

## Custom as a Source of Law in Louisiana

Gail S. Stephenson

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# Custom as a Source of Law in Louisiana

*Gail S. Stephenson* \*

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## INTRODUCTION

“To say that customs have the force of laws in a country, where all the laws are written appears to us a contradiction.”<sup>1</sup>

Who pays for the wedding reception—the bride’s parents or the newlyweds? Can a woman use her husband’s surname after a divorce? These might seem like etiquette questions for Miss Manners,<sup>2</sup> but Louisiana courts have answered these questions by referring to custom,<sup>3</sup> a primary source of law in Louisiana.<sup>4</sup> These cases are rare, however; Louisiana courts usually reject a litigant’s attempt to invoke custom.<sup>5</sup> When the courts do mention custom, they often mean conventional usage, a secondary source of Louisiana law.<sup>6</sup>

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\* Louisiana Outside Counsel A.A. Lenoir Endowed Professor and Director of Legal Analysis & Writing at Southern University Law Center; J.D., Louisiana State University Paul M. Hebert Law Center 1984. Funding to support work on this Article was provided by a summer research stipend from Southern University Law Center, with special thanks to Chancellor John K. Pierre. I also thank SULC Director of Library Services Phebe Poydras and her amazing staff for their research assistance, as well as the participants at the Louisiana Scholarly Workshop 2018 at Loyola New Orleans for their helpful suggestions.

1. 1 LA. STATE LAW INST., LOUISIANA LEGAL ARCHIVES: A REPUBLICATION OF THE PROJÉT OF THE CIVIL CODE OF LOUISIANA OF 1825 (1937) (proposing suppression of article 3).

2. Judith Martin writes a newspaper column on etiquette under the name “Miss Manners”; she also writes books on etiquette. *See, e.g.*, JUDITH MARTIN, MISS MANNERS ON WEDDINGS (1999).

3. *See Int’l River Ctr. v. Kogos*, 516 So. 2d 1327, 1329 (La. Ct. App. 1987) (bride testified it was “common custom for the parents of the bride to pay for the wedding reception”); *Welcker v. Welcker*, 342 So. 2d 251, 253 (La. Ct. App. 1977) (divorced women are customarily “known by a combination of their Christian name, their family surname and their former husband’s surname”).

4. Article 1 of the Louisiana Civil Code provides: “The sources of law are legislation and custom.” LA. CIV. CODE art. 1 (2019). The 1987 Revision Comments to article 1 state that “[a]ccording to civilian doctrine, legislation and custom are authoritative or primary sources of law.” LA. CIV. CODE ANN. art. 1 cmt. b (2019).

5. *See, e.g.*, *Perry v. Allied Offshore Marine Corp.*, 618 So. 2d 1033, 1036 (La. Ct. App. 1993) (rejecting the alleged custom—a court’s long-standing practice of hearing maintenance and cure cases by summary process—as it violated Louisiana procedural law).

6. *See, e.g.*, *Terrell v. Alexandria Auto Co.*, 125 So. 757, 759 (La. Ct. App. 1930) (in interpreting a contract of sale, the court referred to the business practice

Some commentators consider *jurisprudence constante*—“an interpretation of a rule of law that has been accepted and applied by the courts in repeated decisions in a long line of cases”<sup>7</sup>—to be custom and thus binding law, but most Louisiana courts have stated that jurisprudence, even *jurisprudence constante*, is instead a secondary source of law with only persuasive effect.<sup>8</sup>

This Article explores the historical basis of consuetudinary law and the definition of custom, including its characteristics, its distinction from usage, and its relation to jurisprudence. This Article examines the Louisiana Civil Code’s treatment of custom and the legislative history of the 1987 revisions to the Louisiana Civil Code to determine what the Louisiana Legislature intended when it established custom as a primary source of law. The Article also surveys the Louisiana courts’ treatment of custom, including the courts’ confusion between custom and conventional usage and the requirements courts imposed to prove custom. Finally, the Article looks at the decline of custom as a primary source of law and attempts to determine whether customary law still exists in Louisiana.

## I. HISTORICAL TRADITION OF CUSTOMARY LAW

Custom was the law of preliterate societies,<sup>9</sup> “preserved in the memory of old men.”<sup>10</sup> Custom has been described as an “ancient, but now very often foreign, source of law.”<sup>11</sup> In the sixth century, custom was recognized in Emperor Justinian’s Digest.<sup>12</sup> The Digest, or *Pandect*, was a compilation of classical legal texts from the first century B.C. to the fourth century A.D.;<sup>13</sup> the Digest stated, “Custom of long standing is rightly regarded as law.”<sup>14</sup>

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of delivering a car by driving it from the dealership to the purchaser’s home as “the custom of the place”).

7. MARY GARVEY ALGERO, *LOUISIANA LEGAL RESEARCH* 8–9 (3d ed. 2017).

8. *See, e.g.*, *Delta Chem. Corp. v. Lynch*, 979 So. 2d 579, 588 (La. Ct. App. 2008).

9. DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 3 (2010).

10. BARON DE MONTESQUIEU, 2 *THE SPIRIT OF THE LAWS* 251 (J.V. Prichard ed., Thomas Nugent trans., London, 1914).

11. Emily Kadens, *Introduction: Lessons from the History of Custom*, 48 *TEX. INT’L L.J.* 349, 355 (2013).

12. R.H. Helmholz, *Christopher St. German and the Law of Custom*, 70 *U. CHI. L. REV.* 129, 131 (2003).

13. A.N. YIANNOPOULOS, *LOUISIANA CIVIL LAW SYSTEM COURSE OUTLINES*, Part 1, § 9, at 18 (1971).

14. Helmholz, *supra* note 12.

Most early Roman and European law in the Middle Ages was customary.<sup>15</sup> The customs—*coutumes*—were ultimately written down or, in some cases, enacted as legislation.<sup>16</sup> In France in 1453, King Charles VII in the *Ordinance of Montil-les-Tours* called for French customs to be reduced to writing.<sup>17</sup> This began to be accomplished once printed books became widely available in the late 15th century.<sup>18</sup> The *Coutume de Ponthieu*, the “first definitive text of a coutume,” was published in 1495.<sup>19</sup> By the 16th century, most customary law in France was reduced to writing.<sup>20</sup> Codifications of the 19th century diminished the role of unwritten custom in France as a subsidiary source of law.<sup>21</sup>

The enacted custom “resist[ed] in many fields the invasion of Roman law,”<sup>22</sup> but Roman law was used to fill gaps in the customary law in civil law countries.<sup>23</sup> When Roman law and custom conflicted, however, custom prevailed.<sup>24</sup> This “pan-European amalgam of inherited Roman law, the emerging canon law of the [Roman Catholic] Church, and pre-existing customary regimes”—the *ius commune*—is “the cultural bridge of the Western legal tradition.”<sup>25</sup>

Both civil and common law systems recognize customary law and acknowledge it as the source of modern law. John Selden, a 17th century English jurist and legal historian, noted “that all law originates, historically, in customary law.”<sup>26</sup> One commentator noted that a “surprising degree of

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15. YIANNOPOULOS, *supra* note 13, § 33, at 89.

16. *Id.*

17. THOMAS GLYN WATKIN, *AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW* 122 (1999).

18. *Id.*

19. JEAN-GABRIEL CASTEL, *THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUÉBEC* 37 (1962).

20. RENÉ DAVID, *ENGLISH LAW AND FRENCH LAW* 6 (1980).

21. Claire M. Germain, *The French Legal System: Sources of Law, Authorities and Research Methods*, in *INTRODUCTION TO FOREIGN LEGAL SYSTEMS* 57, 61 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994).

22. *Id.*

23. *Id.*; F.H. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 18 (1955).

