

THE PRECEDENTIAL EFFECT OF UNPUBLISHED JUDICIAL OPINIONS UNDER LOUISIANA LAW

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The deadline is fast approaching to submit a brief on a dispositive motion. After hours spent researching dozens of cases, statutes, and treatises, it finally appears—a seemingly perfect case. The facts are indistinguishable, the judicial reasoning is airtight, and, best of all, the holding unreservedly supports your client’s position. There is only one problem: the case caption is marked “Not Designated for Publication.”

What now? Opposing counsel will surely argue that an unpublished opinion is not valid legal authority, and the judge may agree. On the other hand, ignoring the case or relegating it to a footnote means abandoning favorable, perhaps even binding,

* This Article is dedicated, in gratitude, to Justice Jeannette Theriot Knoll—a civilian jurist *par excellence*.

authority simply because the decision was issued electronically instead of in print.

Louisiana lawyers may believe this problem was resolved by the 2006 enactment of La. Code of Civ. Proc. art. 2168, which provides that unpublished opinions “may be cited,” thus reversing years of prior practice that strictly forbade reference to those opinions in all but a few limited circumstances.¹ However, article 2168 only addresses the issue superficially. Almost any source, legal or not, “may be cited.” The more important question is whether the unpublished opinion is *authoritative*. In other words, in what circumstances, if any, will a court consider itself bound by the holding of an unpublished opinion?² Article 2168 leaves this question unanswered.

Publication, citeability, and precedential value are three independent (though not unrelated) attributes of judicial opinions.³ Article 2168 addresses only two of these three attributes: publication and citeability.⁴ It requires the electronic publication of so-called “unpublished” cases on the websites of all Louisiana appellate courts and states that those opinions “may be cited.”⁵ However, it leaves open the third and most important question of whether an unpublished opinion is authoritative.⁶ This Article posits that, under the traditional understanding of *jurisprudence constante*, there is no valid reason to treat a case as lesser precedent based solely on its publication status. An unpublished opinion should be considered authoritative to the same extent that any judicial decision is authoritative under Louisiana law.

1. Article 2168 states, in its entirety: “A. The unpublished opinions of the supreme court and the courts of appeal shall be posted by such courts on the Internet websites of such courts. B. Opinions posted as required in this Article may be cited as authority and, if cited, shall be cited by use of the case name and number assigned by the posting court.” LA. CODE CIV. PRO. ANN. art. 2168 (2006).

2. For a thorough discussion of the distinction between citeability and precedential value, see Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE. L. REV. 1429 (2005).

3. David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. APP. PRAC. & PROCESS 19, 21 (2010); see also Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 5-6 (1989).

4. LA. CODE CIV. PRO. ANN. art. 2168(A)-(B).

5. *Id.*

6. Schiltz, *supra* note 2, at 1463 (“[I]ssues—such as whether unpublished opinions should or must be treated as precedential . . . are extremely important.”).

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This Article begins by reviewing the historical development of the unpublished opinion as a distinct jurisprudential concept, both nationwide and within Louisiana. The second section defines the traditional civilian theory of *jurisprudence constante* and sets forth the traditionally accepted reasons for treating judicial opinions as authoritative sources of law despite the Civil Code's explicit language to the contrary. The third section explains why, given Louisiana's unique approach to jurisprudence as legal authority, the publication status of an opinion should not affect its legal authority under Louisiana law.

I. THE DEVELOPMENT OF THE LEGAL PUBLICATION SYSTEM

A. A SHORT HISTORY OF THE AMERICAN CASE PUBLICATION SYSTEM

The currently understood distinction between published and unpublished opinions would have made no sense to an 18th century attorney. At the time, there were no official reporters and essentially no American legal publications.⁷ Indeed, judges primarily gave oral, not written, reasons for their judgments.⁸ Attorneys would keep personal notebooks in which they recorded the holdings of cases they had participated in or witnessed.⁹ They later cited these handwritten records by "vouching the record," that is, reciting the facts and holding of the previous case in hopes that it would be deemed good precedent.¹⁰

As America's legal system matured, and the number of attorneys grew, this informal case reporting system soon became inadequate. By the early 19th century, states began to appoint

7. See, e.g., Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 128 (1976) ("Almost all of the lawbooks used in colonial Massachusetts were imported from England.").

8. Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 55 (1981).

9. *Id.* at 50.

10. See Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 59-60 (2001). Because the court was wholly reliant on the attorney's representation of the earlier case, this practice was subject to abuse. See, e.g., *Belt v. Belt*, 1 H. & McH. 409, 418 (Md. 1771) (refusing to give precedential effect to a "manuscript" case because of its perceived unreliability); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 38 (1959); T. Ellis Lewis, *The History of Judicial Precedent*, 46 L.Q. REV. 341, 346 (1930) ("The facts of the precedents sometimes appear to have been grossly perverted and licked into shape by counsel to support their arguments.").

official reporters in an attempt to make the jurisprudential record more uniform and complete.¹¹ Nonetheless, reliable American case reports remained rare for much of the 19th century, especially in frontier areas.¹²

As might be expected, the early reporters were of uneven quality—some were praised for their accuracy and careful annotations, while others were described as “signally incorrect and deficient in execution.”¹³ In the second half of the 19th century, two developments led to increasingly standardized and accurate case reports. First, judges began to regularly issue written judgments.¹⁴ Lawyers no longer had to depend on reports prepared by someone sitting in the courtroom and transcribing the judges’ oral pronouncements; they could read each decision exactly as rendered by the judge. Second, in the 1870s, the West Publishing Corporation, with its novel Key system and standardized regional reporters, achieved near-dominance in the legal publishing field.¹⁵ The rise of the West Corporation effected

11. The first official reporter position was established by the Massachusetts Legislature in 1804. See 4 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 227 (Boston, Isaiah Thomas & Ebenezer T. Andrews eds., 1807). Other state legislatures soon followed suit. Indeed, in many states the reporters were given an “exclusive right to record, print, and publish the decisions of a court.” Thomas A. Woxland, *Forever Associated with the Practice of Law”: The Early Years of the West Publishing Company*, 5 Legal Reference Services Q., Spring 1985, at 115, 120. Granting a monopoly was seen as the only way to make legal publishing economically viable. *Id.* at 120-21. But see *Wheaton v. Peters*, 33 U.S. 591, 668 (1834) (“[N]o reporter has or can have any copyright in the written opinions delivered by this court . . .”). In Louisiana, the early 19th century caselaw was reported and printed by Louisiana Supreme Court Justice François-Xavier Martin as a lucrative side business. See FRANÇOIS-XAVIER MARTIN, THE HISTORY OF LOUISIANA, FROM THE EARLIEST PERIOD xxi (New Orleans, James A. Gresham 1882) (Preface by William Wirt Howe). The Louisiana Legislature established an official reporter in 1846, and he was charged with publishing the decisions of the Louisiana Supreme Court in “all cases in which any judgment shall be pronounced . . . except such as present only questions of fact or in which damages may be allowed as for a frivolous appeal.” An Act to provide for the publication of the Decisions of the Supreme Court, No. 114, § 2, 1846 La. Acts. 89.

12. Richard Peters, U.S. Supreme Court Reporter from 1828–1843, bemoaned the “scarcity of copies of reports of Supreme Court decisions in even some Federal courts . . . ‘the great and overruling law of the land is almost unknown in many populous parts of the Union.’” Thomas J. Young, Jr., *A Look at American Law Reporting in the 19th Century*, 68 LAW LIBR. J. 294, 295-96 (1975); see also Kempin, *supra* note 10, at 34-35.

