 1998). *See also* C. Civ. art. 5 (George A. Bermann & Vivian Grosswald Curran trans., Juris Publishing, Inc. 1998) (providing: "Judges are forbidden to decide by way of a general and rule-making (*réglementaire*) decision the cases submitted to them.").

French judicial system certainly have force for the lower courts whose decisions will be appealable to those same courts. These lower courts must conduct their own analysis of the cases that are presented to them in light of the applicable enacted law, but they decide cases knowing that the higher court may reverse them should they decide in such a way that is inconsistent with the higher court's earlier decisions.[49] Thus, the decisions of the higher courts can provide an "authoritative argument" to the lower courts on how to interpret the enacted law, though "the lower court has no legal obligation to follow that argument."[50]

This method of allowing precedent to play an important role, though not allowing it to bind courts, has been described as creating a *"de facto* obligation" to follow precedents, which arises from the hierarchy within the court system.[51] French courts are only bound to follow the official sources of law–the Constitution, European law, statutes, and codes–even though precedents are frequently cited to the courts to explain how to interpret and apply these sources.[52] Thus, these cases interpreting statutes have, in many ways, become a *de facto* source of law to lower courts because they represent the accepted interpretation of the statutes.[53]

2. Italy

The Italian system considers precedents in much the same way as the French system. Commenting on precedent in Italy, one commentator explained: "In the Italian legal system no precedent may be considered as strictly binding: the main reason for this is that it is

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49. Troper & Grzegorczyk, *supra* note 46, at 117–19; *see also* Yvon Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 La. L. Rev. 235, 258 (1958).

50. Troper & Grzegorczyk, *supra* note 46, at 111. *See also* Pugh, *supra* note 4, at 1170; Loussouarn, *supra* note 49, at 258.

51. Troper & Grzegorczyk, *supra* note 46, at 118–19.

52. *Id.* at 112–13, 117. *See also* Germain, *supra* note 13, at 195; Loussouarn, *supra* note 49, at 250–54 (discussing the role of custom as a source of law in France).

53. Troper & Grzegorczyk, *supra* note 46, at 118–19. Professors Troper and Grzegorczyk explained:

> A precedent is binding to the extent that a decision by a lower court contrary to a precedent by a superior court can be reversed by that superior court. But, as already mentioned, French courts have no obligation to follow a precedent as such, but only to the extent that it is considered by the superior courts as the "correct" application of a rule. What the precedent stands for is the rule.

Id. at 129. *See also* Lasser, *supra* note 47, at 1404–05 (referring to precedent as establishing "judicial norms" and as "mere authority," as opposed to the "law," which comes from the legislature).

not a system based upon the principle of formally binding precedent."[54] Precedents are not a source of law. Even decisions of the Corte di Cassazione do not bind lower courts.[55] Thus, if "the basis of the legal regulation of a matter can be found in precedents, a reference to some statutory provisions is required. In many instances such a reference is weak and vague, but nevertheless the prevailing opinion is that precedents cannot be the only basis of a judicial decision."[56] Italian courts are only bound to follow the official sources of law–codes, constitution, and statutes–even though precedents are frequently cited to the courts to explain how to interpret and apply the statutes.[57] In fact, "precedents are now by far *the most important* justificatory material used in judicial opinions," and they far surpass any reliance on academic or professional writings.[58]

Despite the lack of bindingness of "precedents," the decisions of higher courts in the Italian judicial system certainly have great influence on and are persuasive to lower courts whose decisions will be appealable to those same courts.[59] These lower courts can adopt a different position on the legal issue; however, they are expected to adequately explain the reasons for disregarding the decision of the higher court if they choose not to follow the precedential decisions.[60] The lower courts have a right, not an obligation, to apply the previous ruling.[61] Thus, the decisions of the higher courts are instructive to the

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54. Michele Taruffo & Massimo La Torre, *Precedent in Italy*, *in* Interpreting Precedents: A Comparative Study 141, 154 (D. Neil MacCormick & Robert S. Summers eds., 1997).

55. Mazzotta, *supra* note 20, at 150. The Corte di Cassazione is the court of last resort for most civil and criminal cases. (Constitutional issues and administrative law issues are considered by other courts, outside of the system of "ordinary jurisdiction," of which the Corte di Cassazione is a part.) The Corte di Cassazione hears appeals from decisions of an intermediate level of appellate courts, which includes the Corte d'Appello, the Tribunale, and the Corte d'Assise d'Appello. The first level of courts in the system includes two courts of limited jurisdiction and one court of general jurisdiction. Taruffo & La Torre, *supra* note 54, at 141–42.

56. Mazzotta, *supra* note 20, at 148.

57. *Id.* at 153.

58. *Id.*

59. Taruffo & La Torre, *supra* note 54, at 154–55. *See also* Mazzotta, *supra* note 20, at 141, 137 (explaining that it is unusual for a lower court to render a decision that is inconsistent with a decision of the Corte di Cassazione and noting that decisions of the Corte di Cassazione are most persuasive, followed by decisions of the appellate courts); Pugh, *supra* note 4, at 1186. *But see id.* at 134 (noting that the Italian Constitution does not subordinate lower courts to higher courts) (citing Cost. art. 107(3)).

60. Taruffo & La Torre, *supra* note 54, at 155.

61. *Id.* at 156.

lower courts on how to interpret the enacted law.[62] Moreover, in addition to a consideration of the level of the court that rendered a prior decision, the persuasive value of prior decisions is significantly increased when a line of cases, as opposed to only one case, supports a particular interpretation of the law, in which case the interpretation is considered "giurisprudenza constante" or "consolidata," and courts are "bound" by the interpretation "except for very good countervailing reasons."[63]

3. Spain

In Spain, another system whose laws and judicial traditions have served as an influence on the laws and judicial traditions in Louisiana,[64] a fundamental principle of law is that "'the judge is bound by (statutory) law and not by "precedent."'"[65] This statement is based in large part on the fact that jurisprudence, or precedent, is not listed in the *Codigo Civil* (the Civil Code of Spain) as one of the sources of law, which are legislation, custom, and general principles of law.[66] However, article 1(6) of the *Codigo Civil* recognizes that "jurisprudence of the courts shall serve as a complement to the legal order with the doctrine that, in a constant manner, may be established by the Supreme Court, in its interpretation of legislation, customs, and the general principles of law."[67] Thus, although the legislature has not recognized precedent as a formal source of law, it has recognized its value.

The structure of the court system also lends itself to a great respect for the prior decisions of higher courts. A typical civil case will be decided first by a lower trial court, which is referred to as a *juzgados.*[68] An appeal from this court's decision may be taken to an

62. *Id.*

63. *Id.* at 160–61.

64. *See* Robert Anthony Pascal, *Of the Civil Code and Us*, 59 La. L. Rev. 301, 301–03 (1998) (opining that Louisiana law was primarily based on Spanish civil law in the early 1800s, but recognizing that the French Code Civil of 1804 provided a model of form and organization for the Louisiana Civil Code). Professor Pascal referred to the first digest of Louisiana law, A Digest of the Civil Laws in Force in the Territory of Orleans in 1808, as a "Spanish girl in French dress." *Id.* at 303.

65. Alfonso Ruiz Miguel & Francisco J. Laporta, *Precedent in Spain, in* Interpreting Precedents: A Comparative Study 259, 269 (D. Neil MacCormick & Robert S. Summers eds., 1997) (quoting Constitutional Court ruling 49/1985).

66. Article 1(1) of the Codigo Civil (the Civil Code of Spain) provides in part: "The sources of the Spanish legal order are legislation, custom, and the general principles of law." C.C. art. 1(1) (trans. Julio Romanach, Jr., Lawrence Publishing Co. 1994).

67. *Id.* art. 1(6).

68. *See* Miguel & Laporta, *supra* note 65, at 260.

intermediate appellate court, known as the *Tribunales Superiores de las Comunidades Autonomas*. Seventeen of these courts exist in Spain, with their jurisdiction over appeals corresponding with seventeen different autonomous communities, somewhat similar to the numbered intermediate appellate courts in the United States federal court system. Often, the intermediate appellate courts provide the final review of lower court decisions. An appeal from one of the intermediate appellate courts would typically be to the *Tribunal Supremo*.[69] Spanish procedural law allows an appeal to the Tribunal Supremo when two intermediate appellate courts have reached inconsistent decisions in similar cases.[70] In this circumstance, the decision of the Tribunal Supremo establishes the jurisprudence on the issue, and other courts face reversal if they decide differently. This system provides yet another recognition of the value of precedent in the Spanish legal system.

The above provisions explain in part why the courts show a great respect for precedent and almost always follow the interpretations of the law provided by the courts above them in the hierarchy of the court system.[71] Other factors contributing to this respect are the fact that lower court judges depend on higher court judges for career promotions and that lower court decisions are reviewed by the higher courts.[72]

III. SOURCES OF LAW AND THE VALUE OF PRECEDENT IN LOUISIANA

As a legal system that has been influenced by the systems discussed above, the Louisiana legal system has developed in a way that most closely resembles the civil law jurisdictions when it comes to the sources of law and the value of precedent with one exception–the express judicial recognition that Louisiana Supreme Court decisions are binding on the lower courts.[73] Much like the Civil Code of Spain, the Louisiana Civil Code identifies the sources of law–legislation and custom.[74] In the absence of legislation and custom, the Civil Code directs judges to "proceed according to equity."[75] Although cases interpreting the primary sources of law are not recognized by the Legislature as being sources of law themselves, Louisiana Supreme Court and appellate court decisions are important

69. *Id.* at 260–61.
70. *Id.* at 274.
71. *Id.* at 274–75, 288.
72. *Id.* at 274–75.
73. *See infra* notes 114–56 and accompanying text.
74. La. Civ. Code art. 1 (1999).
75. *Id.* art. 4.

to consult in determining the meaning of Louisiana law 1) because the Louisiana Constitution gives these bodies supervisory[76] and appellate jurisdiction,[77] respectively, over civil and criminal cases that arise from the courts within their jurisdictions; and 2) because the Louisiana Supreme Court has identified its decisions as binding statements of Louisiana law.[78]

A. Legislation

Legislation, or enacted law, is the primary source of law in Louisiana.[79] The term "legislation" in the Louisiana Civil Code refers to "rules enacted by a person or group of persons enjoying legislative authority."[80] Thus, in Louisiana, legislation includes the United States Constitution, the Louisiana Constitution, and all federal and state statutes. The Louisiana Civil Code governs most private law issues, divided into a preliminary title and four books, including Book I, Of Persons; Book II, Of Things and the Different Modifications of Ownership; Book III, Of the Different Modes of Acquiring the Ownership of Things; and Book IV, Conflict of Laws. Other sources of state legislation are the Louisiana Constitution, the Louisiana Revised Statutes, the Louisiana Children's Code, the Louisiana Code of Evidence, the Louisiana Code of Civil Procedure, and the Louisiana Code of Criminal Procedure.