24. LAWSON, *supra* note 23, at 40.

25. BEDERMAN, *supra* note 9, at 22.

26. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1700 (1994); *see also* BEDERMAN, *supra* note 9, at 3 (“All law begins with custom . . .”). Not all commentators gave customary law the same respect, however. Jeremy Bentham, English philosopher and jurist, referred to customary law as “traditionary law” but “dismissed it. . . as the law for ‘barbarians.’” Frederick Schauer, *The Jurisprudence of Custom*, 48 *TEX. INT’L L.J.* 523, 525 (2013)

commonality” exists in the treatment of customary law in the legal systems that developed in Europe.<sup>27</sup> In his *Commentaries on the Laws of England* in 1765, William Blackstone noted that Roman law paid great regard to custom, but not as much as the common law; under Roman law, custom was adopted only when the written law was deficient.<sup>28</sup>

## II. DEFINITION OF CUSTOM

Commentators and judges have struggled “to find a cogent and functional definition of custom”<sup>29</sup> “since at least the twelfth century.”<sup>30</sup> One writer noted that custom has “many different and concurrent meanings.”<sup>31</sup> Most codes do not define custom because definitions of sources of law are considered “a matter of legal science rather than legislation.”<sup>32</sup>

An English law professor, Bernard S. Jackson, defined custom as “the unwritten body of norms of a group.”<sup>33</sup> Another English writer defined it as “the unwritten law . . . of Romanistic origin which often serves the purpose of supplying any gaps there may be in the provisions of the codes.”<sup>34</sup> French law professor François GénY described custom as “a complex of facts” that “reveal a legal sentiment.”<sup>35</sup> A frequent description

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(quoting THE COLLECTED WORKS OF JEREMY BENTHAM: OF THE LIMITS OF THE PENAL BRANCH OF JURISPRUDENCE 162 (Philip Schofield ed., 2010)).

27. See BEDERMAN, *supra* note 9, at 22.

28. See *id.* at 31 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 73–74 (1765–69)).

29. Emily Kadens & Ernest A. Young, *How Customary Is Customary International Law?*, 54 WM. & MARY L. REV. 885, 906 (2013).

30. Kadens, *supra* note 11, at 349.

31. H.C. GUTTERIDGE, COMPARATIVE LAW 80 (1946).

32. A.N. Yiannopoulos, *Jurisprudence and Doctrine as Sources of Law in Louisiana and in France*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 69, 70 (Joseph Dainow ed., 1974); see also YIANNOPOULOS, *supra* note 13, § 33, at 90; Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 38, 45 (Joseph Dainow ed., 1974).

33. Bernard S. Jackson, *Code and Custom*, in CODES AND CUSTOMS: MILLENNIAL PERSPECTIVES 119, 119 (Roberta Kevelson ed., 1994). Jackson further described custom as “the *internalisation* of norms.” *Id.* at 120.

34. GUTTERIDGE, *supra* note 31.

35. FRANÇOIS GÉNY, MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF § 110 (La. State Law Inst. trans., 2d ed. 1954).

of custom is “bottoms-up lawmaking”—law made “without the command of a single sovereign.”<sup>36</sup>

Marcel Planiol defined custom as “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.”<sup>37</sup> Unlike most codes, the Louisiana Civil Code has always defined custom. From Louisiana’s first Civil Code in 1808 until its 1987 revision, article 3 read: “Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.”<sup>38</sup> The current version of the Code states that “[c]ustom results from practice repeated for a long time and generally accepted as having acquired the force of law.”<sup>39</sup>

### A. Characteristics of Custom

Custom’s key characteristics are “longevity, consistency, and widespread observance.”<sup>40</sup> Professor Emily Kadens condenses these characteristics into two parts: “an objective requirement that an act be done repeatedly over time [the longevity and consistency factors], and a subjective requirement [known as the *opinio juris*] that the people engaging in the act do so out of a sense of legal obligation [the widespread observance factor].”<sup>41</sup> The comments to Civil Code article 3 are in accord: “According to civilian theory, the two elements of custom are a long practice (*longa consuetudo*) and the conviction that the practice has the force of law (*opinio necessitatis or opinio juris*).”<sup>42</sup>

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36. Kadens & Young, *supra* note 29, at 886–87; *see also* BEDERMAN, *supra* note 9, at x; Pascale Fournier & Pascal McDougall, *False Jurisdictions? A Revisionist Take on Customary (Religious) Law in Germany*, 48 TEX. INT’L L.J. 435, 436 (2013).

37. MARCEL PLANIOL, *TRAITE ELEMENTAIRE DE DROIT CIVIL*, Vol. 1, part 1, § 3(11) 8–9 (La. State Law Inst. trans., 1959).

38. LA. CIV. CODE art. 3 (1885) (revised 1987).

39. *Id.* art. 3 (2019).

40. BEDERMAN, *supra* note 9, at 19.

41. Kadens, *supra* note 11, at 350. The common law concept of custom also requires a sense of legal obligation. As one commentator explained, “[T]he custom must, even prior to its formal recognition by the courts, have created in some people an obligation to conform.” Schauer, *supra* note 26, at 524. Furthermore, the “notion of custom arising out of a sense of legal obligation . . . has been specifically recognized as an attribute of customary international law.” David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1451 (1996).

42. LA. CIV. CODE ANN. art. 3 cmt. b (2019).

Both the objective and subjective parts are necessary. Repeated behavior that the community does not consider legally binding is merely conventional usage.<sup>43</sup> For example, standing for the national anthem and writing thank you notes are societal expectations.<sup>44</sup> Failure to do these acts may earn social disapprobation,<sup>45</sup> but no legal consequences result from their nonobservance.<sup>46</sup> As Gény explained, the requirement of “color of necessity (*opinio necessitatis*)” “excludes from its scope certain social practices which may be firmly established, but which would claim in vain the character of a source of positive private law, for the usage on which they are based does not imply any coercive idea.”<sup>47</sup>

Planiol stated that “there are controversies without end” regarding customary law’s authority and nature.<sup>48</sup> Planiol himself believed custom could become an obligatory authority only after it had been “applied in adjudged cases”<sup>49</sup> but acknowledged that “the majority of modern authors deny that customary law originates with the courts.”<sup>50</sup>

French jurists are of three schools regarding what constitutes custom.<sup>51</sup> The first says that custom includes “practice, usages, received doctrine, and even the circumstances of social life.”<sup>52</sup> The second “assimilates custom to usages of daily life, social, business, industrial, and agricultural, and even the rules of etiquette and moral and religious practices.”<sup>53</sup> The third limits custom to case law.<sup>54</sup> French law professor and Dean Yvon Loussouarn was of the opinion that the first was too broad, the second

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43. Kadens, *supra* note 11, at 350.

44. Schauer, *supra* note 26, at 530.

45. See, e.g., Alex Altman & Sean Gregory, *Trump’s Offensive Playbook*, TIME, Oct. 9, 2017, at 33 (United States President Donald Trump referred to a National Football League player who knelt rather than stood for the national anthem as a “son of a bitch”).

46. For example, standing for the national anthem is not required by statute. See, e.g., 36 U.S.C. § 301(b)(1)(C) (2012) (during the national anthem, persons “*should* face the flag and stand at attention” (emphasis added)). No penalty attaches for failing to stand.

47. GÉNY, *supra* note 35, § 110.

48. PLANIOL, *supra* note 37, part 1, § 3 (No. 11) p. 9.

49. *Id.*

50. *Id.* at n.6. Planiol denied the idea that a judge was bound to follow customary law, stating, “That is an English idea that has never been accepted in France.” *Id.* § 3 (No. 14) p. 12, n.10.

51. Yvon Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 LA. L. REV. 235, 247 (1958).

52. *Id.*

53. *Id.* at 247–48.