13. See Surrency, *supra* note 8, at 57-58; Kempin, *supra* note 10, at 32.

14. Surrency, *supra* note 8, at 55-56.

15. For an overview of the history of West Publishing Company in the 19th century, see Woxland, *supra* note 11, at 115-24.

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a sea change in the legal publishing industry.¹⁶ West's reporters soon covered every state in the country, and, for the first time, lawyers were able to easily and accurately cross-reference cases and legal concepts.¹⁷

The legal publishing industry had become professionalized. Thus, by the turn of the 20th century, lawyers began to complain there were too many reported cases, prompting some to posit:

The greatest and most serious difficulty of our system grows out of the vast accumulation of law books; a difficulty that increases every day. Most of the cases now decided are of no use to the law as a science, mere threshing over old straw, saying again what has been as well or better said a hundred times before.¹⁸

By 1938 there was said to be “sufficient evidence at hand to convince the most reluctant observer that the volume of American case law ha[d] . . . reached almost unmanageable proportions.”¹⁹ While early 19th century attorneys were desperate for reliable, well-organized case reporters, by the mid-20th century many American law offices boasted full sets of reporters containing thousands upon thousands of cases, many of which involved no unique principle of law and a good number of which no one would ever read.²⁰

B. THE ADVENT OF THE UNPUBLICATION DOCTRINE

By the early 1960s, complaints about the increasing number of reported decisions led the federal judiciary to begin studying

16. See Woxland, *supra* note 11, at 115-24.

17. See *id.* at 116, 118-19.

18. *American Bar Association*, 64 ALB. L.J. 333, 335 (1902) (discussing annual meeting called to order by President of the Bar Association, U.M. Rose). Rose was concerned about the effect this mass of oft-conflicting precedent would have on the common law doctrine of *stare decisis*: “According to the inevitable law of evolution the decisions become more and more discordant; and much of the time of the courts is taken up in vain efforts at reconciliation.” *Id.* Rose looked favorably on civil law courts which, in his understanding, did not have to concern themselves with reconciling or justifying conflicting precedents. See *id.* at 335-36.

19. Francis R. Aumann, *American Law Reports: Yesterday and Today*, 4 OHIO ST. U. L.J. 331, 331 (1938).

20. See generally BENJAMIN N. CARDOZO, *THE GROWTH OF LAW* 1-19 (1924). Bringing order to this “wilderness of precedent” is a principal concern of Judge Benjamin Cardozo’s 1924 book, *The Growth of the Law*, which was instrumental in the drafting of the American Legal Institute’s Restatements. *Id.*

alternative publication schemes.²¹ In 1964, the Judicial Conference of the United States issued a report recognizing the “ever increasing practical difficulty and economic cost of establishing and maintaining private and public law library facilities.”²² Even if a lawyer had the budget necessary to fill his library, he could not possibly read and understand that much material.²³ Judges were also facing increasing workloads and thus had less time to devote to each opinion.²⁴ This led to a widespread belief that the resulting opinions, which in some cases were largely left to law clerks or staff attorneys, were of inferior quality.²⁵ However, the 1964 report stopped here, simply identifying the problem; it did not recommend any specific solutions.²⁶ The committee instead only adopted a general resolution that “judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.”²⁷

In 1973, the Advisory Council on Appellate Justice issued a report, based on a two-year study, titled “Standards for

21. Some Federal Circuits began studying this issue as early as the 1940s. See Francis P. Whitehair, *Opinions of Courts: Fifth Circuit Acts Against Unneeded Publication*, 33 A.B.A. J. 751 (1947); *Opinions of Courts: Should Number Published Be Reduced?*, 34 A.B.A. J. 668 (1948) (report of a Third Circuit committee convened to address the question of published opinions).

22. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964) [hereinafter 1964 JUDICIAL COUNCIL REPORT].

23. “By the early 1960s, there was much talk in the legal profession about the geometric rate of increase in the amount of material a lawyer had to scan to do a comprehensive job of legal research. Simply said, there was more law. Lawyers had begun to see legal research as becoming an almost intolerable burden.” William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543, 544 (1984).

24. See *Nat'l Labor Relations Bd. v. Amalgamated Clothing Workers of Am.*, 430 F.2d 966, 968-71 (5th Cir. 1970). This trend continues. See also Ruggero J. Aldisert, *All Right, Retired Judges, Write!*, 8 J. APP. PRAC. & PROCESS 227, 228 (2006) (“[W]hen I began as a member of the Third Circuit in 1968 each judge was responsible for deciding on the merits ninety appeals a year. But now, each active judge in the Third Circuit decides 400 cases every 365 days.”).

25. See Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 786-89 (1981) (analyzing the roles of staff attorneys and their negative impact on drafted judicial opinions); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007).

26. 1964 JUDICIAL COUNCIL REPORT, *supra* note 22, at 11.

27. *Id.*

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Publication of Judicial Opinions.” The Council recommended that no opinion should be published unless it meets one of the following standards:

- [1.] The opinion establishes a new rule of law or alters or modifies an existing rule; or
- [2.] The opinion involves a legal issue of continuing public interest; or
- [3.] The opinion criticizes existing law; or
- [4.] The opinion resolves an apparent conflict of authority.²⁸

These four guidelines form the foundation of the vast majority of modern federal and state rules regarding the publication of opinions.²⁹ Within a year, all of the federal courts of appeals had adopted some version of this model rule,³⁰ and, by the 1978–79 term, half of federal appellate court dispositions were designated as unpublished.³¹

Notably, however, the 1973 model rule only addresses publication—not citeability or precedential value. The drafters deliberately chose to sidestep these questions,³² issues that had been the subject of hot debate among the committee members. At the time, the drafters were able to avoid the issue because they knew lawyers had no easy way of finding unpublished opinions, thus rendering their precedential value a purely academic question.³³ One commenter describes this resolution as “a sort of judicial out of sight, out of mind.”³⁴

However, unpublished opinions did not remain “out of sight”

28. FED. JUDICIAL CTR., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE 22 (1973) [hereinafter 1973 FED. JUDICIAL CTR. REPORT].

29. See Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405, 406 (1981).

30. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75-76 (2001). Each circuit adopted slightly different criteria for deciding what opinions should be published. *Id.* at 76-78; Cleveland, *supra* note 3, at 27-42.

31. Merritt & Brudney, *supra* note 30, at 76.

32. See 1973 FED. JUDICIAL CTR. REPORT, *supra* note 28, at 20-21.

33. See *id.* at 19. As a practical matter, if an opinion was not included in West’s Federal Reporter, it was invisible.

34. David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685, 687 (2009).

for long. With the advent of computer-assisted research, these opinions became increasingly accessible to attorneys. By the mid-1990s, computerized legal research had become mainstream as Westlaw and Lexis competed to add unpublished opinions to their online databases.³⁵ Computerized legal research systems not only made unpublished opinions easy to access, they provided a built-in standardized citation system (the now-familiar “WL” and “LEXIS” citations). Previously, an attorney trying to cite an unpublished case was sometimes required to provide a hard copy of the opinion to save the court the trouble of tracking down the case.³⁶ With the WL and LEXIS citation markers, anyone with computer access could quickly find the cited authority. Although this ability was initially limited to Lexis and/or Westlaw subscribers (i.e., lawyers and judges), in 2002 Congress passed the E-Government Act, which requires all federal courts to make accessible unpublished opinions available on the court website.³⁷ The circle was completed when West unveiled its Federal Appendix: a printed volume collecting “unpublished” opinions.³⁸ As “unpublished” opinions are now published both online and in bound volumes, the phrase “unpublished opinion” has become meaningless in any literal sense; it is now purely “a term of art.”³⁹

One of the primary justifications for forbidding citation of unpublished opinions was that, given the difficulty in obtaining copies of unpublished opinions, attorneys with better access to those opinions would have an unfair advantage in litigation.⁴⁰ The playing field had been leveled by the advent of universal online access to legal researching databases. Unpublished

35. Peter W. Martin, *Finding and Citing the “Unimportant” Decisions of the U.S. Courts of Appeals* 2-3 (Cornell Law Sch., Research Paper No. 08-015 (2008)).