What primarily distinguishes articles in the Louisiana Civil Code from other Louisiana legislation is that, in the civilian tradition, the Civil Code articles tend to be written in general terms such that they are able to last through time and be applied to changing circumstances; the non Civil Code provisions tend to address specific issues, sometimes raised by the application of the more general code provisions.[81] In a similar way, many statutes in common law

76. La. Const. art. 5, § 5(A) & (C).

77. *Id.* art. 5, § 10(A). The courts of appeal also have jurisdiction over matters appealed from family and juvenile courts. *Id.*

78. *See, e.g.,* Pelican State Assocs., Inc. v. Winder, 253 La. 697, 219 So. 2d 500 (1969).

79. La. Civ. Code arts. 1–3 (1999).

80. Yiannopoulos, *supra* note 11, at 85.

81. *See, e.g.,* Ardoin v. Hartford Acc. & Indem. Co., 360 So. 2d 1331, 1334–36 (La. 1978) (interpreting the general Louisiana tort law provision, La. Civ. Code art. 2315, in light of a Louisiana Revised Statute that specifically addresses tort liability by physicians and dentists, La. Rev. Stat. Ann. § 9:2794. The court explained that the Legislature enacted section 9:2794 to provide "guidance in applying the Civil Code's general principle of fault" to the specific issue of physician and dentist tort liability.); *see also* Lorio, *supra* note 13, at 2 & nn. 4 & 5; Tetley, *supra* note 8, at 703 (explaining that civil law statutes "complete" the civil code provisions, which are written concisely without great detail).

jurisdictions are written to address specific issues, but these issues have typically arisen from prior court decisions and the common law that has arisen from those decisions.[82]

The courts are charged with interpreting and applying enacted law. Louisiana Civil Code articles 9–13 provide guidance to the courts on this function. Article 9 provides: "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."[83] Louisiana Civil Code articles 10–12 instruct courts on how to interpret the meaning of the words of a statute and how to interpret a statute when the language of the statute is susceptible to different meanings.[84] Article 13 provides that "[l]aws on the same subject matter must be interpreted in reference to each other."[85]

B. Custom

Custom is the other source of law in Louisiana. The Louisiana Civil Code provides, "Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation."[86] According to the late French professor and scholar Marcel Planiol,[87] customary law is "law which has not been sanctioned by legislation. It consists of traditional rules established little by little in the course of time, and which are often difficult to ascertain."[88] Customary law has historically been the primary source of private law "in primitive societies" and in societies ruled by weak governments;[89] it plays a less influential role in large, modern societies with well-organized governments and little

82. Tetley, *supra* note 8, at 703.
83. La. Civ. Code art. 9 (1999).
84. *Id.* arts. 10–12.
85. *Id.* art. 13.
86. *Id.* art. 3.
87. Professor Marcel Planiol was a professor of civil law studies in France who wrote one of the preeminent treatises on the French Civil Code in the late 1800s and early 1900s. Professor Planiol's treatise was translated by the Louisiana State Law Institute in 1959 and since that time it has served as a valuable resource concerning the meaning of the Louisiana Civil Code. *See* Planiol, *supra* note 19.
88. Planiol, *supra* note 19, at 8–9. *See also* Loussouarn, *supra* note 49, at 248 ("[F]or a practice to be considered custom it must not only be generally recognized and constant, but also generally regarded as juridically binding. It is practice reflecting a juridical sentiment."). That customary law is written down does not change its status from custom to written law; written law must be enacted by a legislative body, while custom is not the enactment of a legislative body. Planiol, *supra* note 19, at 8. For example, in the sixteenth century, the customs of various regions of France were written down. *Id.* at 9.
89. Planiol, *supra* note 19, at 8–9.

opportunity for common practices to develop and become known by everyone in the society.[90] Customary law is flexible and can be changed much more easily than the written law.

Traditional French scholarship, which has been consulted over the years by scholars in interpreting Louisiana law, presents differing opinions as to the source and enforcement of customary law. Some scholars have argued that customs must necessarily arise from judges who are ruling on disputes and enforcing general, unwritten rules accepted in the society. Others have argued that customs come from the people through general usage over time that is enforced through some type of social sanction.[91]

Professor Têtе, a Louisiana law scholar, has indicated that the Louisiana Civil Code contemplates that custom may arise from judicial opinions, noting that the Louisiana Civil Code provisions on custom stem more from Spanish law than French law.[92] Commenting on the meaning of custom in Louisiana, Professor Têtе explained that custom is established by "a practice or usage by the people in general, and a common belief that this practice is necessary as required by law."[93] After consideration of the Spanish law in Louisiana at the time the early drafts of the Code were being written, he determined that the meaning of custom includes customs that arise from the judiciary's repeated enforcement of a rule.[94]

Louisiana courts have expressed a similar view. In Louisiana, customs may arise from cases through the concept of "jurisprudence constante,"[95] and from repeated practices, typically in contracts and

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90. Loussouarn, *supra* note 49, at 250.

91. *See* Planiol, *supra* note 19, at 9 & n.6. Professor Planiol has described custom as the rules that governed particular areas in France that were at some point in the 1500s written down (in some ways similar to the Restatements of United States law, which is drafted by the American Law Institute). He distinguishes written law, which is enacted by legislatures, from customary law, which he says must necessarily arise from judges who are ruling on disputes. *Id.*

92. Têtе, *supra* note 22, at 2, 7–9, 12.

93. *Id.* at 12 (citing Loussouarn, *supra* note 49, at 248).

94. *Id.*

95. "[I]t is only when courts consistently recognize a long-standing rule of law outside of legislative expression that the rule of law will become part of Louisiana's custom under Civil Code article 3 and be enforced as the law of the state." Doerr v. Mobil Oil Corp., 2000-0947 (La. 2000), 774 So. 2d 119, 129; *see also* Eubanks v. Brasseal, 310 So. 2d 550, 555 (La. 1975) (Barham, J. concurring). But note that not all doctrines or decisions pronounced by the courts over time that become jurisprudence constante are considered to rise to the level of custom. *See also* Dennis, *supra* note 14, at 3 n.7; A.N. Yiannopoulos, *Jurisprudence and Doctrine as Sources of Law in Louisiana and in France*, *in* The Role of Judicial Decisions and Doctrine 69, 79 (Joseph Dainow ed., 1974). *But see* Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co., 179 F.3d 169, 175 (5th Cir. 1999) ("Jurisprudence, even when it rises to the level of *jurisprudence constante*, is a secondary law source in

business transactions, that have not been recognized by the judiciary, but have become accepted practices.[96] Custom cannot abrogate or modify statutory law, nor can it create an obligation or alter an express contract.[97] Custom can, however, serve to clarify ambiguities in contracts.[98]

Because of these restrictions on custom and because so much of Louisiana law has been set forth in enacted law, few modern examples exist in which the courts have expressly cited custom as the basis for their decisions.[99]

C. *Equity*

In the absence of legislation and custom, the Civil Code directs judges to "proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."[100] Scholars have questioned precisely what constitutes the absence of legislation and custom such that a gap exists, noting that a gap is often the result of judicial interpretation of the legislature's intent.[101] Professor Palmer noted that a judge may find a "gap" when 1) the existing law is silent on an issue that is presented by a case or 2) a law exists that could govern the issue presented by the case, but the judge believes the law was not intended to cover that issue either because the issue was not contemplated when the legislation was enacted or the application of the law to the particular case would work an injustice.[102] Of course, to find many of these "gaps"the judge must first conclude or presume

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Louisiana.").

96. *See, e.g.*, Terrell v. Alexandria Auto Co., 125 So. 757, 758–59 (La. App. 2d Cir. 1930) (in a contract dispute over what constituted delivery of a new car, the court turned to custom to hold that a car was still considered new when driven by the dealer from one dealership in the state to another for delivery to the buyer).

97. La. Civ. Code arts. 1, 3 (1999). *See also* Clement v. South Atlantic S.S. Line, 128 La. 399, 401–02, 54 So. 920, 921 (La. 1911); Baton Rouge Union of Police, Local 237 v. City of Baton Rouge, 696 So. 2d 642, 645 (La. App. 1st Cir. 1997).

98. *See, e.g.*, Terrell v. Alexandria Auto Co., 125 So. 757, 759 (La. App. 2d Cir. 1930); People's Bank & Trust Co. v. La. State Rice Milling Co., 119 So. 779, 780 (La. App. 1st Cir. 1929) (holding that custom or usage regularly followed by two parties to contract became part of the contract and had the force of law).

99. *See* Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana, in* The Role of Judicial Decisions and Doctrine 38, 49 (Joseph Dainow ed., 1974) (Custom does not play a major role as a source of law "in modern society as frequently as it was when our Code was adopted."). *See, e.g., Baton Rouge Union of Police*, 696 So. 2d at 645 (holding that custom that was contrary to legislation could not be enforced); *accord Clement*, 128 La. at 401–02, 54 So. at 921.

100. La. Civ. Code art. 4.

101. Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 Tul. L. Rev. 7, 36–37, 39, 41 (1994).