54. *Id.* at 248.



included usages that were not juridically binding and thus did not have the force of law, and the third was incorrect because judicial decisions are not binding in France.<sup>55</sup>

### *B. Usage Distinguished from Custom*

Louisiana legislators apparently agreed with Loussouarn that none of the three French schools of thought were correct. The first two include usages, “a much broader, less-demanding concept than custom,”<sup>56</sup> although even statutory texts often “improperly classif[y]” usages as custom.<sup>57</sup> Planiol stated that the nature of usages was “quite different from that of Custom.”<sup>58</sup> He explained that when usages were adopted in contracts, they were “freely adopted,” as opposed to customs, which were “imposed upon them.”<sup>59</sup> He further noted that “usages followed by individuals are absolutely without force” and that a “usage is merely a fact.”<sup>60</sup>

Gény explained that usages include “all the manifestations of society which remain outside the positive legal order”—“the habits of daily life, . . . the mores of the people or of certain social classes, the commercial and other economic usages, the rules of civil behavior, the social conventions, or even moral and religious practices.”<sup>61</sup> The lack of a coercive ideation, however, prevents them from becoming positive law.<sup>62</sup>

The Louisiana Civil Code distinguishes custom from usage and specifically refers to usage in articles on interpretation of contracts,<sup>63</sup> explaining that a usage is “a practice regularly observed.”<sup>64</sup> Article 4 provides that the courts may resort to “justice, reason, and prevailing usages” in the absence of custom or legislation.<sup>65</sup>

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55. *Id.*

56. David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 S.M.U. L. REV. 387, 390 (2004).

57. GÉNY, *supra* note 35, § 110.

58. PLANIOL, *supra* note 37, part 1, § 3 (No. 14) p. 11 n.8.

59. *Id.*

60. *Id.* § 3 (No. 11) p. 10 n.6.

61. GÉNY, *supra* note 35, § 110 (footnote omitted).

62. *Id.*

63. *See* LA. CIV. CODE arts. 1785, 2053–55 (2019).

64. *Id.* art. 2055.

65. *Id.* art. 4. This is similar to article 7 of the Civil Code of Puerto Rico, which provides: “When there is no statute applicable to the case at issue, the court shall decide in accordance with equity, which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs, shall be taken into consideration.” P.R. LAWS ANN. tit. 31, § 7 (2018).

The comments to article 1 explain that legislation and custom, the primary sources of law, “are contrasted with persuasive or secondary sources of law, such as . . . conventional usages . . . that may guide the court in reaching a decision in the absence of legislation and custom.”<sup>66</sup>

### C. *Jurisprudence Is Not Custom*

Louisiana legislators and judges have rejected the third school of thought—that judicial decisions are customary law. The comments to article 1 of the Civil Code explicitly state that jurisprudence is “persuasive or secondary” and that courts should use it only in the absence of legislation and custom.<sup>67</sup> Louisiana courts have repeated this principle innumerable times,<sup>68</sup> most recently in Justice John L. Weimer’s concurrence in *Billeaudeau v. Opelousas General Hospital Authority*, in which the court stated, “[J]urisprudence, even when it arises to the level of *jurisprudence constante*, is a secondary source of law.”<sup>69</sup>

Some doctrinal writers, mostly those writing before the 1987 amendment to the Civil Code, have opined that “a long line of decisions on a certain subject may be taken to establish rules of customary law” that courts must follow.<sup>70</sup> In 1973, Professor William Thomas Tête asserted

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66. LA. CIV. CODE ANN. art. 1 cmt. b (2019).

67. *Id.*

68. *See, e.g.*, *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 128 (La. 2000); *Ardoin v. Hartford Acc. & Indem. Co.*, 360 So. 2d 1331, 1334 (La. 1978) (“The case law is invaluable as previous interpretation of [a statute] . . . , but it is nevertheless secondary information.”); *Royal v. Cook*, 984 So. 2d 156, 163 (La. Ct. App. 2008).

69. *Billeaudeau v. Opelousas Gen. Hosp. Auth.*, 218 So. 3d 513, 529 (La. 2016) (Weimer, J., concurring) (quoting 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)).

70. YIANNOPOULOS, *supra* note 13, § 35, at 101; *see also* Mack E. Barham, *Methodology of the Civil Law in Louisiana*, 50 TUL. L. REV. 474, 484 (1976) (“[T]here also exists that jurisprudence which, through common usage, has become accepted as a source of law as custom.”); Robert A. Pascal & W. Thomas Tête, *The Work of the Louisiana Appellate Courts for the 1969-1970 Term: Law in General*, 31 LA. L. REV. 185, 186 (1971) (“‘[A] long series’ of judicial decisions, ‘constantly repeated’ and enjoying ‘uninterrupted acquiescence’ by the people may evidence that ‘tacit and common consent’ of the people which is as generative of custom as the express consent of the whole people through their representatives is generative of legislation.”); Robert L. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A. J. 11 (1929) (“The Civil Law

that article 3 of the 1825 Civil Code was based on Spanish law, not French, and that the Spanish concept of custom “closely linked customary law and judicial decision.”<sup>71</sup> Thus, he concluded that the courts’ repeated enforcement of a rule could create customary law.<sup>72</sup>

Other commentators, however, agree with Justice Weimer’s assertions that *jurisprudence constante* does not create customary, binding law. For example, former Louisiana Supreme Court justice and current federal appellate judge James L. Dennis wrote, “*Jurisprudence constante* certainly does not represent legislative force in the proper sense, such as we attach to written law or custom.”<sup>73</sup>

### III. CIVIL CODE TREATMENT OF CUSTOM

From the first version of the Louisiana Civil Code in 1808 until its 1987 revision, article 1 read: “Law is a solemn expression of legislative will.”<sup>74</sup> According to Professor Vernon Palmer, this article was seen as “a manifesto proclaiming that legislation is the only recognized source of law and, in relation to it, jurisprudence would have no or low value.”<sup>75</sup> Article 3 previously read: “Customs result from a long series of actions constantly repeated, which have by such repetition and by uninterrupted acquiescence acquired the force of a tacit and common consent.”<sup>76</sup>

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begins with the principle that precedents are not binding. Then it makes exceptions where the matter is *jurisprudence constante*.”)

71. William Thomas Tête, *The Code, Custom, and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 TUL. L. REV. 1, 7 (1973).

72. *Id.* at 1–2, 7, 12.

73. James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993); see also MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 205 (1985) (“Some treatise writers have characterized settled case law as custom, but it is not officially recognized as such.”); WATKIN, *supra* note 17, at 8–9 (“[T]he recorded decisions of the courts in civil law countries . . . have considerable persuasive force . . . . The decisions of the courts are referred to as their *jurisprudence*, and this is regarded as a secondary source of law. . . . Court decisions however never amount to a justifying reason why the law should be applied or interpreted in a particular way.”).

74. LA. CIV. CODE ANN. art. 1 (1986) (revised 1987).

75. Vernon Valentine Palmer & Harry Borowski, *Louisiana, in MIXED JURISDICTIONS WORLDWIDE* 303 (Vernon Valentine Palmer ed., 2d ed. 2012).

76. LA. CIV. CODE ANN. art. 3 (1986) (revised 1987).

*A. Civil Code Revision of 1987*

The preliminary title of the Louisiana Civil Code was revised in 1987. Article 1 now provides: “The sources of law are legislation and custom.”<sup>77</sup> The 1987 Revision Comments state that, “[a]ccording to civilian doctrine, legislation and custom are authoritative or primary sources of law.”<sup>78</sup> The comments further state that “legislation is the superior source of law in Louisiana”;<sup>79</sup> that “legislation is superior to any other source of law”;<sup>80</sup> and that a judge “may look for solutions elsewhere” only when the case is “not covered by legislation.”<sup>81</sup>

The definition of custom in article 3 was changed in 1987. It now reads: “Custom results from practice repeated for a long time and generally accepted as having acquired the force of law.”<sup>82</sup> The comments state that this definition “reproduces the substance” of the previous version and “does not change the law.”<sup>83</sup> The revision added the following to article 3: “Custom may not abrogate legislation.”<sup>84</sup> The comments reiterate that “[l]egislation and custom are primary sources of law,” but “legislation is the superior source of law in Louisiana.”<sup>85</sup>

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77. LA. CIV. CODE art. 1 (2019).