36. *See, e.g.*, Former 6th Cir. R. 28(g) (stating that unpublished opinions could only be cited in a narrow set of circumstances, and only if the “party serves a copy thereof on all other parties in the case and on this Court”) (later amended).

37. E-Government Act of 2002, Pub. L. No. 107-347 § 205(a)(5), 116 Stat. 2899, 2913 (2002).

38. Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 2 (2002). Publishing supposedly “unpublished” opinions is not an entirely new idea. For example, certain volumes of West’s California Appellate Reporter have contained a “supplemental” section since the 1930s. *See, e.g.*, *People v. Moss*, 33 Cal. App. 2d Supp. 763 (1939).

39. Schiltz, *supra* note 2, at 1429 n.1.

40. DONNA STIENSTRA, FED. JUDICIAL CTR., UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 10 (1985); FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130 (1990).

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opinions are trivially easy to find on Westlaw and Lexis. And, inevitably, as unpublished opinions became more readily available, attorneys wanted to cite them. Strict no-citation rules came under increasing judicial and academic criticism, and some federal courts began amending their local rules to permit citation of unpublished opinions in limited circumstances.⁴¹

In 2003, the Federal Advisory Committee on Appellate Rules, chaired by then-Judge Samuel Alito, proposed a new Federal Rule of Appellate Procedure to impose a uniform rule on citation of unpublished opinions in federal court.⁴² The proposed rule was highly controversial, and the Federal Rules Committee received a near-record number of comments and suggestions.⁴³ Despite this controversy, the proposed rule was adopted in 2006 as Federal Rule of Appellate Procedure 32.1.⁴⁴ As promulgated, Rule 32.1 sets forth a compromise position between those who wanted to keep strict no-citation rules in place and those who wanted to make unpublished opinions freely citeable. The Rule affirms the citeability of unpublished opinions going forward, stating that a court “may not prohibit or restrict the citation of federal judicial opinions . . . issued on or after January 1, 2007.”⁴⁵ But, just as in 1973, the Committee said nothing about the precedential value of unpublished opinions.⁴⁶ Moreover, the rule operates prospectively only, and each circuit has discretion to forbid citation to any unpublished opinions issued before January 1, 2007.⁴⁷ Thus, despite decades of study and numerous attempts to enforce a uniform standard, federal courts are still highly split both as to the authoritative value of unpublished opinions generally and the citeability of unpublished opinions dating from 2006 and before.

41. Schiltz, *supra* note 2, at 1430-31.

42. *Id.* at 1431, 1444-45.

43. *Id.* at 1432. Schiltz was the reporter for the Advisory Committee for proposed Rule 32.1, and his article represents a fascinating firsthand view of the controversy surrounding that Rule. *See id.* at 1429.

44. *See* FED. R. APP. P. 32.1.

45. FED. R. APP. P. 32.1(a).

46. Because of this lacuna, Schiltz dismisses Rule 32.1 as “not even an important rule.” Schiltz, *supra* note 2, at 1433.

47. *See* Cleveland, *supra* note 3, at 26-27, 42-48 (comparing practice between circuits).

C. UNPUBLICATION IN LOUISIANA

Louisiana has a long history of discretionary limitations on the publication of judicial opinions. In 1846, when the Legislature established the position of an official state reporter, it also instructed the reporter not to publish cases which “present only questions of fact or in which damages may be allowed as for a frivolous appeal.”⁴⁸ Early volumes of the Louisiana Annotated Reporter began with a “List of Cases Not Reported,” which suggest the reporter was quite willing to omit cases he did not deem worthy of publication.⁴⁹

Nonetheless, the limited publication system had its critics. In his preface to the sixteenth volume of the Louisiana Annual Reports, which covered cases decided in 1861–62, S.F. Glenn—then the state’s official reporter—issued a biting retort to complaints that he was publishing too many repetitive or otherwise uninteresting cases:

It is objected to by many of our Jurisconsults, that there are too many repetitions of the same doctrine in the Annual Reports. The Reporter has in this respect no option. The Act of 1855,^[50] establishing his office, directs him to report all cases in which any judgment shall be pronounced, except such as present only questions of fact, or in which damages may be allowed as for a frivolous appeal. Moreover, we have many novitiates at our Bar, and copies of the previous volumes cannot be obtained,—they having all been destroyed in the conflagration of the State House at Baton Rouge three years ago.^[51] Besides, decisions which, to careless and unskillful persons, appear only to repeat the same sense, will often exhibit to a more accurate examiner diversities of

48. An Act to provide for the publication of the Decisions of the Supreme Court, No. 114, §§ 1-2, 1846 La. Acts. 89.

49. For instance, Volume Four of the Louisiana Annotated Reporter, which includes cases from 1849, lists about 140 cases which are not reported; Volume Six lists about 150. 4 La. Ann. xi-xii (1913); 6 La. Ann. xi-xii (1913). The table of unreported cases is, for whatever reason, missing from Volume Five.

50. The Act establishing the position of official reporter was originally passed in 1846. No. 114, §§ 1-2, 1846 La. Acts. 89. The Act was reenacted March 15, 1855. No. 244, § 1, 1855 La. 300, 300-03.

51. The State House, now known as the Old State Capitol, was burned down during the Civil War. *See Burning of the State House at Baton Rouge*, HARPER’S WEEKLY, Jan. 24, 1863, at 51. Presumably this is a reference to the December 28, 1862 fire allegedly set by Confederate sympathizers. *See id.*

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signification; or, at least, afford different shades of the same meaning . . . Our own Court has given their dictum that a single decision is not conclusive upon any question of law. (13 La. Ann. 345)⁵²

Although the basic rule remained untouched for many years, the 1973 Federal Judiciary Report, referred to *supra*, Section I(A), influenced state court practices across the country;⁵³ Louisiana was no exception. In 1978, the Louisiana Supreme Court enacted a new Rule of Appellate Court, Rule XII-A, which set forth the basic framework for limited publication that is still in use today, albeit in an altered form.⁵⁴

Rule XII-A began by defining three types of opinions: (1) full opinions, which give the judgment of the court and a full statement of the reasons supporting the judgment; (2) memorandum opinions, which give the judgment of the court and a brief statement of the reasons supporting the judgment; and (3) *per curiam* opinions, which give only the judgment of the court.⁵⁵ Under the rule, a majority vote of the panel determined whether a case would be decided via full opinion, memorandum opinion, or *per curiam*.⁵⁶ A full opinion was considered appropriate only if one of the following circumstances applied: (a) in deciding the case, the court enunciated a new rule of law or modified an existing rule; (b) an apparent conflict of authority existed; (c) the court was not unanimous in its disposition of the case; or (d) the decision was of substantial public interest.⁵⁷

Slightly different standards applied when determining whether a case should be published. Instead of stating that, for

52. 16 La. Ann. iii (1910) (emphasis added); Landry v. Klopman, 13 La. Ann. 345, 345 (1858) (“As under our system, a single decision is not considered as conclusive upon any question of law.”).

53. See, e.g., George Rose Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 ARK. L. REV. 26, 28 (1978) (discussing the Report's influence on Arkansas and how that publication “led the Supreme Court of Arkansas to adopt its non-publication rule”).

54. See LA. CT. APP. UNIF. R. 12-A (1978) (repealed 1999). This rule only applied to the Louisiana Courts of Appeal, while the Louisiana Supreme Court continued (and continues) to publish all of its decisions. Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349, 369 (2004).