102. *Id.* at 36–41.

that the legislature was not intentionally silent on the issue or that the legislature did not intentionally word the legislation such that it would be interpreted broadly to cover the issue.[103]

When resorting to equity, the Louisiana judge should keep the Civil Code and other Louisiana enacted law at the forefront, first consulting legislation for provisions that could be applied by analogy because they govern similar interests and circumstances.[104] An example of this type of analysis that is often cited is the use of the Civil Code provisions governing servitudes to decide cases involving mineral rights before Louisiana had specific legislation governing mineral rights.[105] When the Civil Code was enacted, the redactors did not contemplate the oil and gas industry that would later develop in Louisiana. The redactors did contemplate that use and ownership of property could be separated, and these articles provided the foundation on which the courts based their decisions concerning mineral rights that could be owned or leased separately from the ownership of the real property prior to the enactment of the Louisiana Mineral Code.[106]

When analogy is not available to the judge to determine the law, some Louisiana law scholars have urged judges to follow French legal scholar Francois Gény's theory of "free scientific research" and article 1 of the Swiss Civil Code.[107] Under this theory the judge would consider general principles and values implicit in the Civil Code and other Louisiana enacted law and "render that decision which he would propose if he were a legislator using his own assessment of social, economic, and moral factors."[108] Despite some opinions in which judges have utilized this method, the Code does not require the judge to sit as legislator; Louisiana judges have looked to many sources to guide their decisions based on equity, including prior jurisprudence from Louisiana and other civil and common law

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103. *Id.* at 39.

104. *See, e.g.*, Langlois v. Allied Chem. Corp., 258 La. 1068, 1076–77, 249 So. 2d 133, 137–38 (1971) (interpreting the meaning of the term "fault" in La. Civ. Code Ann. art. 2315, the Court looked to other Civil Code provisions addressing responsibility and standards of conduct), *cited in* Dennis, *supra* note 14, at 11–12; *see also* Tate, *supra* note 6, at 675 (quoting Clarence Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 Tul. L. Rev. 351, 549–54 (1943)).

105. *See, e.g.*, Dennis, *supra* note 14, at 8 (citing Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922)); Tucker, *supra* note 7, at 760–61.

106. *See, e.g.*, *Frost-Johnson Lumber Co.*, 150 La. 756, 91 So. 207.

107. *See, e.g.*, Dennis, *supra* note 14, at 6–7 (citing Francois Gény, Méthode d'Interprétation et Sources en Droit Privé Positif (La. State Law. Institute trans., 2d ed. 1954) & Cc art. 1 (1907) (Switzerland)).

108. *Id.* at 13.

jurisdictions, Louisiana doctrine, French doctrine, Roman sources,[109] and what Judge Albert Tate has termed "the judge's sense of justice."[110]

Interestingly, when Louisiana courts exercise their equitable power to fill real or perceived gaps in the law, their decisions often become de facto sources of law. Examples of equitable doctrines that the Louisiana courts have applied to fill in "gaps" in the law and that have become recognized as Louisiana law include "the principles of unjust enrichment, equitable estoppel, and *contra non valentem*."[111]

D. Judicial Decisions

Judicial decisions, or precedents, are not a primary source of law in Louisiana according to the Louisiana Civil Code,[112] though in practice appellate court judicial decisions are persuasive as to what the law is,[113] and Louisiana Supreme Court decisions are considered to be "binding" on the appellate and trial courts.[114] The doctrine of stare decisis is not recognized in the Louisiana state court system.[115]

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109. Palmer, *supra* note 101, at 32–33. *See generally* Albert Tate, Jr., *The "New" Judicial Solution: Occasions For and Limits to Judicial Creativity*, 54 Tul. L. Rev. 877 (1980).

110. Tate, *supra* note 109, at 913.

111. Palmer, *supra* note 101, at 31.

112. *Id.*

113. Times-Picayune Publ'g Corp. v. New Orleans Publ'g Group, Inc., 2000-0748 (La. App. 4th Cir. 2002), 814 So. 2d 34, 36 (recognizing the value and persuasiveness of appellate court decisions).

114. *See, e.g.*, Pelican State Assocs., Inc. v. Winder, 253 La. 697, 706, 219 So. 2d 500, 503 (1969); United States Fid. & Guar. Co. v. Green, 252 La. 227, 234, 210 So. 2d 328, 331 (La. 1968). *But see Ardoin*, 360 So. 2d at 1334 (recognizing the value of prior decisions in which a statute is interpreted, but noting that the prior decisions are only "secondary information").

115. *See* Alvin B. Rubin, *Hazards of a Civilian Venturer in Federal Court: Travel and Travail on the Erie Railroad*, 48 La. L. Rev. 1369, 1372 (1988); *Doerr*, 2000-0947 (La. 2000), 774 So. 2d at 128; Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 296, 236 So. 2d 216, 218 (1970), *overruled on other grounds*, Jagers v. Royal Indem. Co., 276 So. 2d 309, 312 (La.1973); McKellar v. Mason, 159 So. 2d 700 (La. App. 4th Cir. 1964); Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331 (La. 1978); City of Shreveport v. Baylock, 236 La. 133, 107 So. 2d 419 (1958); Bell v. Albert Hanson Lumber Co., 151 La. 824, 92 So. 350 (1922); Belouguet v. Lanata, 13 La. Ann. 2 (La. 1858). In *Miami Corp. v. State*, the Supreme Court declared that "[e]ven in regard to the rules of property the maxim of stare decisis is not absolutely inflexible. . . . particularly . . . when it is shown that by following, rather than by disregarding previous erroneous decisions from which an evil resulted, the community would suffer greater damage." 186 La. 784, 801, 173 So. 315, 320 (La. 1937). *See also* Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1974); Carter v. Moore, 258 La. 921, 248 So. 2d 813 (1971); Stevens v. State Mineral Bd., 255 La. 857, 233 So. 2d 542 (La. 1970); State v. Cenac, 132 So. 2d 928 (La. 1961).

The most comparable doctrine expressly recognized in Louisiana is the doctrine of jurisprudence constante, or settled jurisprudence.

> Unlike Stare decisis, this latter doctrine does not contemplate adherence to a principle of law announced and applied on a single occasion in the past. However, when, by repeated decisions in a long line of cases, a rule of law has been accepted and applied by the courts, these adjudications assume the dignity of Jurisprudence constante; and the rule of law upon which they are based is entitled to great weight in subsequent decisions.[116]

Several commentators have also recognized that in civil law jurisdictions, precedent has a "moral impact" or sometimes may serve to morally bind courts, even though it does not technically bind them.[117]

Explaining how a court should interpret and apply Louisiana law in a case in which the interpretation of two Civil Code articles and a revised statute was at issue, the Louisiana Supreme Court wrote that a court should first look to the Code and other legislative sources for provisions that are directly applicable, then for provisions that are relevant by analogy.[118] The court should consider prior decisions as secondary information, "which may or may not reflect the meaning of the laws for contemporary purposes."[119] The Court criticized the appellate court for following one of the Supreme Court's own prior

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But see Heinick v. Jefferson Parish Sch. Bd., 97–579 (La. App. 5th Cir. 1997), 701 So. 2d 1047, 1050 (stating, "[W]here a question is not regulated by statute, the law is what the Louisiana Supreme Court has announced it to be."). In *Heinick*, despite the court's recognition of the use of jurisprudence constante and not stare decisis in Louisiana, the court concluded that it was "constrained to follow a supreme court decision dispositive of the issue before us." *Id. See also* Higgins v. State, 627 So. 2d 217 (La. App. 4th Cir. 1993) (the court recognized the doctrine of stare decisis and held that the policies in favor of following stare decisis far outweighed those suggesting departure); St. Martin Land Co. v. Pinckney, 212 La. 605, 33 So. 2d 169 (1947); Garret v. Pioneer Prod. Corp., 390 So. 2d 851 (La. 1980); Vaughan v. Housing Auth. of New Orleans, 80 So. 2d 561 (La. App. 1955); Lacour v. Ford Inv. Corp., 183 So. 2d 463 (La. App. 4th Cir. 1966).

116. *Johnson*, 256 La. at 296, 236 So. 2d at 218.

117. *See, e.g.*, Jean-Louis Baudoin, *Impact of the Common Law on the Civilian Systems in Louisiana and Quebec*, *in* The Role of Judicial Decisions and Doctrine in Civil Law and In Mixed Jurisdictions 1, 12 (Joseph Dainow ed., 1974); *see also* Spurlock v. Prudential Ins. Co., 448 So. 2d 218 (La. App. 1st Cir. 1984); City of New Orleans v. Treen, 421 So. 2d 282 (La. App. 4th Cir. 1982) (stating, "[W]hile this court has the power to modify and overrule its former decisions, it does not do so unless it is clearly demonstrated that error has occurred and hardship and injustice will attend a continuation of the rule of law.").

118. *Ardoin*, 360 So. 2d at 1334–36.

119. *Id.* at 1334, 1336.

decisions and treating it as primary authority when civilian methodology called for a reexamination of the legislation.[120]

The *Ardoin* decision illustrates the more traditional civilian approach or methodology; however, it does not accurately reflect the methodology most often used by Louisiana courts. Like the Court in *Ardoin*, Louisiana courts usually begin their analysis of a legal issue by consulting enacted law for any applicable provisions. However, the courts often place great value on prior decisions of the Supreme Court, a practice the Supreme Court criticized in *Ardoin*.

The value of precedent in Louisiana, like the value of precedent in France, Italy, and Spain, increases with the level of the court rendering the decision in the hierarchy of the court system. As previously mentioned, the Louisiana Constitution entrusts the Louisiana Supreme Court with supervisory jurisdiction over both civil and criminal cases, and the Louisiana courts of appeal have appellate jurisdiction over civil and criminal cases that arise from the courts within their circuits.[121] In civil cases, the Supreme Court has the authority to review cases on both questions of law and fact.[122] Because of this court structure and the power of review, lower courts are aware of the fact that if they do not follow a higher court's interpretation of Louisiana law, they run the risk of reversal. Likewise, attorneys and litigants are aware that courts tend to decide cases consistently with their own decisions and the decisions of the courts to which their decisions are appealable. Thus, although legal decisions are not a source of law, they frequently are persuasive to Louisiana courts and other courts interpreting Louisiana law.