78. LA. CIV. CODE ANN. art. 1 cmt. b (2019).

79. *Id.* cmt. a.

80. *Id.* cmt. c.

81. *Id.* Similarly, in Québec, legislation and custom are both considered primary law, with custom being considered a “‘subsidiary’ primary source of law.” F. Pearl Eliadis, *The Legal System in Québec*, in GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* 209, 219 (4th ed. 1995). The Civil Code of Québec states, in pertinent part: “[T]he Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.” Civil Code of Québec, S.Q. 1991, Preliminary Provisions (Can.).

82. LA. CIV. CODE art. 3.

83. LA. CIV. CODE ANN. art. 3 cmt. a.

84. *Id.*

85. *Id.* cmt. d.

Although the comments to the Civil Code are not law,<sup>86</sup> Louisiana courts consider comments to be “highly authoritative.”<sup>87</sup> The Louisiana Supreme Court stated, “While the revision comments do not form part of the law, they were presented together with the proposed legislation and illuminate the understanding and intent of the legislators.”<sup>88</sup>

Notably, *jurisprudence constante* is not mentioned in either article 1 or 3, or in the comments to these articles, leaving the issue of whether *jurisprudence constante* can be considered custom—and thus primary law—open to interpretation.

### B. Louisiana Supreme Court’s Interpretation of Code Revisions

After the 1987 revisions, the Louisiana Supreme Court’s first pronouncement on the issue of *jurisprudence constante* was in *Doerr v. Mobil Oil Corp.*<sup>89</sup> *Doerr* contains several statements regarding the authority to be given jurisprudence. The court first stated: “Judicial decisions . . . are not intended to be an authoritative source of law in Louisiana.”<sup>90</sup> The court then quoted a law review article by Judge Dennis: “Under the civilian tradition, . . . *jurisprudence constante* . . . operates with ‘considerable persuasive authority.’”<sup>91</sup> The court concluded that “it 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

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86. H.R. Con. Res. 58, 1978 Leg., 4th Reg. Sess. (La. 1978); *Louisiana Senate Rules of Order, Joint Rule of Order of the Senate and House of Representatives No. 10, La. State Legislature*, LA. ST. SENATE, <http://senate.la.gov/Documents/Rules/Joint.htm#10> [<https://perma.cc/2JV5-RU3E>] (last visited Apr. 2, 2019). The enacting legislation for the revisions to the Preliminary Title, including articles 1–4, states that the “comments in this Act are not a part of the law and are not enacted into law by virtue of their inclusion in this Act.” 1987 La. Acts, § 3.

87. Melissa T. Lonegrass, *Hidden Law: Taking the Comments More Seriously*, 92 TULL. REV. 265, 296 (2017).

88. *Wartelle v. Women’s & Children’s Hosp., Inc.*, 704 So. 2d 778, 783 (La. 1997). Professor Melissa Lonegrass described the comments to the Preliminary Title of the Code, and specifically articles 1–4, as comments that “do much more than simply contextualize the law. . . . [c]omments of this sort act as gap-fillers, suggesting solutions to legal problems that did not make their way into the text and making explicit various connections to which the text points only implicitly, if at all.” Lonegrass, *supra* note 87, at 310.

89. *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119 (La. 2000).

90. *Id.* at 128.

91. *Id.* (citing Dennis, *supra* note 73, at 15). Dennis’s statement is supported in the literature. See, e.g., WATKIN, *supra* note 17, at 8 (“[T]he recorded decisions of the courts in civil law countries . . . have considerable persuasive force . . .”).

custom under Civil Code article 3 and be enforced as the law of the state.”<sup>92</sup>

The court’s language regarding *jurisprudence constante* is confusing. If the Louisiana Supreme Court meant *jurisprudence constante* when it referred to “a long-standing rule outside of legislative expression,”<sup>93</sup> the court’s concluding statement conflicts with its statement that *jurisprudence constante* has “considerable persuasive authority.”<sup>94</sup> Law that is primary and authoritative is binding; law that is secondary and persuasive is not.<sup>95</sup> Thus, *jurisprudence constante* cannot be both a “highly persuasive” secondary source, and custom, a primary source that can “be enforced as the law of the state.”

In the 2005 decision *Willis-Knighton Medical Center v. Caddo Shreveport Sales & Use Tax Commission*,<sup>96</sup> Justice Weimer adopted Justice Dennis’s view that *jurisprudence constante* is a secondary, nonbinding source of law, stating: “*Jurisprudence constante* carries ‘considerable persuasive authority,’ but is not the law.”<sup>97</sup> He further stated: “*Jurisprudence constante*, as this court recognized in *Doerr*, is only ‘persuasive authority.’”<sup>98</sup> Again, in the 2015 case *Kelly v. State Farm Fire & Casualty Co.*,<sup>99</sup> Weimer stated that “legislation is a primary source of law and *jurisprudence constante* is a secondary source of law.”<sup>100</sup>

Only one Louisiana intermediate appellate court has quoted *Doerr*’s language regarding “a long-standing rule of law outside of legislative expression” becoming custom, and thus authoritative law. Judge Amy of the Louisiana Third Circuit Court of Appeal used *Doerr*’s language in a dissent in a way that seemed to refer to *jurisprudence constante*. The judge found that the two recent cases the plaintiff cited were not “controlling,” implying he was not bound to follow them because the cases did not form a long-standing rule of law.<sup>101</sup>

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92. *Doerr*, 774 So. 2d at 129.

93. *Id.* at 129.

94. *Id.* at 128 (citing Dennis, *supra* note 73, at 15).

95. See, e.g., ALGERO, *supra* note 7, at 6; CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 78–79 (2006); MICHAEL D. MURRAY & CHRISTY HALLAM DE SANCTIS, LEGAL RESEARCH AND WRITING 2–3 (2005).

96. *Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm’n*, 903 So. 2d 1071, 1087 (La. 2005) (internal citations omitted).

97. *Id.* at 1088 (internal citations omitted).

98. *Id.* at 1106 (Weimer, J., assigning additional reasons).

99. *Kelly v. State Farm Fire & Cas. Co.*, 169 So. 3d 328, 338 (La. 2015).

100. *Id.*

101. See *Aguillard v. Auction Mgmt. Corp.*, 884 So. 2d 1257, 1262–63 (La. Ct. App. 2004) (Amy, J., dissenting), *rev’d*, 908 So. 2d 1 (La. 2005).

*C. Legislative History of 1987 Revision*

A review of legislative history reveals that Justice Weimer's repeated statements that *jurisprudence constante* is only a secondary source of law are correct. When the legislature revised the Preliminary Title of the Louisiana Civil Code in 1987 and reenacted articles 1 and 3, it intended that jurisprudence, and even case law that rises to the level of *jurisprudence constante*, be only secondary, persuasive, nonbinding law.