55. LA. CT. APP. UNIF. R. XII-A(1)(a) (1978) (repealed 1999).

56. LA. CT. APP. UNIF. R. XII-A(1)(b).

57. *Id.*

instance, all full opinions should be published while memorandum or *per curiam* opinions should go unpublished, Rule XII-A provided a separate set of guidelines for determining publication. The Rule stated:

An opinion of the Court of Appeal shall not be designated for publication unless a majority of the panel decides it should be published under the following standards:

- (a) The opinion establishes a new rule of law or alters or modifies an existing rule;
- (b) The opinion involves a legal issue of continuing public interest;
- (c) The opinion criticizes existing law;
- (d) The opinion resolves an apparent conflict of authority; or
- (e) The opinion will serve as a useful reference such as one reviewing case law or legislative history.⁵⁸

The first four guidelines were adopted *verbatim* from the 1973 Federal Judiciary Conference Report.⁵⁹ The Louisiana rule added one ground for publication not mentioned in the federal report, allowing for the publication of a case which serves as a “useful reference.”⁶⁰ It also strictly forbid citation to unpublished opinions, which could not be “cited, quoted, or referred to by any counsel, or in any argument, brief, or other materials presented to any court, except in continuing or related litigation.”⁶¹

The rule remained substantively unchanged for twenty-two years.⁶² In 1999, however, it was amended to expand the categories of cases eligible for publication. In addition to the reasons listed above, a case could be published if it included a concurrence or dissent, reversed the trial court judgment, or affirmed the trial court judgment on different grounds.⁶³ A provision allowing the trial court judge to request publication of an opinion originally designated as unpublished was also added although, oddly, the parties were granted no corresponding

58. LA. CT. APP. UNIF. R. XII-A(2) (1978) (repealed 1999).

59. See 1973 FED. JUDICIAL CTR. REPORT, *supra* note 28, at 22.

60. LA. CT. APP. UNIF. R. XII-A(2)(e).

61. LA. CT. APP. UNIF. R. XII-A(3) .

62. In 1982 the rule was renumbered as LA. CT. APP. UNIF. R. 2-16.

63. LA. CT. APP. UNIF. R. 2-16.2 (1999).

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right.⁶⁴

This version of the rule remained in effect for many years, and most Louisiana courts during this time strictly adhered to the rule against citing or considering unpublished decisions.⁶⁵ However, there were rare exceptions in which certain courts showed a willingness to consider, and sometimes even rely on, unpublished opinions.⁶⁶

Rule XII-A was completely redrafted in 2004. The previous framework of full opinion, memorandum opinion, and *per curiam* was discarded in favor of formal opinions, memorandum opinions, and summary dispositions.⁶⁷ The new rule also created a rebuttable presumption that formal opinions would be published while memorandum opinions and summary dispositions would not.⁶⁸ For the first time, the parties had a say in the publication process, as they, along with the trial court judge, could now request publication. Unpublished opinions, however, remained non-citable.⁶⁹ The 2004 amendments would prove short-lived. In 2006, Senator Robert Marionneaux proposed Senate Bill 49, which would have added a new Code of Civil Procedure article stating: “All opinions of the supreme court and courts of appeal shall be published.”⁷⁰ However, the bill was completely rewritten as it worked its way through the Legislature, and the final version was enrolled as Code of Civil Procedure article 2168.⁷¹

64. LA. CT. APP. UNIF. R. 2-16.4.

65. See, e.g., *Springer v. K-Mart Corp.*, 2000-2653, p. 5 (La. App. 1 Cir. 12/28/01); 804 So. 2d 950, 952; *Hall v. Zen-Noh Grain Corp.*, 00-1455, p. 3 (La. App. 5 Cir. 12/27/00); 778 So. 2d 91, 93, *rev'd*, 787 So. 2d 280 (La. 2001); *State v. Drummer*, 99-0858 (La. App. 4 Cir. 12/22/99), 750 So. 2d 360, 365 n.1; *Roberts v. Sewerage & Water Bd. of New Orleans*, 92-2048, p. 15 (La. 3/21/94); 634 So. 2d 341, 349.

66. See, e.g., *State v. Shields*, 98-2283 (La. App. 4 Cir. 9/15/99); 743 So. 2d 282, 284 (discussing *State v. Augillard*, 96-2113 (La. App. 4 Cir. 7/2/97); 698 So. 2d 73 (unpublished)); see also, *Cajun Contractors, Inc. v. Lafayette Consol. Gov't*, 98-180, p. 6 (La. App. 3 Cir. 6/17/98); 715 So. 2d 588, 590-91 (discussing *H & S Constr. Co., Inc. v. Lafayette City-Parish Consol. Gov't*, 97-1137 (La. App. 3 Cir. 9/15/97) (unpublished) (finding that where two suits are “substantially intertwined” and involve the “same legal counsel . . . litigat[ing] identical issues,” it is appropriate to rely on the earlier unpublished decision as precedent)), *rev'd in part*, 723 So. 2d 968 (La. 1998).

67. LA. CT. APP. UNIF. R. 2-16 (2004) (amended 2007).

68. LA. CT. APP. UNIF. R. 2-16.3(A)-(B).

69. LA. CT. APP. UNIF. R. 2-16.3(C).

70. S.B. 49, Reg. Sess. (La. 2006).

71. The Legislature may have overstepped its constitutional bounds in passing LA. CODE CIV. PROC. ANN. art. 2168 (2006). The Louisiana Constitution provides

Art. 2168 Posting of unpublished opinions; citation

A. The unpublished opinions of the supreme court and the courts of appeal shall be posted by such courts on the Internet websites of such courts.

B. Opinions posted as required in this Article may be cited as authority and, if cited, shall be cited by use of the case name and number assigned by the posting court.

Notably, Article 2168 does not refer to the distinction between formal opinions, memorandum opinions, and summary dispositions as found in the Rules of Court. Instead it requires courts to publish all decisions, no matter how short, on their website. It further states that those opinions “may be cited as authority,” although it is arguably unclear whether that refers to citations by the court itself or by litigants before it.

This Article is broadly in accord with its federal contemporary, Federal Rule of Appellate Procedure 32.1. Both represent a sharp departure from the previously strict prohibition against citing unpublished opinions. Both Article 2168 and Rule 32.1 require courts to make unpublished opinions publicly available on their websites, thus emphasizing that the importance of making these opinions easily accessible.

that the Louisiana Supreme Court has “general supervisory jurisdiction over all other courts.” LA. CONST. art. V, § 5(A). Prior to the enactment of article 2168 of the Louisiana Code of Civil Procedure, all Louisiana laws regulating the publication of cases were developed either jurisprudentially or via the rules of court, which are enacted by the Louisiana Supreme Court. *See* Succession of Wallace, 574 So. 2d 348, 360 (La. 1991). Article 2168 effectively overruled portions of the Rules of Court by requiring judges to allow citation to unpublished opinions. This arguably impinges on the Supreme Court’s authority over the state judiciary. *See id.* at 360-61 (“Since final authority over regulating the practice of law is vested in the Louisiana Supreme Court and not in the Louisiana Legislature, legislative acts that affect the practice of law can be upheld only if they do not conflict with this court’s inherent authority.”); *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102, 111-12 (La. 1978). At the same time, Article 5, section 5 of the Louisiana Constitution states that the Supreme Court’s rule-promulgating power extends to “procedural and administrative rules *not in conflict with law.*” LA. CONST. art. V, § 5(A) (emphasis added). Statutes constitute the solemn expression of legislative will and are, therefore “law,” while rules of court are not. LA. CIV. CODE. ANN. arts. 1, 3 (1988). Under this reading of Article 5, section 5, any contradiction between the rules of court and the law as set forth by the Legislature should be resolved in favor of the Legislature. *See* LA. DIST. CT. R. 1.0 cmt. a (2010) (“[A] conflict between a Rule and legislation should be resolved by following the legislation.”). This possible constitutional conflict was rendered moot in November 2007, when rule 2-16.3 of the Louisiana uniform rules for courts of appeal was amended to accord with article 2168 of the Louisiana Code of Civil Procedure.