I refer to this practice as "systemic respect for jurisprudence" because the value of precedent varies with the level of the court, and precedential value is not completely dependent on the existence of a long line of cases, like jurisprudence constante, though a long line of cases may increase its value. In fact, despite the judicial recognition of the applicability of the doctrine of jurisprudence constante and not stare decisis, the Louisiana Supreme Court and all Louisiana appellate courts have asserted that Louisiana Supreme Court decisions are binding statements of Louisiana law that must be followed by all other Louisiana state courts.[123] This binding effect is not dependent

120. *Id.* at 1334.

121. La. Const. art. 5, §§ 5(A) & 10(A). *See also supra* notes 76–77. The courts of appeal also have jurisdiction over matters appealed from family and juvenile courts. La. Const. art. 5, § 10(A).

122. *Id.* art. 5, § 5(C). *See* Times-Picayune Publ'g Corp. v. New Orleans Publ'g Group, Inc., 2000-0748 (La. App. 4th Cir. 2002), 814 So. 2d 34.

123. See *infra* notes 125–156 and accompanying text for a discussion of Louisiana cases recognizing Louisiana Supreme Court decisions as binding precedent.

on the existence of a long line of cases. Further, as is revealed in the survey results discussed in section IV of this article, the majority of Louisiana appellate and district court judges participating in the survey believe that they are bound by Louisiana Supreme Court decisions.[124]

The Louisiana Supreme Court decision most often cited in support of this assertion is *Pelican State Associates, Inc. v. Winder*,[125] a case in which the Supreme Court was resolving an apparent split among the Louisiana appellate courts of appeal as to the proper interpretation of several Louisiana Civil Code articles. The court explained, "While the appellate courts of this state are bound to follow decisions of this court, decisions of courts of other jurisdictions as well as those of courts of appeal of this state, while persuasive are not controlling on this court."[126] This statement was reiterated by the Court in *Johnson v. St. Paul Mercury Insurance Co.*,[127] a case often cited for the proposition that Louisiana recognizes the doctrine of jurisprudence constante and rejects the doctrine of stare decisis. In *Johnson*, the Court faced an appeal from the court of appeal's decision to employ a doctrine other than the one consistently used by Louisiana courts, including the Supreme Court, for determining choice of law. The Court expressed its surprise over the appellate court's failure to follow the "settled jurisprudence" and described the appellate court's action as "a failure by the Second Circuit to recognize its obligation to follow the settled law of this State."[128] The Court explained that when a question is not regulated by statute, "the law is what this Court has announced it to be."[129]

Although the Supreme Court has not reiterated this position in more recent cases, and in fact the Court has spoken of judicial decisions as secondary authority,[130] the Louisiana Courts of Appeal have consistently referred to Louisiana Supreme Court decisions as binding statements of the law. For example, in *State v. Cenac*,[131] the First Circuit Court of Appeal expressed its astonishment at the State's argument that the court had the "power and authority" to overrule a

124. *See* Appendix, questions 13 &14.

125. 253 La. 697, 219 So. 2d 500 (1969).

126. *Id.* at 503. *See also* United States Fid. & Guar. Co. v. Green, 252 La. 227, 234, 210 So. 2d 328, 331 (1968), *overruled on other grounds by* Creech v. Capitol Mack, Inc., 287 So. 2d 497 (La. 1974) ("[T]he appellate courts of this state are bound to follow a decision of this court.").

127. 256 La. 289, 236 So. 2d 216 (1970), *overruled on other grounds*, Jagers v. Royal Indem. Co., 276 So. 2d 309, 312 (La.1973).

128. *Id.* at 217.

129. *Id.* at 217–18.

130. *See supra* note 112.

131. 132 So. 2d 897, 899 (La. App. 1st Cir. 1961), *overruled on other grounds*, Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1975) (on rehearing).

line of decisions, including Supreme Court decisions, interpreting a Louisiana Revised statute. Even though the State had argued that the existing line of decisions "may lead to absurd consequences," the court refused to recognize its power under the more flexible jurisprudence constante, citing the Supreme Court's supervisory jurisdiction as a restriction on the appellate courts to ever decide differently from that court.[132] The court explained:

> It is too clear to admit of argument that one of the primary functions of a superior court whether acting under its direct appellate or supervisory jurisdiction via writ is to enumerate definitive interpretations of law binding upon and controlling subsequent decisions of all inferior courts thereto. It is an elementary, basic principle of law that inferior courts are bound by the decisions of superior, supervisory tribunals.[133]

Similarly, the appellate court in *Phillips v. Neraux*[134] expressed its desire to strike down as unconstitutional a "judicially created" evidentiary rule, but it did not do so because it felt constrained to follow the Louisiana Supreme Court. The court did not mention the doctrine of jurisprudence constante; rather, it quoted one of its earlier opinions in which it explained:

> Where the jurisprudence is clear and unmistakable, this court has no authority to change the policy thereby established. In such instances, it is the duty of intermediate appellate courts to follow the law as established by the decisions of the Supreme Court. . . . Assuming, arguendo, we disagreed with the jurisprudence in this regard, we are compelled to follow what is obviously a clear expression of our Supreme Court.[135]

Expressly stating that it did not have the power to overrule the Supreme Court, it relied on the Supreme Court's decision in *Johnson v. St. Paul Mercury Insurance Co.* as a lecture to intermediate appellate courts that they are bound to follow Supreme Court decisions and that "in the absence of statute, the law is what the Supreme Court says it is."[136]

More recently, the First Circuit Court of Appeal had occasion to repeat this principle when it faced an argument by one party, Exxon Corporation, to employ a test different from the test announced by the

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132. *Id.* at 899–900.
133. *Id.* at 900.
134. 357 So. 2d 813, 820 (La. App. 1st Cir. 1978).
135. *Id.* (quoting O'Connor v. Terry, 346 So. 2d 739, 743 (La. App. 1st Cir. 1977)).
136. *Id.* at 820–21 (citing Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970)).

Louisiana Supreme Court and followed in several other cases to evaluate the excessiveness of a damage award.[137] The court noted that the test Exxon advocated was the test used prior to the Supreme Court's decision on the issue, but explained that it was not free to look to the earlier decisions for guidance because it was "bound to follow the instructions of the Louisiana Supreme Court."[138]

The Second Circuit Court of Appeal has also restated the principle that it is bound to follow Louisiana Supreme Court decisions. In *Lucky v. Fricks*,[139] the court acknowledged the potential merit in the party's argument that it should not interpret Louisiana law as the Supreme Court had in the past, but it concluded that it was not free to interpret the law differently. The court explained:

> Trial courts and courts of appeal are bound to follow the last expression of law of the Louisiana Supreme Court. . . . The time may be ripe to change the rule that there is no cause of action in Louisiana for intentional interference with contracts. . . . We, however, are powerless to make this change.[140]

Similarly, the Second Circuit Court of Appeal reiterated this position in *Mudd v. Christus Health Northern Louisiana*[141] when it responded to an argument by one of the parties that the Supreme Court had incorrectly interpreted Louisiana law and that its decision on the issue should be overruled. The court explained that it was not free to disregard the Supreme Court's statement of the law on the issue because "the appellate courts of the state are bound to follow the decisions of the state supreme court."[142] Interestingly, shortly after the Second Circuit's decision in *Mudd*, the Supreme Court in another case overruled the decision the party in *Mudd* had suggested was incorrect, which is what caused the Supreme Court to grant writs in *Mudd* and remand to the trial court for reconsideration in light of its newest decision.[143] Thus, even though one of the parties was advocating what ultimately was determined to be the proper

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137. Roberts v. Owens-Corning Fiberglas Corp., 2003–0248 (La. App. 1st Cir. 2004), 878 So. 2d 631.

138. *Id.* at 644 (citing Pelican State Assocs., Inc. v. Winder, 253 La. 697, 706, 219 So. 2d 500, 503 (1969)). *See also* Elliot v. District Attorney of Baton Rouge, 94-1804 (La. App. 1st Cir. 1995), 664 So. 2d 122.

139. 511 So. 2d 1315, 1317 (La. App. 2d Cir. 1987).

140. *Id.* (citations omitted).

141. 37, 133 (La. App. 2d Cir. 2003), 850 So. 2d 911, 916, *writ granted & remanded to trial court*, 2003–2098 (La. 2003), 857 So. 2d 507.

142. Id. at 916.

143. *Mudd*, 857 So. 2d at 507 (citing David v. Our Lady of the Lake Hospital, Inc., 2002–2675 (La. 2003), 849 So. 2d 38, in which the court overruled its decision in *Williams v. Jackson Parish Hosp.*, 2000–3170 (La. 2001), 798 So. 2d 921).

interpretation of Louisiana law, the Second Circuit did not even evaluate the argument because of its belief that it was powerless to decide a case contrary to the Supreme Court.

The Third Circuit Court of Appeal has recognized the binding effect of Supreme Court decisions, but on at least one occasion it has acted contrary to Supreme Court jurisprudence,[144] highlighting the confusion existing among Louisiana courts as to how to employ the doctrine of jurisprudence constante as opposed to stare decisis, and still honor the hierarchy of the Louisiana court system. In *Clavier v. Lay Down Service, Inc.*,[145] the court discussed the binding effect of Supreme Court decisions much like the other Louisiana circuits. Faced with a question of interpretation of a Louisiana Revised Statute, the district court in the case had expressly referred to a Supreme Court decision on the issue as "'an erroneous pronouncement of Louisiana law,'" and neglected to follow it.[146] The Third Circuit agreed with the trial court's interpretation. However, the court explained,

> [W]e feel constrained to follow the supreme court's decision in *Kirkland*. As a court of appeal, we are bound to follow the decisions of our supreme court. "In our judicial system the Court of Appeal, in its relation to the Supreme Court, occupies the status of an inferior court, therefore, we do not enjoy the prerogative individually or collectively of either criticizing or reversing a decision of that court, even if it should be obviously erroneous."[147]

This language was quoted again by the Third Circuit in *Anthony Crane Rental v. Fruge*,[148] a case noted here not only because the court acted under the premise that it was bound by Louisiana Supreme Court decisions, but also because after the Third Circuit ruled consistently with the Louisiana Supreme Court decision with which it disagreed, the Louisiana Supreme Court overruled the relied upon decision and reversed the Third Circuit's decision. After a well-reasoned discussion of the statute at issue, the Supreme Court overruled its earlier interpretation of the statute because it had read a requirement into the statute that did not exist.[149] Had the Third

144. See *infra* notes 157–163 and accompanying text for a discussion of the referenced case.

145. 00-00701 (La. App. 3d Cir. 2000), 776 So. 2d 634.