The Louisiana State Law Institute drafted the revisions.<sup>102</sup> The Preliminary Title Committee met on November 1, 1985;<sup>103</sup> December 6, 1985;<sup>104</sup> and February 6, 1987.<sup>105</sup> The full Council met on February 14, 1986;<sup>106</sup> February 27, 1987;<sup>107</sup> and March 20, 1987.<sup>108</sup> Before these meetings, the reporter, Professor A.N. Yiannopoulos, prepared background materials for the other members, including excerpts from his book *Louisiana Civil Law System*,<sup>109</sup> and from the 1959 translation of Marcel Planiol's French treatise on the civil law.<sup>110</sup> Both Yiannopoulos's book and Planiol's treatise were used as textbooks in Louisiana and French law schools, respectively. The materials the Law Institute provided for the first two meetings included language regarding custom from Yiannopoulos's book: "[C]ivilian scholars in France have developed conflicting theories as to the nature and effects of customs. . . . According to a third view, customs derive exclusively from case law. This view must be rejected because judges have no legislative authority."<sup>111</sup>

Interestingly, the background materials did not include the section from Yiannopoulos's book that stated:

The theory that judicial precedents are not a source of law admits an apparent exception. In Louisiana and in France, a long line of

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102. The Louisiana State Law Institute was established by the Louisiana Legislature in 1938 "to promote and encourage the clarification of the law of Louisiana and its better adaptation to present social needs, to secure the better administration of justice and to carry out scholarly research and scientific work." Act No. 166, 1938 La. Acts 429.

103. Minutes, La. State Law Institute Preliminary Title Comm. (Nov. 1, 1985).

104. Minutes, La. State Law Institute Preliminary Title Comm. (Dec. 6, 1985).

105. Minutes, La. State Law Institute Preliminary Title Comm. (Feb. 6, 1987).

106. Minutes, La. State Law Inst. Council (Feb. 14, 1986).

107. Minutes, La. State Law Inst. Council (Feb. 27, 1987).

108. Minutes, La. State Law Inst. Council (Mar. 20, 1987).

109. YIANNOPOULOS, *supra* note 13.

110. PLANIOL, *supra* note 37.

111. A.N. Yiannopoulos, Materials for Meetings of Nov. 1, 1985 and Dec. 6, 1985 (quoting YIANNOPOULOS, *supra* note 13, § 33).

decisions on a certain subject may be taken to establish rules of customary law. This is the doctrine of “settled jurisprudence” (*jurisprudence constante*). *Courts must follow this jurisprudence as customary law rather than as merely precedents*. In France, this exception rests on doctrinal considerations; in Louisiana, there is legislative foundation for it in Articles 3 and 21 of the Civil Code.<sup>112</sup>

In the December 1985 meeting, the Committee members discussed whether jurisprudence could be a primary source of law. Two of the members worried that the new language of article 1, stating that legislation and custom were “[t]he sources of law,” “would mean that one could interpret the article as allowing the use of doctrine and jurisprudence as sources of law. They did not want this result.”<sup>113</sup> Yiannopoulos “argued that a tradition of Louisiana was that jurisprudence was not a source of law. He explained that his comments explained that jurisprudence was a ‘secondary’ source of law and distinguishable from a ‘primary’ source of law.”<sup>114</sup>

The Committee then considered deleting articles 1–3, but Professor Katherine Spaht “urged the Committee to retain the articles, since they were used to emphasize that there was no judge-made law. She argued that the legislature would oppose the absence of those articles.”<sup>115</sup> In that meeting, the Committee also amended the proposed language of article 3 “to clarify that custom resulted from a practice by the people and not by the courts.”<sup>116</sup>

When the Council met to discuss the recommendations of the committee,<sup>117</sup> Yiannopoulos began by explaining that the language of

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112. YIANNOPOULOS, *supra* note 13, § 35, at 101 (emphasis added). Articles 3 and 21, referred to in the quotation, are the articles from the original version of the Louisiana Civil Code in effect from 1808 to 1986, concerning custom and usages. Article 3 provided: “Customs result from a long series of actions constantly repeated, which have by such repetition and by uninterrupted acquiescence acquired the force of a tacit and common consent.” LA. CIV. CODE art. 3 (1986) (revised 1987). Article 21 provided: “In all civil matters, where there is no express laws, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent.” LA. CIV. CODE art. 21 (1986), *superseded* by LA. CIV. CODE art. 4 (2019).

113. Minutes, La. State Law Institute Preliminary Title Comm., p. 2 (Dec. 6, 1985).

114. *Id.*

115. *Id.*

116. *Id.* at p. 3.

117. For a description of the process followed by the Louisiana State Law Institute, see Lonegrass, *supra* note 87, at 278–79.



former article 1—“Law is a solemn expression of legislative will”—“was part of Louisiana tradition and was used by our courts as authority for the principle that judge-made-law was not law.”<sup>118</sup> Some Council members argued that under the Louisiana Constitution, only the legislature could make laws.<sup>119</sup> The Council temporarily adopted a motion indicating that custom was a secondary source of law,<sup>120</sup> but ultimately acceded to the comment to article 1 that both legislation and custom were primary sources. During all of the meetings, however, custom was referred to as law created by the people, and the possibility that jurisprudence could rise to the level of custom as *jurisprudence constante* was never discussed.

The language of articles 1 and 3 as drafted by the Law Institute was submitted as House Bill number 1136.<sup>121</sup> The bill was reported favorably by the House Committee on Civil Law and Procedure on May 13, 1987,<sup>122</sup> and was passed unanimously on May 15, 1987, as Act number 124, exactly as drafted.<sup>123</sup>

#### IV. LOUISIANA COURTS’ TREATMENT OF CUSTOM

As noted at the outset, Louisiana cases applying custom are rare. Often what the court calls custom is actually usage. Some attempts to use custom are rejected for lack of proof; others are rejected because the asserted custom is contrary to legislation or the contract between the parties. And the facts that gave rise to the rare cases decided using custom in the last century would probably not recur today.

##### A. Usage Cases

Despite the clear distinction between custom and usage in the Civil Code, Louisiana courts tend to confuse and conflate the terms,<sup>124</sup> probably because of the lingering questions regarding what constitutes custom.<sup>125</sup>

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118. Minutes, La. State Law Inst. Council, p. 1 (Feb. 14, 1986).

119. *Id.* at p. 2.

120. *Id.*

121. H.B. 1136, 13th Sess. (La. 1987) (enacted).

122. H. REP. JOURNAL, 13th Sess. 472 (La. 1987).

123. *Id.* at 563.

124. See YIANNPOULOS, *supra* note 13, § 33, at 94.

125. Lingering questions, such as the length of time required for a practice to become a custom and the percentage of people who have to believe they are bound for a practice to become “generally accepted as having acquired the force of law,” as required by Louisiana Civil Code article 3, are beyond the scope of this Article. See LA. CIV. CODE art. 3 (2019).

Thus, courts either refer to “custom or usage,” without attempting to determine which actually applies in a particular case,<sup>126</sup> or courts refer to something as custom that can be only usage. For example, in the case regarding payment for the wedding reception, the court noted the bride’s testimony “that it is common custom for the parents of the bride to pay for the wedding reception.”<sup>127</sup> Instead of relying on custom as a primary source of law, the court affirmed the judgment dismissing the bride from the lawsuit by stating that “in the absence of express law, *common custom or received usages* are examined in an appeal to equity.”<sup>128</sup>

Similarly, in the case of the ex-wife who wanted to continue to use her former husband’s surname, the court stated that it could “look to *established custom and equity* for assistance in deciding” the case.<sup>129</sup> The court noted Planiol’s writings that a woman had no right to use her husband’s name after a divorce. The court also took judicial notice of “the generally existent custom under which divorced women are known by a combination of their Christian name, their family surname, and their former husband’s surname,”<sup>130</sup> and recognized the right of a woman to revert to her maiden name after divorce.<sup>131</sup> The court concluded that in “modern life,” divorce had “provoked the establishment of its own customs,” including the “generally acknowledged acceptability of the use of the husband’s surname by his former spouse.”<sup>132</sup> Accordingly, a divorced woman can use her maiden name or her husband’s surname. Without a widespread sense that she is legally required to do one or the other, however, only a usage has been shown, not a custom. Thus, although the court stated it was using “established custom and equity” to decide the case, the court actually applied a usage.