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However, Article 2168 and the federal rule differ in potentially significant ways. Rule 32.1 is prospective only: it applies solely to unpublished opinions issued on or after January 1, 2007.⁷² By contrast, Article 2168 makes no such distinction on its face; it appears to permit citation to unpublished opinions from before the effective date of the Act. However, a closer review suggests that Article 2168 does include a *sub silentio* prospectivity provision. Article 2168(B) does not simply say that any unpublished opinion may be cited. Instead, an unpublished opinion may be cited only if it has been “posted as required [by the] Article”—namely, if it is, posted on the Internet website of the issuing court.⁷³ Under a strict reading of this rule, older unpublished opinions which are not posted on the website of the issuing court are not citable.⁷⁴

At the same time, there is no longer any Rule of Court explicitly *forbidding* citation to unpublished and unposted opinions. Before November 1, 2007, former Louisiana Uniform Rule of Court 2-16.3 would have prohibited courts and attorneys from citing or referring to unpublished opinions.⁷⁵ That provision was repealed effective November 1, 2007, and the Rules of Court are now wholly silent on this issue.⁷⁶ Therefore, whether unpublished, unposted opinions prior to the enactment may be cited is an open question not addressed by any Louisiana rule of court or statute.

A more substantive *lacuna* in Louisiana Code of Civil Procedure article 2168 is its failure to address the precedential value of unpublished opinions. It is clear that unpublished

72. FED. CIR. R. 32.1(a)(ii). As a result, each court of appeal retains the right to prohibit citation to unpublished opinions from 2006 or earlier. *See, e.g.*, 9TH CIR. R. 36-3(c); 7TH CIR. R. 32.1(d).

73. LA. CODE CIV. PROC. ANN. art. 2168. 44 U.S.C. § 3501, passed in 2002, requires all federal court of appeal opinions to be posted on the issuing court’s website. *See* Pub. L. No. 107-347 § 205(a)(5), 116 Stat. 2899, 2913 (2002). This only affected the Third, Fifth, and Eleventh Circuits, as all other federal circuits were already doing so. Schiltz, *supra* note 2, at 1441.

74. For example, in *State v. Watts*, 2005-2328 (La. App. 1 Cir. 11/3/06); 2006 WL 3187318, at *2 (unpublished), a panel of the First Circuit held that defendant’s citation to *State v. Ginn*, 00-2169 (La. App. 1 Cir. 5/11/01); 798 So. 2d 334 was inappropriate because *Ginn* was decided before the enactment of article 2168 and was not posted on the court’s website.

75. *See, e.g.*, *Supreme Servs. & Specialty Co., Inc. v. Sonny Greer, Inc.*, 2004-1400, p. 3-4 (La. App. 3 Cir. 5/3/06); 930 So. 2d 1077, 1080, *rev’d*, 958 So. 2d 634 (La. 2007).

76. LA. CT. APP. UNIF. R. 2-16.3 (2007).

opinions “may be cited as authority,” but it is uncertain whether those opinions are coequal authority with published opinions. Surprisingly, there are very few cases analyzing the precedential value of judicial opinions in light of article 2168. This article has been cited in several Louisiana appellate court decisions (some of which are, themselves, unpublished).⁷⁷ However, it is most often mentioned in passing, often in a footnote, to explain the court’s citation to an unpublished opinion.⁷⁸ The only case to explicitly make a distinction between citeability and precedential value is *Brownell Land Co., LLC v. Oxy USA Inc.*, a federal district court case.⁷⁹ In a footnote, Judge Barbier noted that, while Article 2168 provides that unpublished cases are citeable, they—like all judicial opinions—are not controlling under Louisiana law:

Plaintiff comments that even though *Duplantier*⁽⁸⁰⁾ has not been selected for publication, it still has the force of precedent. Plaintiff cites LA. CODE CIV. PROC. ANN. art. 2168 in support of this proposition. Plaintiff is certainly correct that article 2168 permits the citation of unpublished cases, and even indicates that such citations should receive the same weight of authority as unpublished cases. However, the article cannot stand for the proposition that the case is “precedent,” in the sense that the case is not necessarily controlling on this court or any other court for that matter.⁸¹

77. See, e.g., *State ex rel S.L.*, 11-883, p. 2 n.2 (La. App. 5 Cir. 4/24/12); 94 So. 3d 822, 827 n.2; *Diaz v. Nicosia, Licciardi & Nunez, LLC*, 2011-1641, p. 4 & n.3 (La. App. 4 Cir. 4/18/12); 94 So. 3d 793, 795 & n.3; *Greenup v. La. Parole Bd.*, 2011-0671, p. 2 n.1 (La. App. 1 Cir. 3/23/12); 2011 WL 992117, at *2 n.1.

78. See cases cited *supra* note 77.

79. 538 F. Supp. 2d 954, 957-58 & n.3 (E.D. La. 2007).

80. *Duplantier Family P’ship v. BP Amoco*, 2007-0293 (La. App. 4 Cir. 5/16/07); 955 So.2d 763 (unpublished).

81. *Brownell Land Co.*, 538 F. Supp. 2d at 958 n.3 (citing to LA. CIV. CODE ANN. art. 1 and the discussion on *jurisprudence constante* within the opinion). Although the court did not address this issue, article 2168 probably does not apply in federal court. Under *Erie v. Tompkins* and its progeny, state substantive laws are binding on federal courts, but state procedural laws are not. See Jed I. Bergman, *Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 973 (1996). If article 2168 only addresses the citeability of cases in briefs before Louisiana courts, it is a procedural law and thus inapplicable to federal courts (who, after all, have their own rules regarding citation of unpublished opinions). See Cleveland, *supra* note 3, at 27-42. However, if article 2168 requires courts to treat the holdings of unpublished opinions as authoritative statements of Louisiana law, it may be substantive and thus binding on federal courts, as the Fifth Circuit has long recognized that it must take into account Louisiana’s legal system (including *jurisprudence constante*) when deciding issues of Louisiana law. *Songbryd, Inc. v.*

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While Judge Barbier suggests that unpublished cases are entitled to “the same weight of authority” as published cases, this is a footnote in a single district court decision—hardly a final and authoritative statement of Louisiana law. Yet it represents the most comprehensive judicial discussion of this question to date. No appellate court has addressed this issue, and the relevant Civil Law Treatise mentions Article 2168 only in passing.⁸²

Louisiana practitioners are thus left in an uncertain position. Given the state’s longstanding practice barring essentially any citation or reference to an unpublished opinion, many practitioners believe that unpublished opinions are a “lesser” form of legal authority and will likely remain leery of relying on them. However, the Legislature has made clear that unpublished opinions *are* citeable as authority, and it seems unlikely that the Legislature would provide for the citation of opinions with no authoritative value whatsoever.⁸³ In short, what Louisiana lawyers have long believed about unpublished opinions—that they are unciteable, unreliable, and not valid authority—has been flipped on its head. Resolving this inherent tension between past practice and current reality requires rethinking what is perhaps the first principle of any legal system—defining what is and what is not “the law.”