146. *Id.* at 637.

147. *Id.* at 638 (quoting Fouchaux v. Board of Commr's of Port of New Orleans, 65 So. 2d 430, 432 (La. App. Orleans 1953)).

148. 02-0635 (La. App. 3d Cir. 2002), 833 So. 2d 1070, 1079, *reversed*, 2003-0115 (La. 2003), 859 So. 2d 631.

149. *Anthony Crane Rental*, 859 So. 2d at 639.

Circuit not felt bound or constrained by the Supreme Court's decision, perhaps it could have properly interpreted the statute.

The Fourth Circuit Court of Appeal seems to abide by the principle that it is bound by Supreme Court decisions, though the court has indicated that in some circumstances it may have the power to rule differently from Supreme Court precedent. In one case, citing its earlier decisions, the court stated, "[T]he law is settled that this appellate court is bound to follow the decisions of our Supreme Court."[150] Applying this principle, the court followed an earlier Supreme Court decision and rejected reliance on a federal district court decision, which it noted was merely persuasive.[151]

On the other hand, the Fourth Circuit has indicated that in some circumstances it may have the power to overrule or decide differently from a Supreme Court decision. In *State v. South Central Bell Telephone Co.*,[152] faced with an argument based on a prior Supreme Court decision rendered in 1899, the court referred to prior decisions as "persuasive, but not conclusive since they can be overruled or distinguished." The court tempered this statement with an admonition that prior Supreme Court decisions should be followed unless some compelling reason exists for "changing the law."[153]

The Fifth Circuit Court of Appeal decisions in which the value of the Supreme Court decisions is mentioned are consistent with the other circuits. In one case, the court was faced with a challenge to the interpretation of Louisiana Civil Code article 3492, which permits prescription to run on a minor's tort claim during his minority.[154] The court explained, "Although we sympathize with the plaintiff and believe that it may well be time to change our rule, as an intermediate appellate court we are bound to follow the precedent set by our Supreme Court."[155] The court reasoned that any change in the

150. Chittenden v. State Farm Mut. Auto. Ins. Co., 98-2919 (La. App. 4th Cir. 2000), 748 So. 2d 641, 644. *See also* Burger v. Burger, 1181-82 (La. App. 4th Cir. 1978), 357 So. 2d 1178 (noting the potential merit of an argument asserted by one party for a particular interpretation of Louisiana Civil Code article 2324 , but recognizing that it remained beyond the court's power to overrule an earlier Supreme Court decision).

151. *Chittenden*, 748 So. 2d at 644.

152. 619 So. 2d 749, 753 (La. App. 4th Cir. 1993).

153. *Id.*

154. Gauthreaux v. Rheem Mfg Co., 588 So. 2d 723, 725 (La. App. 5th Cir. 1991).

155. *Id. See also* Heinick v. Jefferson Parish Sch. Bd., 97-579 (La. App. 5th Cir. 1997), 701 So. 2d 1047, 1050 (stating, "[W]here a question is not regulated by statute, the law is what the Louisiana Supreme Court has announced it to be.". In *Heinick*, despite the court's recognition of the use of jurisprudence constante and not stare decisis in Louisiana, the court concluded that it was "constrained to follow a supreme court decision dispositive of the issue before us."); State v. Serio,94-131

existing law "must come from the legislature or our Supreme Court."[156] This last sentence indicates some belief by the court that the Supreme Court, along with the legislature, has the power to change or amend the law. Pursuant to traditional civilian treatment of precedent, the courts do have the power to "change" the law through reexamination and reinterpretation of the enacted provisions, but this power belongs to all courts, not just the court of last resort.

Despite the above decisions, from time to time Louisiana appellate courts have followed a more traditional definition of jurisprudence constante, giving a long line of prior decisions great respect, but not binding power. The Third Circuit Court of Appeal in *LeJeune v. Rayne Branch Hospital*[157] chose not to follow the Louisiana Supreme Court's interpretation of tort law concerning recovery for mental anguish resulting from injury to another. The appellate court's thoughtful and well-researched opinion is a testament to the great respect paid to the decisions of the Supreme Court, yet the court exercised its power to reexamine the Louisiana Civil Code article at the heart of the issue. Dissatisfied with the jurisprudence interpreting Louisiana Civil Code article 2315 as not allowing claims for damages for mental anguish resulting from injury to a third person, which was originally set forth in *Black v. Carrollton*[158] in 1855, the court considered the following before making its decision: (1) the long line of cases that had followed *Black*, which included three Louisiana Supreme Court decisions;[159] (2) the few "maverick" appellate court decisions that had carved out exceptions to *Black*; (3) the many appellate court decisions in which the courts followed *Black*, but openly criticized it; (4) the many writ applications denied by the Supreme Court in which the issue was raised; (5) the recovery allowed in analogous circumstances, including a recent discussion by the Supreme Court on a related issue; (6) a recent amendment to the code provision at issue; (7) the writings of commentators on the issue; and (8) common law approaches to the

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(La. App. 5th Cir. 1994), 641 So. 2d 604, 607 (although a criminal case, the court cited *Pelican State Assocs., Inc. v. Winder*, 253 La. 697, 706, 219 So. 2d 500, 503 (1969), for the principle that an appellate court is bound to follow the decisions of the Louisiana Supreme Court even if it disagrees with the Supreme Court's interpretation of the law); Duhe v. Duhe, 466 So. 2d 595, 597 (La. App. 5th Cir. 1985) (explaining that even though a Supreme Court decision had been criticized by several courts of appeal, the court was bound by the prior Supreme Court decision).

156. *Gauthreaux*, 588 So. 2d at 725.

157. 539 So. 2d 849 (La. App. 3d Cir. 1989).

158. 10 La. Ann 33 (La. 1855).

159. Kaufman v. Clark, 141 La. 316, 75 So. 65 (1917); Brinkman v. St. Landry Cotton Oil Co., 118 La. 835, 43 So. 458 (1907); Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906).

issue.[160] Accepting its responsibility to reexamine the interpretation of the Civil Code article at issue, the court explained, "Developments in the law of torts, particularly in recent years, lead us to believe that the *Black* rule should be discarded, if it has not already been abandoned."[161] The court held that the policy reasons underlying the *Black* line of decisions were "no longer valid," and it allowed the plaintiffs to maintain a cause of action that had been denied under Louisiana law for at least the past 134 years.[162]

On review, the Supreme Court reassessed its position regarding this issue, affirmed the appellate court's decision, and overruled *Black*.[163] Like the appellate court, the Supreme Court also thoughtfully considered prior Louisiana jurisprudence, the development of tort law in other states in the United States, and scholarly writings on the issue. Interestingly, the Supreme Court's opinion is silent as to the propriety of the appellate court's action of rendering a decision that was contrary to existing jurisprudence.

Thus, while the Supreme Court has endorsed use of a more traditional civilian approach, which relegates prior decisions to a secondary status that simply shows how the law has been interpreted and which is consistent with the Louisiana Civil Code, the Court has also directed lower courts to follow its decisions as binding statements of the law. This contradiction has come from the courts' struggle to remain true to the civilian tradition and the Louisiana Civil Code provisions regarding sources of law and, at the same time, recognize the superior position of the Louisiana Supreme Court to lower state courts, which is set forth by the Louisiana Constitution.

IV. SURVEY OF LOUISIANA JUDGES

A survey of Louisiana state judges further identified and clarified the sources of law actually used in modern day Louisiana and the value of precedent.[164] The focus of the survey was on the sources cited by attorneys when arguing to the courts and on the sources on which the courts rely when deciding cases. The survey also inquired about the court's respect for precedent, and its power to reject precedent.

A copy of the survey was sent by mail to the seven Louisiana Supreme Court justices, fifty-three Louisiana Court of Appeal judges, and 220 Louisiana district court judges.[165] Judges were not

160. *Lejeune*, 539 So. 2d at 851–59.
161. *Id.* at 850.
162. *Id.* at 859.
163. LeJeune v. Rayne Branch Hosp., 556 So. 2d 559, 569 (La. 1990).
164. See Appendix to this article for a copy of the survey and results.
165. The goal was to send a survey to all Louisiana state judges who serve at the

compensated for their participation in the survey. Participation in the survey was voluntary. One hundred and nineteen Louisiana district court judges, or 54% of Louisiana district court judges, responded to the survey; thirty-one Louisiana Court of Appeal judges, or 58% of Louisiana Court of Appeal judges, responded to the survey; and no Louisiana Supreme Court justices responded to the survey. Most of the judges who responded to the survey received their legal education in Louisiana and stated that they received an excellent (66%) or adequate (30%) background in the methodology of civil law analysis. The responding judges represented a range of experience as Louisiana state court judges, with 22.6% serving for less than five years, 30% serving for five to ten years,22% serving for ten to fifteen years, and 25.3% serving for more than fifteen years.

When it came to identifying "sources," both primary and secondary, that the judges indicated attorneys cite to the court as authority for their arguments, the numbers did not differ much whether the attorneys' arguments were based on the Louisiana Civil Code or the Louisiana Constitution or other Louisiana enacted law.[166] When arguing before the courts most attorneys rely on prior Louisiana court decisions to support their arguments–89.6% for arguments based on the Civil Code and 84.4 % for arguments based on the Louisiana Constitution and other Louisiana enacted law. In contrast, most attorneys do not rely heavily on legal treatises and law review articles in their arguments to the courts. While 39.7% and 41.2% of attorneys sometimes rely on these sources for arguments based on the Civil Code and arguments based on other Louisiana enacted law, respectively, most attorneys rely on these sources seldom or never–59.5% and 57.4%, respectively.