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126. See, e.g., *Hurst v. Ricard*, 514 So. 2d 14, 16 (La. 1987) (“[I]t was a custom or usage to divide chenal frontage into tapered tracts closing rearward.”); *People’s Bank & Trust Co. v. La. State Rice Milling Co.*, 119 So. 779, 780 (La. Ct. App. 1929) (“Such a custom or usage had the force of law between the parties . . .”).

127. *Int’l River Ctr. v. Kogos*, 516 So. 2d 1327, 1329 (La. Ct. App. 1987).

128. *Id.* (emphasis added). Under the Louisiana Civil Code, equity is the application of “justice, reason, and prevailing usages” when no positive law exists. LA. CIV. CODE art. 4. As no statute answered the question before the court, the court decided the case by looking at what was usually done by people in similar situations.

129. *Welcker v. Welcker*, 342 So. 2d 251, 253 (La. Ct. App. 1977) (emphasis added).

130. *Id.*

131. *Id.* (citing *Wilty v. Jefferson Par. Democratic Exec. Comm.*, 157 So. 2d 718 (La. 1963)); *Succession of Kneipt*, 134 So. 376 (La. 1931).

132. *Welcker*, 342 So. 2d at 254.

### B. Proof of Custom

French courts in the 18th century required proof of custom through inquests, called *turba*, of at least ten local persons who were “thought likely to know or remember” the customary law.<sup>133</sup> Proof of the custom required that ten people agree to the existence of the custom for it to be binding.<sup>134</sup> Later, the number increased to 20 as two *turba* were required.<sup>135</sup>

Louisiana law did not adopt any specific requirements for proof of custom. While the jurisprudence is unclear as to the burden of proof of custom, courts tend to reject assertions of custom due to insufficient proof. One of the first cases regarding proof of custom arose in 1834 in *Broussard v. Bernard*, when an heir attempted to prove through parol evidence certain customs regarding community property law and “that the Fuero Real of the kingdom of Spain, was in force, where the succession was opened.”<sup>136</sup> The court found that parol evidence could not prove custom, stating that “[t]he recognition of customs, by our Code, necessarily admitted proof, other than that required to establish laws.”<sup>137</sup> The court, however, remanded the case for the introduction of certain documentary evidence that the trial judge originally rejected.<sup>138</sup>

Similarly, in 1841, the court rejected a claim by a ship’s captain that he was entitled to a certain commission on freight according to “the usage and custom of merchants in New Orleans.”<sup>139</sup> The court held the evidence of the custom was insufficient, stating that “when a custom is relied on, it must be established by evidence, the private knowledge of the jury will not authorize a verdict without the proof . . . and custom cannot be regarded as law until a long and uninterrupted prevalence is proved.”<sup>140</sup>

In 1917, an attorney—who had given up his legal practice in favor of real-estate investing—attempted to avoid paying a fee to another attorney who had worked on his case for six years, citing the “custom of courtesy,” i.e., members of one profession did not charge others in the same profession.<sup>141</sup> A dozen practitioners and judges were called to testify, and the court concluded that the plaintiff had failed to prove a binding legal

133. WATKIN, *supra* note 17, at 101.

134. *Id.*

135. *Id.*

136. *Broussard v. Bernard*, 7 La. 211, 215 (1834).

137. *Id.*

138. *Id.* at 215–16.

139. *Tyson v. Laidlaw*, 18 La. 380, 381 (1841).

140. *Id.* at 382 (citations omitted).

141. *Thigpen & Herold v. Slattery*, 73 So. 780, 782 (La. 1917).

custom; most of the witnesses followed the rule, but the witnesses believed the rule could be disregarded under the right circumstances.<sup>142</sup> The court added, however, that “a case might, perhaps, be presented in which that rule would be applied as the law which should govern it.”<sup>143</sup>

In a recent case involving a dispute between two municipalities and the parish police jury over who was responsible for paying the pre-adjudicative expenses for housing juveniles the municipalities arrested, the court relied on *Bernard*.<sup>144</sup> The towns claimed that the police jury had paid the expenses in the past and that this “custom and practice” was sufficient to obligate the police jury to pay in this situation as well.<sup>145</sup> Without explaining what proof was necessary, the court rejected the custom argument due to insufficient evidence, stating that the jurisprudence regarding proof of custom has “remained unchallenged” since *Bernard*.<sup>146</sup>

An odd example of proof of custom is found in the wedding reception case. The plaintiff in that case—the reception hall—initially sued only the bride and later added her parents as defendants.<sup>147</sup> Despite provisions in the Louisiana Code of Civil Procedure that allow a plaintiff to amend the petition to add further defendants,<sup>148</sup> the court stated that the plaintiff had “tacitly acknowledged” the custom that the bride’s family pays for the reception when it initially sued the bride and not the groom. The court found the tacit acknowledgment was sufficient proof of this “common custom.”<sup>149</sup>

One clear tenet regarding proof of custom is that the party seeking to invoke a custom must prove that both parties were aware of the rule sought to be declared custom.<sup>150</sup> The decisions establishing this tenet are logical, as the parties must be under the conviction that the rule has the force of law—which is difficult to show when one party is unaware of the rule. If

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142. *Id.* at 782–83.

143. *Id.* at 783.

144. *City of Abbeville v. Vermilion Par. Police Jury*, 85 So. 3d 233, 236–37 (La. Ct. App. 2012).

145. *Id.* at 236.

146. *Id.* at 237; *id.* (Painter, J., dissenting) (stating that the police jury’s pleadings were insufficient to establish custom).

147. *Int’l River Ctr. v. Kogos*, 516 So. 2d 1327, 1328 (La. Ct. App. 1987).

148. *See* LA. CODE CIV. PROC. art. 1151 (2019).

149. *Kogos*, 516 So. 2d at 1329.

150. *See, e.g., Lewis v. The Ship “Success,”* 18 La. Ann. 1 (La. 1866) (quoting *Parrott v. Thacher*, 26 Mass. (9 Pick.) 426, 438 (1830) (miscited by the court as “*Pratt v. Thatcher*, 9 Peck”)); *see also Hirsch v. N.H. Fire Ins. Co. of Manchester*, 1 Teiss. 215, 219 (La. Ct. App. 1904).

the parties are residents of the same area and one does not know of the rule, the rule does not meet the “widespread observance” requirement.<sup>151</sup> As the Louisiana Supreme Court stated, “When . . . the question is of a custom or usage, and it is not known to those who, from business and connections, have the best means of knowing it, the ignorance of it is, in some sense, positive testimony of its non-existence.”<sup>152</sup>

Furthermore, a rule that is widely known within an area cannot be applied as customary law to a non-resident who is unaware of the rule.<sup>153</sup> For example, in 1909, a theater company offered an actor an employment contract “for the season” but fired him after giving two weeks’ notice.<sup>154</sup> The defendant testified that all employment contracts, “in theatrical parlance, carry two weeks’ notice on either side.”<sup>155</sup> The actor, however, who was from Columbus, Ohio, testified he had never heard of the custom.<sup>156</sup> The Louisiana Supreme Court affirmed the trial court’s decision to exclude evidence of the so-called custom, stating: “The usage of a particular place or a particular class of persons cannot be binding on non-residents or on any person, unless they are shown to have been cognizant of it.”<sup>157</sup>

Requiring proof that both parties knew of the custom seems to conflict with “the legal maxims that ‘all are presumed to know the law’ and that ‘ignorance of the law is no excuse,’”<sup>158</sup> which are codified in Louisiana Civil Code article 5.<sup>159</sup> These maxims, which arise out of Roman civil law,<sup>160</sup> are “founded upon considerations of public policy and necessity [and] should be adhered to in most instances.”<sup>161</sup> The presumption that all people know the law, however, is legally sound only when the law is “certain and capable of being ascertained.”<sup>162</sup> Although Roman law at the time of the Digest was largely based on custom, it was “definite and

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151. See *supra* notes 90–92 and accompanying text.