II. THE STATUS OF JUDICIAL OPINIONS AS AUTHORITY IN LOUISIANA

Even with respect to traditional published opinions, Louisiana courts have long struggled to delineate the precise authoritative value of jurisprudence under the civil law system.⁸⁴ The long-held and oft-repeated maxim is that jurisprudence is not law—the Civil Code begins with the (recursive) assertion that

Bearsville Records, Inc., 104 F.3d 773, 776 (5th Cir. 1997) (citing Hon. Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 LA. L. REV. 1369, 1372 (1988)).

82. See 1 LA. CIV. L. TREATISE, CIVIL PROCEDURE, §§ 14:13 n.20, 14:15 (2d ed. 2012).

83. “Courts should give effect to all parts of a statute and should not give a statute an interpretation that makes any part superfluous or meaningless, if that result can be avoided.” Succession of Boyter, 99-0761, p. 9 (La. 1/7/00); 756 So. 2d 1122, 1129.

84. This discussion is limited to private law; that is, the “adjudication of disputes between private, non-governmental parties,” not public law, which concerns the relationship between individuals and the state. *City of Baton Rouge v. Bernard*, 2001-2468, p. 4 (La. App. 1 Cir. 1/22/03), 840 So. 2d 4, 6.

“[t]he sources of law are legislation and custom” and that, of these two, legislation is supreme.⁸⁵ Because judicial decisions are not a “source of law,” as defined by the Civil Code, they are not binding on future courts.⁸⁶ Further, Louisiana does not recognize the doctrine of *stare decisis*.⁸⁷ Jurisprudence is, at best, evidence of the law, provided there is a “constant stream of uniform and homogenous rulings having the same reasoning,” a concept known as *jurisprudence constante*.⁸⁸ Yet *jurisprudence constante* is not a primary source of law like legislation and custom.⁸⁹ It remains a mere secondary source, albeit one that is entitled to “considerable persuasive authority.”⁹⁰

This answer is oversimplified at best; in reality, Louisiana courts often do treat prior judicial opinions as binding. This subject has generated volumes of academic literature debating the status of jurisprudence in a “pure” civil law system and has led to disputes regarding Louisiana’s authenticity as a civil law jurisdiction at all.⁹¹ This Article assumes a more functional

85. LA. CIV. CODE ANN. arts. 1 & cmt. a, 3 (1988) (noting within the comments that the 1988 amendment of these articles “does not change the law and “Article 1 and 3 of the Louisiana Civil Code of 1870 make it clear that the sources of law in Louisiana are legislation and custom”). The article is recursive because it claims authority through its own authoritativeness: Legislation is the ultimate source of law because the Civil Code says so, and the Civil Code is the ultimate authority on that question because it, as legislation, is the ultimate source of law.

86. See *Doerr v. Mobil Oil Corp.*, 00-0947, p. 13 (La. 12/19/00), 774 So. 2d 119, 128 (citing A.N. YIANNPOULOS, LOUISIANA CIVIL LAW SYSTEM § 35, at 53 (1977)), *reh’g granted*, 782 So. 2d 573 (La. 2001).

87. See *id.*

88. *Id.* (citing James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993)).

89. *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 Louisiana.”). Other sources describe *jurisprudence constante* as a kind of “custom,” thus elevating it to a primary source of law under Civil Code article 1. See *Doerr*, 774 So. 2d at 129; 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, 77 (Joseph Dainow ed., 1974); John A. Lovett, *Another Great Debate?: The Ambiguous Relationship Between the Revised Civil Code and Pre-Revision Jurisprudence As Seen Through the Prytania Park Controversy*, 48 LOY. L. REV. 615, 635-3 (2002).

90. 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 LA. CIV. CODE ANN. art. 1 cmt. b.

91. This controversy began in 1937 when Professor Gordon Ireland asserted that Louisiana had become a common law state. Gordon Ireland, *Louisiana’s Legal*

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definition of precedent: judicial opinions are legal authority to the extent that “lawyers and judges reason from them, cite to them, and rely on them.”⁹² In everyday practice, Louisiana judges give great weight to jurisprudence from Louisiana courts when determining a question of Louisiana law. This is the very definition of “legal authority.”

Why, though, do judges treat jurisprudence as legal authority when the Civil Code defines legislation and custom as the only sources of law? The people in the best position to answer that question are the judges themselves. I have therefore relied, as much as possible, on sources written by Louisiana jurists, including Justice Barham,⁹³ Justice Dennis,⁹⁴ and, especially, Justice Tate.⁹⁵ Each of these jurists’ extrajudicial writings provides valuable insight into how the theory of jurisprudence within Louisiana is applied by actual judges facing actual cases.

The civilian tradition, as developed in Louisiana, recognizes three separate sources from which jurisprudence derives its authoritative value. The first is hierarchical—a court will follow an opinion if it is issued by a “higher” court with jurisdiction to review the deciding court’s judgment. The second is prudential—in the interests of stability, a judge is likely to follow an opinion that reflects a broad judicial consensus on a certain point of law. The third is doctrinal—a court will follow an opinion if it contains a well-reasoned and scholarly exegesis of the relevant legal principles.

These three factors are independent of each other, but do not

System Reappraised, 11 TUL. L. REV. 585 (1937). This conclusion raised the hackles of Louisiana civilians, and drew immediate criticism. See Leonard Greenburg, *Must Louisiana Resign to the Common Law?* 11 TUL. L. REV. 598 (1937); R. L. Tullis, *Louisiana’s Legal System Reappraised*, 12 TUL. L. REV. 113 (1937). The debate has continued into the 21st century. See Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 LA. L. REV. 1, 3 (2002); Marc L. Roark, “Opening the Barbarians’ Gate” or Watching the Barbarians from the Coliseum: A Requiem on the Nomos of the Louisiana Civil Law, 67 LA. L. REV. 451 (2007); J.-R. Trahan, *The Continuing Influence of Le Droit Civil and El Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. 1019 (2003).

92. Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2d 259, 263 (2002).

93. Mack E. Barham, *Methodology of the Civil Law in Louisiana*, 50 TUL. L. REV. 474, 485 (1976).

94. Dennis, *supra* note 90, at 15.

95. Albert Tate, *Techniques of Judicial Interpretation of Louisiana Law*, 22 LA. L. REV. 727 (1961) [hereinafter Tate, *Techniques*].

operate in isolation. The precedential or persuasive force of an opinion is based on a combination of all three factors; that is, a well-reasoned case, issued by a higher court and representing a uniform line of jurisprudence, will be treated as fully binding precedent. Contrarily, a case has almost no precedential value if it is poorly reasoned, issued by an inferior court or a court of another jurisdiction, and is an outlier in the jurisprudence. Each of these three sources of jurisprudential authority will be discussed in turn.

A. JURISPRUDENCE AS HIERARCHY

The first factor in determining the authoritative value of an opinion is the hierarchical position of the court that authored it.⁹⁶ In short, an opinion will be treated as binding if it was issued by a court with power of direct appellate review over the current dispute. A trial court judge in Orleans Parish will consider himself bound by decisions from the Fourth Circuit and the Louisiana Supreme Court, but not decisions from the Third Circuit.

This deference to decisions from a higher court is an inherent aspect of a hierarchically-structured judicial system.⁹⁷ A trial court judgment that ignores or conflicts with binding precedent from a reviewing court will be reversed, perhaps summarily, leading to additional work for the judge and wasted judicial resources, especially if the reversal requires a second trial.⁹⁸ The fear of reversal thus acts as a constraint on lower court judges, who are well aware that they do not have the final say on questions of law.⁹⁹

This is self-evident to any practicing attorney or judge. However, it reflects an inherent tension between the hierarchical structure of the court system, which demands strict fidelity to

96. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 42 (2005) (“Every judge and lawyer in America has internalized the hierarchical nature of our justice system . . .”).