As for the "value" attributed to prior decisions by attorneys arguing before Louisiana courts, the judges indicated that attorneys put a high value on such decisions, especially when the Louisiana Supreme Court has weighed in on the issue. When relying on a line of decisions, which includes at least one Louisiana Supreme Court decision, most attorneys either always or almost always argue that the court is bound to follow the line of decisions–80.6% of attorneys

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district court level and higher. Names and addresses were obtained primarily from the 2002 edition of the Louisiana Legal Directory, which is the "official directory of the Louisiana State Bar Association," with a few additions or deletions based on information gathered about newly elected judges and recent retirements.

166. All but two questions inquiring into the sources that attorneys cite to the courts as authority for their arguments begin with the express premise that the issue was governed by enacted law–either the Louisiana Constitution, Civil Code, or Louisiana statutes. *See* Appendix, questions 4–9 and 12–13. Questions 9 and 13 inquire of circumstances when the issue was not governed by a Louisiana Civil Code article.

when prior decisions interpret the Civil Code and 79.5% when prior decisions interpret Louisiana enacted law other than the Civil Code. The numbers change somewhat when attorneys rely on a line of decisions that includes at least one decision from the Louisiana Court of Appeal in which they are arguing or to which an appeal would be brought. In those cases, 70.2% of attorneys always or almost always argue to the court that it is bound to or must follow the line of decisions interpreting the Civil Code, and 66.6% of attorneys always or almost always argue to the court that it is bound to or must follow the line of decisions interpreting the Louisiana Constitution or other Louisiana enacted law.

Similarly, after enacted law, most judges turn to prior court decisions to determine applicable Louisiana law.[167] If an issue is apparently not governed by Louisiana enacted law, 83.87% of the appellate court judges indicated that they would rely on prior decisions of Louisiana state courts to guide their decisions, and 85.47% of state district court judges would do the same.[168] In response to this same question, assuming the absence of enacted law, most judges would also consider Louisiana enacted laws that govern analogous or similar issues—70.9% of appellate court judges and 77.77% of district court judges; a legal treatise or law review article—70.9% of appellate court judges and 62.39% of district court judges; and equity—51.6% of appellate court judges and 57.26% of district court judges.[169] In addition, 67.74% of the appellate court judges would consider prior decisions of courts other than Louisiana state courts, and 43.58% of district court judges would consider these other state courts' decisions.

Interestingly, despite its identification by the legislature in the Civil Code as a source of law, only 25.8% of the appellate court judges and 35% of the district court judges identified custom as something they would rely on to guide them in decisionmaking. These results are consistent with the fact that few modern examples exist in which the Louisiana courts have expressly cited custom as the basis for their decisions. Perhaps they are also explained by the fact that unlike France, where custom was the primary source of law for

167. *See* Appendix questions 23–25; *see also* questions 10–11, 14–18, & 20.

168. *See* Appendix, question 23.

169. *See id.*; *see also* Appendix question 21 (concerning use of legal treatises or law review articles). In response to the question regarding how often the judge's decisions *are* influenced by legal treatises or law review articles, 54.83% of the appellate court judges indicated the response "sometimes," and 56.7% of the district court judges indicated the response "sometimes." Only 12.9% of the appellate court judges indicated "almost always" and none indicated "always." An even smaller influence of legal treatises and law review articles was indicated by the district court judges with .84% or one judge out of 118 respondents indicating "almost always" and .84% or one other judge indicating "always."

hundreds of years, Louisiana drafted its first Civil Code a relatively short time after its purchase by the United States, eliminating the necessity for courts to turn to custom in most circumstances. Moreover, in present day Louisiana where all appellate court and Supreme Court decisions are published and people customarily put agreements and expectations in writing, courts turn to prior decisions for information on how to interpret enacted law or how to fill the interstices left by enacted law and turn to other writings to determine the intentions of parties. This reliance on precedent, especially *jurisprudence constante*, is arguably a reliance on custom, which "results from practice repeated for a long time and generally accepted as having acquired the force of law,"[170] and which the Louisiana judges have more than likely identified in the survey by indicating a reliance on prior decisions.

This reliance on prior decisions is strong, even when enacted law exists, to the point that Louisiana Supreme Court decisions are considered binding by the appellate and district courts, confirming what was found from a review of the reported cases on the value of decisions.[171] The majority of judges responding to the survey indicated that they did not consider it within their power and authority to overrule a Louisiana Supreme Court decision interpreting Louisiana enacted law even if they believed that the Supreme Court had incorrectly interpreted the law. Of the appellate court judges, 83.87% indicated that they could not overrule the Supreme Court, and 81.89% of the district court judges indicated the same.[172] On the other hand, the majority of the courts do not feel bound by their own prior decisions interpreting Louisiana enacted law, with 67.74% of appellate court judges and 90.9% of district court judges indicating that they consider it within their power and authority to overrule a decision of their own court that they believe incorrectly interpreted the Louisiana Civil Code.[173]

Perhaps reflective of the above beliefs, one experienced Louisiana Court of Appeal judge added this comment to his survey responses:

> As you know, in a civilian system there is no such thing as precedent. It is jurisprudence constante, a different thing entirely. I think we Louisiana judges sometimes take the easy

170. La. Civ. Code. art. 3 (1999).

171. *See supra* part III.D.

172. *See* Appendix questions 14 & 15.

173. *See* Appendix question 10. Question 11 asked the same question about Louisiana enacted law other than the Civil Code and the responses were similar, with 66.66% of appellate court judges and 90.3% of district court judges indicating that they consider it within their power and authority to overrule a decision of their own court that they believe incorrectly interpreted the Louisiana Constitution or Louisiana enacted law other than the Civil Code.

> way out: if we can find a single intermediate appellate court decision on the subject, we will apply it to our issue as though it has the force of law. When we do so, we are giving that decision the effect of "precedent."[174]

This same judge indicated that intermediate appellate court judges consider themselves bound by Louisiana Supreme Court decisions, but not by decisions of other courts of appeal.

Finally, the judges nearly unanimously recognized a respect for prior decisions when they indicated that if they chose not to follow a relevant line of decisions, which included opinions rendered by their court or a court to which their decision would be appealable, they would either explicitly indicate that they were overruling precedent and explain why or distinguish the case they were deciding from the line of decisions. One hundred percent of the appellate court judges responding would do one of the above, rejecting the option of not mentioning the line of decisions or giving it little mention 98.27% of the district court judges responding would do one of the above with 1.73% of judges indicating that they would not mention the line of decisions or would give it little mention.[175]

V. COMMENTS, RECOMMENDATIONS, AND CONCLUSIONS

The research discussed in this article leads me to several conclusions regarding the sources of law in Louisiana and the value of precedent. No one can dispute that enacted law is the primary source of law in Louisiana. It is recognized as a source of law in the Civil Code and by the courts. Some questions arise, though, as to the value of custom as a source of law. The Civil Code expressly recognizes it as a source of law, and courts have consistently identified it as a source of law. However, in modern times, courts have rarely identified custom as the basis for their decisions, and the majority of Louisiana judges do not identify custom as something they would rely on to guide them in decision-making.

In contrast to custom, precedent, or prior decisions by Louisiana state courts, which some commentators and courts argue may rise to the level of custom after achieving the status of jurisprudence constante, are not recognized in the Civil Code as a primary source of law, and Louisiana courts often state that they are not bound by

174. Survey Responses (on file with the author).

175. *See id.* The percentages noted above were based on responses to question 16, which pertained to decisions based on cases interpreting the Louisiana Civil Code. The results in response to question 17 pertaining to other Louisiana enacted law differed only slightly, with only .88%, or one judge, indicating that he would not mention the line or give it little mention.

precedent like their common law brothers. However, in modern times, Louisiana courts have frequently identified precedent as a basis for their decisions, and the majority of Louisiana judges identify precedent as something they would rely on to guide them in decisionmaking. Louisiana courts seem to be applying what I have called "systemic respect for jurisprudence," a concept that includes an aspect of stare decisis and an aspect of jurisprudence constante. As described earlier, this concept contemplates a respect or value for precedent or jurisprudence that is tied to the court hierarchy within the legal system. The decisions of the highest court in the system, which is the court of last resort, are considered statements of binding law on all of the lower courts, subject to change only by the highest court itself or the legislature, which is similar to the common law concept of stare decisis. This court thereby provides some certainty by providing the final interpretation of law for the jurisdiction.

Although the Louisiana Supreme Court has expressly limited the value of prior decisions to secondary authorities, the Louisiana Supreme Court and Louisiana appellate courts have expressly recognized Louisiana Supreme Court decisions as binding on lower Louisiana courts, thus "judicially" making these decisions a source of law. In some cases, these decisions may attain their status as a source of law because they have become custom through their repeated use, and the Civil Code recognizes custom as a source of law. However, the Louisiana courts that have held that Louisiana Supreme Court decisions are binding have not restricted binding force to repeated decisions; they recognize that one Louisiana Supreme Court decision has binding force on the lower Louisiana courts.

Other Louisiana court decisions are not considered binding on any court under the concept of "systemic respect for jurisprudence," which is the aspect of the concept that incorporates the doctrine of jurisprudence constante. When no Louisiana Supreme Court decision has been rendered on an issue, courts may consider prior decisions as persuasive to their interpretation of the law; when repeated decisions interpret the law in the same way, these adjudications assume the dignity of jurisprudence constante, and the rule of law upon which they are based is entitled to great weight in subsequent decisions.