152. *Lewis*, 18 La. Ann. at 6.

153. See *Hirsch*, 1 Teiss. at 219.

154. *Camp v. Baldwin-Mellville Co.*, 48 So. 927, 930 (La. 1909).

155. *Id.*

156. *Id.*

157. *Hirsch*, 1 Teiss. at 219.

158. *Cruze v. Life Ins. Co. of Va.*, 184 So. 735, 738 (La. Ct. App. 1938); see also *Gaspard v. Liberty Mut. Ins. Co.*, 243 So. 2d 839, 842 (La. Ct. App. 1971).

159. LA. CIV. CODE art. 5 (2019) (“No one may avail himself of ignorance of the law.”).

160. Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 350 (1998).

161. *Cruze*, 184 So. at 738–39.

162. Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 76 n.1 (1908).

knowable” because it was “well integrated with the community mores of the time.”<sup>163</sup> Modern statutory law is made definite and knowable through enactment and publication of notice,<sup>164</sup> after the promulgation of a law, each person is charged with knowledge of the law.<sup>165</sup> As custom is not made public in this manner, the application of customary law to persons who have no notice of the law does not comport with modern notions of due process.<sup>166</sup>

### C. Custom Cannot Abrogate Legislation

Even before the 1987 revision to article 3—explicitly stating that custom cannot abrogate legislation—Louisiana courts adopted the principle that custom could trump neither legislation nor the contract between the parties.<sup>167</sup> One of the earliest cases arose in 1832, when a plaintiff demanded rescission of an entire sale of 401 coils of bale rope, when only some of the rope was of unmerchantable quality.<sup>168</sup> The law was clear that he was entitled to return only the bad rope and not all of it. Plaintiff asserted, however, that “a custom, or commercial usage in New Orleans,” authorized return of the whole parcel if part of the order was defective.<sup>169</sup> The court held: “[W]here the law is express, no man or set of men can create a custom for their own benefit or convenience, and give to that custom a force paramount to that of the law.”<sup>170</sup>

The same principle was applied 150 years later when the defendants asserted that a savings and loan’s (“the S&L”) practice of permitting sales with assumption of the previous owner’s mortgage prevented the company from enforcing the “due-on-sale” clause in the defendants’ mortgage.<sup>171</sup>

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163. Davies, *supra* note 160, at 350 n.38.

164. See *Fields v. State*, 714 So. 2d 1244, 1259 (La. 1998).

165. *Succession of Young*, 732 So. 2d 833, 836 (La. Ct. App. 1999).

166. See *Fields*, 714 So. 2d at 1250. The Supreme Court held that the Due Process Clause of the U.S. Constitution requires “that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). The Court further held that although the rule that “ignorance of the law is no excuse” is deeply ingrained in our law, the requirement of notice under the Due Process Clause limits the exercise of that rule. *Lambert v. California*, 355 U.S. 225, 228 (1957).

167. See, e.g., *Clement v. S. Atl. S.S. Line*, 54 So. 920, 921 (La. 1911).

168. *Ledoux v. Armour*, 4 Rob. 381, 381–82 (La. 1832).

169. *Id.* at 385.

170. *Id.*

171. *La. Sav. Ass’n v. Trahan*, 415 So. 2d 592, 596 (La. Ct. App. 1982). A due-on-sale clause is a contract provision in a mortgage that “authorizes a lender,

The defendants' home was financed by the S&L's mortgage.<sup>172</sup> The mortgage contained a due-on-sale clause that required the company's consent to a sale with assumption of mortgage, which would transfer the obligations under the mortgage to any subsequent purchaser of the home.<sup>173</sup> When the defendants executed a sale with assumption without the S&L's consent, the S&L foreclosed.<sup>174</sup>

The court rejected the defendants' argument that the S&L's prior practice of permitting sales with assumption created a custom.<sup>175</sup> The court found there was both an express contractual provision and an express Louisiana statute permitting the enforcement of the due-on-sale clause.<sup>176</sup> The court stated, "Jurisprudence construing Civil Code Article 3 has established the rule that neither 'custom' nor 'usage' nor 'practice' may prevent the enforcement of an express statutory provision."<sup>177</sup>

#### *D. True Custom Cases*

It is necessary to go back to the early 20th century to find cases of true custom. One such case, from 1927, involved the question of whether an estate was responsible for the cost of the decedent's headstone.<sup>178</sup> The decedent's sister had ordered the grave marker, but she subsequently opposed payment by the estate in the estate's final accounting and homologation.<sup>179</sup> The court denied her opposition, citing Civil Code article 3 and stating: "The expenditure of a reasonable sum out of the estate of a party who has died for the purpose of marking his grave is authorized by a custom, so long existing that it has acquired the force and effect of a law."<sup>180</sup>

Another case in which the court applied custom with the force of law arose in 1935. This case involved an overseer of a large cotton plantation

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at its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent." 12 U.S.C. § 1701j-3(a)(1) (2012).

172. *Trahan*, 415 So. 2d at 593.

173. *Id.*

174. *Id.*

175. *Id.* at 596.

176. *Id.*

177. *Id.*

178. *Succession of Dunn*, 6 La. App. 663, 664 (1927).

179. *Id.* at 666.

180. *Id.*

who was fired in August despite being hired for “the year.”<sup>181</sup> The court stated that the rule that overseers were hired for the calendar year was so well known that a court could take judicial notice of the custom “without allegation or proof.”<sup>182</sup>

Today it is difficult to imagine a headstone being sold or a manager being employed for a large agricultural holding without a written agreement; for this reason, cases of this nature are unlikely to arise again.

## V. MODERN DIMINISHMENT OF CUSTOM

Although most civil law systems today accept custom as a source of law, the importance of custom has declined in modern legal systems.<sup>183</sup> In fact, John Henry Merryman commented in 1969 that the “amount of writing on custom as law in civil law jurisdictions is immense, far out of proportion to its actual importance as law. . . . [T]he importance of custom as a source of law is slight and decreasing.”<sup>184</sup> Custom fills the lacunae in the statutes, but Louisiana Supreme Court Justice Mack Barham commented in 1974 that the historical meaning of custom “is not applicable in modern society as frequently as it was when our code was adopted.”<sup>185</sup>

A 1962 law review article written by Albert Tate, Jr. is an indication of the diminished status of customary law.<sup>186</sup> Tate, a state appellate judge who would go on to serve on the Louisiana Supreme Court, stated the “principal formal sources used by a Louisiana judge” were the Civil Code and the statutes, doctrine, and precedent.<sup>187</sup> Tate’s only mention of custom was in a footnote, wherein he stated he was omitting discussion of custom because it was “used with relative infrequency in deciding civil litigation in our state courts.”<sup>188</sup>

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181. *Fletcher v. Crichton*, 164 So. 411, 412 (La. 1935).

182. *Id.* at 413.

183. YIANNOPOULOS, *supra* note 13, § 33, at 89.

184. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 24–25 (1969).

185. Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 38, 49 (Joseph Dainow ed., 1974).

186. Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 *LA. L. REV.* 727, 728 (1962).

187. *Id.* at 728.

188. *Id.* at 728 n.4; *see also* MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 131 (3d ed. 2008) (“In the civil law theory of sources of law, custom is regularly listed as a primary source, but routinely dismissed as of slight practical importance . . .”).