97. See LA. CONST. art. V, §§ 1, 5. What I refer to as the hierarchical aspect of jurisprudence is similar to what common law courts call “vertical *stare decisis*.” See *State v. Menzies*, 889 P.2d 393, 399 n.3 (Utah 1994).

98. Stephen J. Choi, G. Mitu Gulati, & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals* 1 (Univ. of Chi. John M. Olin Law & Econ. Working Paper Series, Paper No. 508; N.Y.U. Law & Econ. Research Paper Series, Paper No. 10-06, 2010).

99. *Id.* at 9, 24.

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higher court judgments, and the theory of *jurisprudence constante*, which does not. This conflict was addressed in a law review article written by (later) Justice Albert Tate during his time on the Louisiana Third Circuit Court of Appeal.¹⁰⁰ Justice Tate stated that, contrary to civilian theory, Louisiana trial courts and courts of appeal are bound by decisions of the Louisiana Supreme Court for two reasons.¹⁰¹ The first is that, as discussed above, a lower court's refusal to follow a Supreme Court decision will lead to "unnecessary expense and delay to the litigants" as the decision "will certainly be reversed."¹⁰² Justice Tate also argued that respect for a higher court's decision demonstrates a "loyalty to the concept of a rule of order within the legal system" which is vital to a functioning judiciary.¹⁰³

The hierarchical approach to jurisprudence is exemplified by a Louisiana Supreme Court case titled *Louisiana Electorate of Gays and Lesbians, Inc. v. State*.¹⁰⁴ LEGAL, as the plaintiff entity was known, filed a declaratory judgment action challenging the constitutionality of LA. REV. STAT. § 14:89(A)(1), which criminalized certain types of sexual activity.¹⁰⁵ The trial court struck down the statute as a violation of the right to privacy guaranteed in the Louisiana Constitution.¹⁰⁶ An appeal was taken to the Louisiana Supreme Court.¹⁰⁷ While the *LEGAL* appeal was pending, that Court issued *State v. Smith*,¹⁰⁸ which expressly affirmed the constitutionality of LA. REV. STAT. §

100. Tate, *Techniques*, *supra* note 95. Although Justice Tate completed his judicial career as a Judge of the Federal Fifth Circuit, I refer to him as Justice Tate because this article is focused on Louisiana civilian legal theory, and his greatest contributions in that area were made during his time on the Louisiana Supreme Court.

101. *Id.* at 750.

102. *Id.*

103. *Id.*

104. 2001-2106, p. 5 (La. 3/28/02); 812 So. 2d 626, 629 (per curiam). This opinion is discussed in Jason Edwin Dunahoe, Note, "*Jurisprudence Desorientee*:" *The Louisiana Supreme Court's Theory of Jurisprudential Valuation*, Doerr v. Mobil Oil and Louisiana Electorate of Gays and Lesbians v. State, 64 LA. L. REV. 679 (2004).

105. La. Electorate of Gays & Lesbians, Inc., v. State, 2001-2106, p. 3-4 (La. 3/28/02); 812 So. 2d 626, 627 (per curiam). Specifically, the statute criminalized "unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal." LA. REV. STAT. ANN. § 14:89(A)(1); *LEGAL*, 812 So. 2d at 627 n.1.

106. *LEGAL*, 812 So. 2d at 627.

107. Although that Court is generally one of discretionary jurisdiction, a right to appeal is automatic where a statute has been declared unconstitutional.

108. 99-0606 (La. 7/6/00); 766 So. 2d 501, 505.

14:89(A)(1). The Supreme Court remanded the *LEGAL* decision back to the district court for reconsideration in light of *Smith*.¹⁰⁹

On remand, the district court reaffirmed its finding of unconstitutionality and sought to enjoin all Louisiana prosecutors from enforcing the statute.¹¹⁰ The Supreme Court reversed in a *per curiam* opinion which must have surprised no one except, perhaps, the trial court judge herself:

Despite the clarity of our holding to this effect, the district court chose to depart from *Smith* and reached a contrary result on the law. This action involves, at least, a failure by the lower court to recognize its obligation to follow the law of this State as pronounced by this court. Accordingly, insofar as the judgments of the district court dated March 17, 1999 and March 23, 2001 invalidate any or all of the targeted statutes based upon La. Const. art. I, § V, those are hereby vacated in their entirety.¹¹¹

As a matter of civilian legal theory, a lower court judge is not bound by a single judicial decision, even if that decision is issued by the highest court in the land.¹¹² Indeed, just two years earlier, in *Doerr v. Mobil Oil*, the Louisiana Supreme Court stated that, in Louisiana's legal system, "a single decision is not binding on our courts."¹¹³ However, as the *LEGAL* case demonstrates, there is a disconnect between theory and practice. The Louisiana Supreme Court's pronouncement in *LEGAL* that lower courts have an "obligation to follow the law of this State as pronounced by this court" seems to contradict its holding in *Doerr*.¹¹⁴

Professor Mary Garvey Algero explains this discrepancy by

109. La. Electorate of Gays & Lesbians, Inc., v. State, 2001-2106, p. 3-4 (La. 3/28/02); 812 So. 2d 626, 628 (per curiam).

110. *Id.* at 628-29.

111. *Id.* at 629.

112. As one judge of the French Cour de Cassation stated: "The law of precedent, i.e., conferring a required value on prior legal decisions rendered in similar cases, does not exist in French law." Alain Lacabarats, *The State of Case Law In France*, 51 LOY. L. REV. 79, 80 (2005).

113. *Doerr v. Mobil Oil Corp.*, 00-0947, p. 14 (La. 12/19/00), 774 So. 2d 119, 128 (citing James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993)), *reh'g granted*, 782 So. 2d 573 (La. 2001)). Perhaps since *Doerr* held that a judicial decision is not binding on future courts, one cannot blame future courts for not considering themselves bound by *Doerr*.

114. *See Dunahoe, supra* note 104, at 682-83 (quoting *LEGAL*, 812 So. 2d at 629).

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claiming that Louisiana courts do not actually apply *jurisprudence constante*; rather, they have developed a hybrid precedential system that she calls “systemic respect for jurisprudence.”¹¹⁵ The primary difference between this system and pure *jurisprudence constante* is the recognition that the perceived legal authority of a judicial decision “increases with the level of the court rendering the decision in the hierarchy of the court system,” because “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.”¹¹⁶ Professor Algero thus argues that lower courts are *de facto*, if not *de jure*, bound by these decisions.¹¹⁷

Under this analysis, *Doerr* and *LEGAL*, read together, stand for the proposition that a single decision of the Louisiana Supreme Court is binding on lower courts, but not on the Supreme Court itself. That Court is only bound by its prior decisions if those decisions create an unbroken line of precedent following the same reasoning, in which case *jurisprudence constante* applies.¹¹⁸

Thus, the Louisiana Supreme Court may accurately say that it is the “ultimate arbiter of the meaning of the laws of this state”¹¹⁹ and that lower courts have an “obligation to follow the

115. Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 800 (2005).

116. *Id.*

117. *Id.* at 788, 813-14. Although federal courts of appeal consider themselves bound by even U.S. Supreme Court *dicta*, Louisiana appellate courts do not appear to follow the same rule. Compare *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (“[T]his court considers itself bound by Supreme Court *dicta* almost as firmly as by the Court’s outright holdings . . .”), and *McCoy v. Mass. Inst. of Tech.* 950 F.2d 13, 19 (1st Cir. 1991) (finding that “federal appellate courts are bound by the Supreme Court’s considered *dicta*”) (collecting cases), with *La. Patient’s Comp. Fund Oversight Bd. v. Edwards*, 39,149 (La. App. 2 Cir. 12/15/04), 891 So. 2d 85, 90 (declining to follow the Louisiana Supreme Court’s *dicta* in rendering its decision), and *Guillory v. Emp’rs Mut. Liab. Ins. Co.*, 121 So. 2d 273, 274 (La. App. 1 Cir. 1960) (distinguishing a previously decided case and stating, “[T]his court is not bound by what is actually abiter [sic] *dicta* of the [Louisiana] Supreme Court in that decision.”), *overruled by Landreneau v. Liberty Mut. Ins. Co.*, 309 So. 2d 283 (La. 1975).