Systemic respect for jurisprudence seems to describe the doctrine that is being used in many civil law jurisdictions, including those jurisdictions discussed herein—Louisiana, France, Spain, and Italy—with varying degrees of recognition of the actual value of precedent. Of the four mentioned, Louisiana has gone the furthest in judicially recognizing the binding nature of decisions of its highest state court. Spain has also recognized that decisions of its Tribunal Supremo are binding on lower courts, but only when the court is settling the law over which two or more of its appellate courts have reached differing

interpretations.[176] In Italy, the lower courts are free to take a different position on a legal issue from the position taken by the Corte di Cassazione, but they are expected to adequately explain the reasons for disregarding the high court's prior interpretation of the law. Moreover, when a line of prior consistent decisions exists on an issue, implicating the doctrine of "giurisprudenza constante" or "consolidata," the Italian courts are bound by the interpretation except for very good countervailing reasons.[177]

In the French system, the hierarchy of the courts also plays a role, but that role has not been expressly formalized. Decisions of the higher courts provide an "authoritative argument" to the lower courts on how to interpret the statutory law, which some have described as creating a "de facto obligation" on the lower courts to follow the prior interpretations because the decisions of these lower courts will be reviewed by the higher courts.[178]

As for the reliance on doctrine and other secondary sources that is traditionally associated with civil law jurisdictions, in Louisiana, like in many other civil law jurisdictions, doctrine has been relegated to a position behind enacted law and precedent. This makes perfect sense from an historical perspective. Doctrine was a highly valued secondary source that explained the law when court decisions were not readily available, when court decisions were often not accurately transcribed, and when courts did not always take the time to explain their reasoning. In contrast, today the decisions of Louisiana courts, as well as many other courts, are readily available, they are accurately transcribed, and courts routinely explain their reasoning, thus making them a valuable and easily obtainable resource for other courts.

The legal system and traditions of Louisiana, an arguably civil law state in a common law nation, have adapted well. Louisiana has remained true to its civil law traditions, which have allowed its law to remain grounded in a strong statutory foundation, while at the same time it has taken advantage of the availability of prior interpretations of the law and has recognized their value. Some confusion seems to exist among the Louisiana courts as to whether those prior interpretations should ever bind the lower courts of the state. This confusion could be resolved by enacting a provision to be added to the Louisiana Civil Code similar to the provision in the Codigo Civil of Spain recognizing the value of jurisprudence.[179] This provision would codify "systemic respect for jurisprudence" by recognizing that lower courts necessarily place a high value on the decisions of the

176. *See supra* notes 70–71 and accompanying text.
177. *See supra* notes 59–63 and accompanying text.
178. *See supra* notes 49–53 and accompanying text.
179. *See supra* text accompanying note 67.

courts to which their decisions are appealable, but it would also restrict those decisions from becoming "law." The provision might read,

> Jurisprudence of the courts shall serve as a complement to the legislation, customs, and principles of equity, especially when the jurisprudence has achieved the status of jurisprudence constante. Interpretations of the law by the Louisiana Supreme Court, whether they have achieved the status of jurisprudence constante or not, are entitled to great weight, though they do not create law and do not bind lower courts.

In earlier times, when civilian jurisdictions often relied on unwritten sources of law, it may have been sufficient for courts to reference the custom of using the doctrine of jurisprudence constante when considering prior judicial decisions. In Louisiana today, codifying the value to be placed on prior judicial decisions would clarify for the courts how they should value prior decisions and would make this methodology a matter of law. This proposed codification would also provide a workable model for civilian jurisdictions, like those discussed herein, that seem to be grappling with the ever-increasing availability and reliability of prior judicial decisions.

As Professor Theodore Plucknett wrote in his brilliant text on the common law, "The conditions of society, and men's attitude towards them, are slowly but constantly changing, and the law must do its best to keep in harmony with contemporary life and thought."[180] Adopting a provision such as the one proposed above would not only assist the Louisiana legal system in keeping harmony with contemporary life and thought, but it would also foster the preservation of civil law methodology.

180. Plucknett, *supra* note 1, at 307.

Appendix 1

Survey of Louisiana Judges
Regarding Sources Relied on to Decide Cases
Conducted by Professor Mary Garvey Algero
Loyola University, New Orleans, School of Law

This brief survey is meant to identify the sources relied on by Louisiana courts and the attorneys who argue before the courts. The results of this survey will be an important part of a law review article Professor Algero is preparing on the sources of Louisiana law. Questions are addressed to issues of Louisiana state law. Responses will be reported anonymously, but the level of court may be revealed when the level of court is significant to the information being discussed. In addition to identifying the best response to each question, you are strongly encouraged to provide comments relevant to the questions. Your input as a Louisiana judge is vital to ensuring accurate data for this project.

Please return the completed survey in the enclosed envelope by August 1, 2003. Any questions about the survey should be directed to Professor Algero at (504)861-5675 or algero@loyno.edu or her assistant, Janice Burke, at (504)861-5749. Thank you for your participation.

Instructions: Please circle the letter that corresponds to your response to each question. Several lines for comments about questions or your responses have been included following most questions.

1. Select the response that identifies the court on which you sit:
   a. Louisiana Supreme Court;
   b Louisiana Court of Appeal; La. App. 31 judges
   c. Louisiana District Court. D. Ct. 119 judges

2. Select the response that identifies the number of years you have served as a Louisiana state court judge:

a.	Less than 5 years;	La. App. 0%	D. Ct. 28.57% (34/119)
b.	5–10 years;	La. App. 9.67% (3/31)	D. Ct. 35.29% (42/119)
c.	10–15 years;	La. App. 29.03% (9/31)	D. Ct. 20.16% (24/119)
d.	More than 15 years;	La. App. 61.29% (19/31)	D. Ct. 15.96% (19/119)

3. Select the response that best describes your legal educational background:
   a. I attended a law school located in Louisiana, and I received an excellent background in the methodology of civil law analysis;
      La. App. 67.74% (21/31) D. Ct. 65.54% (78/119)
   b. I attended a law school located in Louisiana, and I received an adequate background in the methodology of civil law analysis;
      La. App. 32.25% (10/31) D. Ct. 29.41% (35/119)
   c. I attended a law school located in Louisiana, and I did not receive a solid background in the methodology of civil law analysis;
      La. App. 0% D. Ct. 2.52% (3/119)
   d. I attended a law school located outside of Louisiana, and I received an excellent background in the methodology of civil law analysis;
      La. App. 0% D. Ct. .84% (1/119)
   e. I attended a law school located outside of Louisiana, and I received an adequate background in the methodology of civil law analysis;
      La. App. 0% D. Ct. 1.68% (2/119)
   f. I attended a law school located outside of Louisiana, and I did not receive a solid background in the methodology of civil law analysis.
      La. App. 0% D. Ct. 0%

4. How often do attorneys who argue before the court rely on prior Louisiana court decisions to support their arguments when the arguments are based on the Louisiana Civil Code? (The phrase "argue before the court," which is used several times in this survey, should be read to include written arguments as well as oral arguments.)

a. Always.	La. App. 32.25% (10/31)	D. Ct. 15.65% (18/115)
b. Almost always.	La. App. 61.29% (19/31)	D. Ct. 73.04% (84/115)
c. Sometimes.	La. App. 6.45% (2/31)	D. Ct. 7.82 (9/115)
d. Seldom.	La. App. 0%	D. Ct. 2.60% (3/115)
e. Never.	La. App. 0%	D. Ct. .86% (1/115)

5. How often do attorneys who argue before the court rely on prior Louisiana court decisions to support their arguments when the arguments are based on the Louisiana Constitution or Louisiana enacted law (other than the Civil Code)?

a. Always.	La. App. 29.03% (9/31)	D. Ct. 17.09% (20/117)
b. Almost always.	La. App. 58.06% (18/31)	D. Ct. 66.66% (78/117)
c. Sometimes.	La. App. 12.9% (4/31)	D. Ct. 12.89% (15/117)
d. Seldom.	La. App. 0%	D. Ct. 3.41% (4/117)
e. Never.	La. App. 0%	D. Ct. 0%

6. How often do attorneys who argue before the court rely on legal treatises or law review articles to support their arguments when the arguments are based on the Louisiana Civil Code?

a. Always.	La. App. 0%	D. Ct. 0%
b. Almost always.	La. App. 3.22% (1/31)	D. Ct. 0%
c. Sometimes.	La. App. 54.83% (17/31)	D. Ct. 35.65% (41/115)
d. Seldom.	La. App. 41.9% (13/31)	D. Ct. 60% (69/115)
e. Never.	La. App. 0%	D. Ct. 4.3% (5/115)

7. How often do attorneys who argue before the court rely on legal treatises or law review articles to support their arguments when the arguments are based on the Louisiana Constitution or Louisiana enacted law (other than the Civil Code)?

a. Always.	La. App. 3.22% (1/31)	D. Ct. 0%
b. Almost always.	La. App. 3.22% (1/31)	D. Ct. 0%
c. Sometimes.	La. App. 54.83% (17/31)	D. Ct. 37.6% (44/117)
d. Seldom.	La. App. 38.7% (12/31)	D. Ct. 57.26% (67/117)
e. Never.	La. App. 0%	D. Ct. 5.12% (6/117)

8. When attorneys who argue before the court rely on a line of prior decisions interpreting the Louisiana Civil Code, which line of decisions includes at least one Louisiana Supreme Court decision, do they argue that the court is bound to or must follow that line of decisions?

a. Always.	La. App. 19.35% (6/31)	D. Ct. 13.15% (15/114)
b. Almost always.	La. App. 67.74% (21/31)	D. Ct. 65.78% (75/114)
c. Sometimes.	La. App. 12.90% (4/31)	D. Ct. 15.78% (18/114)
d. Seldom.	La. App. 0%	D. Ct. 3.5% (4/114)
e. Never.	La. App. 0%	D. Ct. 1.75% (2/114)

9. When attorneys who argue before the court rely on a line of prior decisions interpreting Louisiana law that is not based on the Louisiana Civil Code, which line of decisions includes at least one Louisiana Supreme Court decision, do they argue that the court is bound to or must follow that line of decisions?

a. Always.	La. App. 29.03% (9/31)	D. Ct. 16.37% (19/116)
b. Almost always.	La. App. 58.06% (18/31)	D. Ct. 61.20% (71/116)
c. Sometimes.	La. App. 9.67% (3/31)	D. Ct. 18.96% (22/116)
d. Seldom.	La. App. 3.22% (1/31)	D. Ct. 2.5% (3/116)
e. Never.	La. App. 0%	D. Ct. .86% (1/116)

10. Do you consider it within your power and authority to overrule a decision of your own court that you believe incorrectly interpreted the Louisiana Civil Code?

a. Yes.	La. App. 67.74% (21/31)	D. Ct. 90.9% (101/111)
b. No.	La. App. 32.25% (10/31)	D. Ct. 9% (10/111)

11. Do you consider it within your power and authority to overrule a decision of your own court that you believe incorrectly interpreted the Louisiana Constitution or Louisiana enacted law (other than the Civil Code)?

a. Yes.	La. App. 66.66% (20/30)	D. Ct. 90.3% (103/114)
b. No.	La. App. 33.33% (10/30)	D. Ct. 9.64% (11/114)

(Louisiana Supreme Court justices should skip questions 12–15.)