Custom has declined in importance for three primary reasons: (1) a strong legislature; (2) a more diverse population; and (3) our ever-changing modern society.<sup>189</sup> As GénY explained in 1899, “[A]s social relations become more complex, as ethnical groups fuse, and as the national aspirations are changed under the influence of cosmopolitanism which makes a strong political centralization necessary, the force of customary law recedes in the face of the constantly growing role of written legislation.”<sup>190</sup> Yiannopoulos stated that customary law flourishes when there is “no central power sufficiently strong to make new laws and to enforce obedience to the old,” but declines “[d]uring periods of strength and of good organization.” According to Yiannopoulos, this explains custom’s decline in importance.<sup>191</sup> Louisiana currently has a strong legislature with power to make new laws and enforce old ones, and thus application of customary law is unnecessary.

Customary law is strongest as a source of law in “small and closely knit communities, which often do not share the modern needs for fixed laws.”<sup>192</sup> Louisiana now has almost 4.7 million people<sup>193</sup> of many races,<sup>194</sup> ethnicities, cultures,<sup>195</sup> and religions.<sup>196</sup> It is difficult to imagine an uncodified practice that all, or even most, Louisiana citizens believe to be a binding legal obligation. The “custom” Yiannopoulos gave as an example during the Law Institute meetings—a wife taking her husband’s

189. See YIANNOPOULOS, *supra* note 13, § 33, at 89.

190. GÉNY, *supra* note 35, § 111.

191. YIANNOPOULOS, *supra* note 13, § 33, at 89; see also PLANIOL, *supra* note 37, § 3(13) 11.

192. Kadens & Young, *supra* note 29, at 899.

193. Louisiana’s population in 2016 was 4,682,000. PROQUEST STATISTICAL ABSTRACT OF THE UNITED STATES 2018 23 (6th ed. 2018).

194. In 2016 Louisiana was 61.2% white, 4.3% Hispanic, 31.2% black, 0.6% American Indian, 1.6% Asian, and 1.1% other. ANGIE SWANSON, LOUISIANA 16 (Jaclyn Jaycox ed., 2017).

195. “The rich diversities in the land, people, and culture of Louisiana are matters of common knowledge. They have been celebrated in song and story. Many of these are deeply rooted in history.” *Nomey v. State*, 315 So. 2d 709, 716 (La. 1975) (Sanders, C.J., dissenting); see also SWANSON, *supra* note 194 (“Louisiana is a land of many cultures. French, British, Spanish, Haitian, and African ancestors created a special culture in Louisiana.”); Erin Ashley Hammons, *I Spy Something Useful: The Short Life and Senseless Death of Louisiana Senate Bill 250*, 43 S.U. L. REV. 355, 355 (2016) (“Louisiana [is] one of the most . . . culture-rich states in the nation.”).

196. See PROQUEST STATISTICAL ABSTRACT OF THE UNITED STATES 2018, *supra* note 193, at 59.

name upon marriage—was not considered a binding legal obligation in 1987 by most people and is certainly not considered binding today.<sup>197</sup>

Sixty years ago, in 1958, Dean Loussouarn noted that custom forms too slowly to keep up with the fast evolution of modern society.<sup>198</sup> Yiannopoulos echoed this notion in 1974, stating that “the formation of customs is too slow to cope with the growing demands of a developing society.”<sup>199</sup> With the advent of computers and the internet, the world moves even faster today. The likelihood of an uncodified practice being followed for a “long time” with the belief that it is legally binding seems exceedingly slim in today’s world.

### CONCLUSION

Louisiana is now too diverse and populous for any uncodified practice to be both repeated for a long period of time and generally accepted as bearing a legal obligation. The only remaining source of law Louisiana courts might consider to be custom is *jurisprudence constante*, a doctrine the legislature never intended to be a primary source of law.<sup>200</sup>

Despite the Louisiana Supreme Court’s recent statements that jurisprudence, even when it becomes *jurisprudence constante*, is only a

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197. The suffragist Lucy Stone kept her maiden name when she married in 1855, and in the 1920s, “prominent feminists formed the Lucy Stone League to help married women preserve the identity of their own surnames.” Claudia Goldin & Maria Shim, *Making a Name: Women’s Surnames at Marriage and Beyond*, 18 J. ECON. PERSPECTIVES 143, 143 (2004). In 2004, a study showed that almost 20% of college-educated women retained their maiden names upon marriage. *Id.* at 159. Another study showed that 14% of women kept their maiden names in the 1980s and that 22% do so in the current decade. Claire Caine Miller & Derek Willis, *Maiden Names, on the Rise Again*, N.Y. TIMES ST1 (June 28, 2015).

198. Loussouarn, *supra* note 51, at 255.

199. Yiannopoulos, *supra* note 32, at 71.

200. This statement excludes Louisiana Indian tribal courts, which are outside the scope of this Article. Custom remains an important consideration for those courts. For example, the Coushatta tribe specifically lists “[c]ustoms, traditions and culture of the Coushatta Tribe” as a source of law. 1 COUSHATTA TRIBE OF LA. JUDICIAL CODE § 1.2.08(4) (2004). The Chitimacha Code of Judicial Conduct states: “The Code is to be applied consistently with applicable constitutional requirements, tribal laws, rules of court, decisional law, tribal tradition and custom, common sense and in the context of all relevant circumstances.” I CHITIMACHA COMPREHENSIVE CODE OF JUSTICE § 402 (1990). It further provides: “A judge shall rely only on those procedures which are prescribed by, or are consistent with, the laws, rules, traditions or customs of the Chitimacha Tribe of Louisiana.” Canons of Judicial Conduct, R. 3.1(5).

persuasive source of law, some courts feel obligated to abide by the decisions of higher courts. Some judges have stated that the lower courts are “bound”<sup>201</sup> or “constrained”<sup>202</sup> to follow the higher courts.

Lower courts tend to follow the decisions of higher courts for several reasons: (1) out of “a systemic respect for jurisprudence,” according to Professor Mary G. Algero of Loyola New Orleans;<sup>203</sup> (2) because they do not want to be reversed or are persuaded by the higher court’s reasoning,<sup>204</sup> according to Merryman;<sup>205</sup> or (3) because “they may lose prestige if they are seen to be inconstant” and desire “additional prestige . . . if they make stable law by always adhering to their decisions.”<sup>206</sup> But courts in a civilian or mixed jurisdiction such as Louisiana should not feel obligated to follow jurisprudence simply because of a misinterpretation of outdated language in the Civil Code regarding custom. The time has come for the legislature to end the confusion by amending Civil Code articles 1 and 3 as well as the comments associated with those articles to remove custom as a primary source of law.

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201. *See, e.g.*, *Oliver v. Magnolia Clinic*, 85 So. 3d 39, 44 (La. 2012) (“[T]rial courts and courts of appeal are bound to follow the last expression of law of the Louisiana Supreme Court.”); *Gauthreaux v. Rheem Mfg. Co.*, 588 So. 2d 723, 725 (La. Ct. App. 1991) (“[A]s an intermediate appellate court we are bound to follow the precedent set by our Supreme Court.”).

202. *See, e.g.*, *Nugent v. McNease*, 195 So. 3d 533, 535 (La. Ct. App. 2016); *Howard v. United Servs. Auto. Ass’n*, 180 So. 3d 384, 400 (La. Ct. App. 2015).

203. Mary Garvey Algero, *Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretations with the Tradition of Flexibility and Adaptability*, 58 LOY L. REV. 113, 115 (2012).

204. One intermediate appellate court stated: “Pretermitt[ing] all speculations as to whether the court is technically bound to follow” the Louisiana Supreme Court’s decision, it “recognize[d] the fact that it expresse[d] the deliberate, and presumably well considered, views of the Supreme Court on the subject.” Thus, it accepted them as “advisory.” *Estalotte v. Clements*, 8 Teiss. 227, 230 (La. Ct. App. 1911).

205. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 47 (3d ed. 2007). Additional reasons posited by Merryman are that the lower courts are impressed by the higher courts or that “they are too lazy to think the problem through themselves.” *Id.*

206. LAWSON, *supra* note 23, at 84.