12. When attorneys who argue before the court rely on a line of prior decisions interpreting the Louisiana Civil Code, which line of decisions includes at least one decision from the Louisiana Court of Appeal in which they are arguing or to which an appeal would be brought, do they argue that the court is bound to or must follow that line of decisions?

a. Always.	La. App. 16.12% (5/31)	D. Ct. 11.9% (14/117)
b. Almost always.	La. App. 48.38% (15/31)	D. Ct. 59.82% (70/117)
c. Sometimes.	La. App. 25.80% (8/31)	D. Ct. 23.93% (28/117)
d. Seldom.	La. App. 3.22 (1/31)	D. Ct. 3.41% (4/117)
e. Never.	La. App. 6.45% (2/31)	D. Ct. .85% (1/117)

13. When attorneys who argue before the court rely on a line of prior decisions interpreting Louisiana law that is not based on the Louisiana Civil Code, which line of decisions includes at least one decision from the Louisiana Court of Appeal in which they are arguing or to which an appeal would be brought, do they argue that the court is bound to or must follow that line of decisions?

a. Always.	La. App. 16.12% (5/31)	D. Ct. 10.92% (13/119)
b. Almost always.	La. App. 48.38% (15/31)	D. Ct. 56.30% (67/119)
c. Sometimes.	La. App. 29.03% (9/31)	D. Ct. 29.41% (35/119)
d. Seldom.	La. App. 3.22% (1/31)	D. Ct. 3.36% (4/119)
e. Never.	La. App. 3.22% (1/31)	D. Ct. 0%

14. Do you consider it within your power and authority to overrule a Louisiana Supreme Court decision that you believe incorrectly interpreted the Louisiana Civil Code?

a. Yes. (If yes, please identify any instances in which you have done so or in which you believe this action would be appropriate.)	La. App. 16.12% (5/31)	D. Ct. 18.10% (21/116)
b. No.	La. App. 83.87% (26/31)	D. Ct. 81.89% (95/116)

15. Do you consider it within your power and authority to overrule a Louisiana Supreme Court decision that you believe incorrectly interpreted the Louisiana Constitution or Louisiana enacted law (other than the Civil Code)?

a. Yes. (If yes, please identify any instances in which you have done so or in which you believe this action would be appropriate.)	La. App. 16.12% (5/31)	D. Ct. 18.10% (21/116)
b. No.	La. App. 83.87% (26/31)	D. Ct. 81.89% (95/116)

16. If you were choosing not to follow a relevant line of decisions on an issue based on the Louisiana Civil Code, which line of decisions includes opinions rendered by your court or a court to which your decision would be appealed, you would most likely:

a. Explicitly indicate that you are overruling precedent and explain why;	La. App. 10.71% (3/28)	D. Ct. 3.47% (4/115)
b. Distinguish the case at issue from the line of decisions, thereby leaving the precedent in place;	La. App. 32.14% (9/28)	D. Ct. 38.26% (44/115)
c. A or B, depending upon the circumstances of the case;	La. App. 57.14% (16/28)	D. Ct. 56.52% (65/115)
d. Not mention the line of decisions or give it little mention.	La. App. 0%	D. Ct. 1.73% (2/115)

17. If you were choosing not to follow a relevant line of decisions on an issue governed by the Louisiana Constitution or Louisiana enacted law (other than the Louisiana Civil Code), which line of decisions includes opinions rendered by your court or a court to which your decision would be appealed, you would most likely:
    a. Explicitly indicate that you are overruling precedent and explain why;
        La. App. 7.4% (2/27) D. Ct. 3.5% (4/113)
    b. Distinguish the case at issue from the line of decisions, thereby leaving the precedent in place;
        La. App. 29.62% (8/27) D. Ct. 39.82% (45/113)
    c. A or B, depending upon the circumstances of the case;
        La. App. 62.96% (17/27) D. Ct. 55.75% (63/113)
    d. Not mention the line of decisions or give it little mention.
        La. App. 0% D. Ct. .88% (1/113Yes. (If yes, please explain below.)

18. If you were choosing not to follow one relevant decision interpreting Louisiana law (as opposed to a line of decisions) rendered by your court or a court to which your decision would be appealed, you would most likely:
    a. Explicitly indicate that you are overruling the earlier decision and explain why; La. App. 7.4 (2/27) D. Ct. 10.34% (12/117)
    b. Distinguish the case at issue from the relevant decision;
        La. App. 40.74% (11/27) D. Ct. 43.96% (51/117)
    c. A or B, depending upon the circumstances of the La. App.se;
        La. App. 51.85% (14/27) D. Ct. 43.96% (51/117)
    d. Not mention the earlier decision or give it little mention.
        La. App. 0% D. Ct. 2.58% (3/117)

19. Have you ever overruled a line of decisions prospectively, that is, by ruling consistently with an existing line of decisions on the case before the court, but overruling the line of decisions for future cases?
    a. Yes La. App. 0% D. Ct. .87% (1/114)
    b. No. La. App. 100% (29/29) D. Ct. 99.12% (113/114)

20. Are you likely to be influenced by prior Louisiana decisions in some areas of law more than other areas of law?
    a. Yes. (If yes, please explain below.)
        La. App. 16/66% (5/30) D. Ct. 21.73% (25/115)
    b. No. La. App. 83.33% (25/30) D. Ct. 78.26% (90/115)

21. How often are your decisions influenced by legal treatises or law review articles?

a. Always.	La. App. 0%	D. Ct. .84% (1/118)
b. Almost always.	La. App. 12.90% (4/31)	D. Ct. .84% (1/118)
c. Sometimes.	La. App. 54.83 (17/31)	D. Ct. 56.7% (67/118)
d. Seldom.	La. App. 29% (9/31)	D. Ct. 38.13% (45/118)
e. Never.	La. App. 3.22% (1/31)	D. Ct. 3.38% (4/118)

22. Are you likely to be influenced by legal treatises or law review articles in some areas of law more than other areas of law?

a. Yes. (If yes, please explain below.)	La. App. 41.93% (13/31)	D. Ct. 31.62% (37/117)
b. No.	La. App. 58.06% (18/31)	D. Ct. 68.37% (80/117)

23. If an issue is not apparently governed by a Louisiana Civil Code article, a Louisiana Constitution article, or other Louisiana enacted law, what would you rely on to guide your decision? (Select all that apply.)

a. Prior decisions of Louisiana state courts;
La. App. 83.87% (26/31) D. Ct. 85.47% (100/117)

b. A legal treatise or law review article;
La. App. 70.9% (22/31) D. Ct. 62.39% (73/117)

c. Prior decisions of courts other than Louisiana state courts;
La. App. 67.74% (21/31) D. Ct. 43.58% (51/117)

d. Louisiana Civil Code articles, Louisiana Constitution articles, or other Louisiana enacted laws that govern analogous or similar issues or interests;
La. App. 70.9% (22/31) D. Ct. 77.77% (91/117)

e. The concept of equity;
La. App. 51.6% (16/31) D. Ct. 57.26% (67/117)

f. Custom;
La. App. 25.8% (8/31) D. Ct. 35% (41/117)

g. Other (please specify below).
La. App. 3.22% (1/31) D. Ct. 3.41% (4/117)

24. Rank the sources you identified in question 23 from most influential to you to least influential.

Most influential

La. App. 50%	said A was most influential (15/30)	D. Ct. 74.33% (84/113)
La. App. 3.3%	said B was most influential (1/30)	D. Ct. 4.42% (5/113)
La. App. 6.66%	said C was most influential (2/30)	D. Ct. 1.76% (2/113)
La. App. 33.3%	said D was most influential (10/30)	D. Ct. 15.92% (18/113)
La. App. 6.66%	said E was most influential (2/30)	D. Ct. 2.65% (3/113)
La. App. 0%	said F was most influential	D. Ct. 0%
La. App. 0%	said G was most influential	D. Ct. .88% (1/113)

Least influential

La. App. 3.44%	said A was least influential (1 /29)	D. Ct. .88% (1/113)
La. App. 17.24%	said B was least influential (5/29)	D. Ct. 10.61% (12/113)
La. App. 27.58%	said C was least influential (8/29)	D. Ct. 17.69% (20/113)
La. App. 3.44%	said D was least influential (1 /29)	D. Ct. 4.42% (5/113)
La. App. 17.24%	said E was least influential (5/29)	D. Ct. 26.54% (30/113)
La. App. 17.24%	said F was least influential (5/29)	D. Ct. 34.51% (39/113)
La. App. 13.79%	said G was least influential (4/29)	D. Ct. 6.19% (7/113)

25. Would you be interested in participating in a follow-up interview concerning the issues addressed in this survey?

a. Yes. (If yes, please provide name and contact information below.)	La. App. 40% (12/30)	D. Ct. 27.19% (31/114)
b. No.	La. App. 60% (18/30)	D. Ct. 72.8% (83/114)

You have reached the end of the survey. Thank you for participating in this project. Feel free to write any additional comments about the survey or your responses below.