118. *Doerr v. Mobil Oil Corp.*, 00-0947, p. 14 (La. 12/19/00), 774 So. 2d 119, 128 (citations omitted), *reh’g granted*, 782 So. 2d 573 (La. 2001).

119. *Cleco Evangeline, LLC v. La. Tax Comm’n*, 2001-2162, p. 3 (La. 4/3/02); 813 So. 2d 351, 353 (citations omitted).

law of this State as pronounced by” the Supreme Court,¹²⁰ while courts of appeal can refer to Louisiana Supreme Court cases as “binding” or “controlling.”¹²¹ This is true even where the appellate court explicitly declares its disagreement with the Supreme Court’s reasoning¹²² or even, according to one court, if the Supreme Court’s ruling directly conflicts with the clear language of a statute.¹²³

District courts likewise view opinions issued by a court with ultimate power of review (*i.e.*, the Louisiana Supreme Court and the local appellate circuit) as binding. Indeed, a trial court has an even greater incentive to closely follow the decisions of the court of appeal, because parties are guaranteed at least one appeal from a district court judgment. A trial court judge knows that any judgment that conflicts with a decision from the reviewing court of appeal will almost certainly be appealed, and almost certainly reversed, thus unnecessarily prolonging the litigation and increasing the costs to the parties.¹²⁴ Courts of appeal may have slightly more leeway, as the odds are low that the Supreme Court will review any given appellate decision.¹²⁵

Justice Tate argued that lower court judges have a *moral imperative* to follow decisions from a higher court, even if they believe the higher court was wrong.¹²⁶ He defined this moral

120. La. Electorate of Gays & Lesbians, Inc., v. State, 2001-2106, p. 5 (La. 3/28/02); 812 So. 2d 626, 629 (per curiam).

121. Kennedy v. Camellia Garden Manor, 02-1027, p. 6 (La. App. 3 Cir. 2/5/03); 838 So. 2d 99, 103; State v. Odom, 2002-2404, p. 15 (La. App. 1 Cir. 6/27/03); 861 So. 2d 202, 212, *rev'd in part*, 861 So. 2d 117 (La. 2003); Miller v. S. Baptist Hosp., 2000-1352, p. 21 (La. App. 4 Cir. 11/21/01); 806 So. 2d 10, 24; Heinick v. Jefferson Parish Sch. Bd., 97-579, p. 5 (La. App. 5 Cir. 10/28/97); 701 So. 2d 1047, 1050.

122. See, e.g., Flores v. Doe, 08-1259, p. 7-8 (La. App. 5 Cir. 6/23/09); 19 So. 3d 1196, 1199-00 (“[A]lthough we are bound to follow . . . we disagree with that result.”); State v. Odle, 02-0226, p. 36 (La. App. 3 Cir. 11/13/02); 834 So. 2d 483, 506.

123. State v. Rodriguez, 2001-2182, p. 18 (La. App. 1 Cir. 6/21/02), 822 So. 2d 121, 135 (acknowledging the Supreme Court ruling that “LSA-C.Cr.P. art. 770’s mandatory language is not actually mandatory” but nonetheless being “bound to follow” that ruling even though the Court of Appeal disagreed).

124. See Tate, *Techniques*, *supra* note 95, at 750 (noting that courts try to avoid reversal in part “because they do not wish to cause unnecessary expense and delay to the litigants by rendering a judgment which will certainly be reversed”).

125. See JUD. COUNCIL OF THE SUP. CT., SUPREME COURT OF LOUISIANA: ANNUAL REPORT 2011, at 9 (2011). For instance, in 2011 the Louisiana Supreme Court granted just 8.9% of writ applications, although these numbers are somewhat artificially deflated by the inclusion of prisoner *pro se* writs (which are extremely unlikely to be granted). *Id.*

126. Tate, *Techniques*, *supra* note 95, at 751.

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duty as arising in part from personal humility: “[W]e must recognize that, no matter how obvious the error of the precedent seems to us, we may well be wrong, since judges of the higher court at least equally conscientious as ourselves have reached a different conclusion.”¹²⁷ This, too, is a kind of respect for hierarchy, as it shows Judge Tate’s apparent faith in judicial meritocracy—the belief that the judges of a higher court have earned their seats for a reason and, because of their presumed wisdom and experience, deserve a great deal of deference.¹²⁸

However, if moral imperative alone were truly a powerful motivating factor, we would expect trial court judges to give the same deference to all decisions by the courts of appeal, even those without authority to review and reverse the instant case. Yet this is not the case. For instance, in *Pollock v. Talco Midstream Assets, Ltd.*,¹²⁹ a case arising out of the Second Circuit, the trial court noted apparently conflicting authority from the Fourth Circuit, on one hand, and the Louisiana Supreme Court and the Second Circuit, on the other.¹³⁰ The judge noted that, in his opinion, the Fourth Circuit decision was correct, but this was “of no moment” because he was “bound” by the decisions of the Supreme Court and the Second Circuit.¹³¹

A similar sentiment was expressed in somewhat more colorful language in *Roby v. Owens-Illinois, Inc.*¹³² Plaintiff Benjamin Roby originally filed suit against Aetna Life & Casualty Insurance Company but, more than a year into the

127. Tate, *Techniques*, *supra* note 95, at 751. Compare this to Judge Tate’s statement in his earlier article, *The Role Of The Judge In Mixed Jurisdictions: The Louisiana Experience*, 20 LOY. L REV. 231, 239 (1973) [hereinafter Tate, *The Role of the Judge*], which suggests that lower courts are justified in ignoring incorrect precedent.

128. See Lovett, *supra* note 89, at 633-34. This is distinct from the “doctrinal” source of jurisprudential authority, discussed below, which suggests that courts will follow decisions they believe are correct and well-reasoned. See *infra* Section II(C). Judge Tate’s comments suggest that he believes that lower court judges should follow the opinions of higher courts *even if it seems to be wrong*. See Tate, *Techniques*, *supra* note 95, at 751. He seems to suggest that, as a lower court judge, if the considered opinion of the judges of a higher court strikes you as obviously mistaken, perhaps it is *you* who is missing something.

129. 44,629 (La. App. 2 Cir. 9/23/09); 22 So. 3d 1033.

130. *Id.* at 1035.

131. *Id.* Somewhat ironically, the Second Circuit reversed, bringing its jurisprudence in line with the Fourth Circuit. *Id.* at 1036 n.2.

132. 357 So. 2d 99, 100 n.1 (La. App. 4 Cir. 1978) (referring to the trial judge’s statements regarding being “bound” by an “outrageous decision”).

litigation, he realized the proper party was Aetna Casualty & Surety Company.¹³³ Roby filed a motion to amend pleadings, which was denied on the grounds that any action against Aetna Casualty & Surety Company had prescribed.¹³⁴ This harsh result was required by the Louisiana Supreme Court's decision in *Majesty v. Comet-Mercury-Ford of Loraine, Michigan*,¹³⁵ which held that a petition filed against an incorrectly named defendant does not suspend prescription against the proper defendant, no matter how minor the naming error.¹³⁶ The trial court's ruling merits quotation:

I am going to maintain the exception, please take an appeal. Let me repeat again, *Majesty versus Comet Mercury Ford of Loraine, Michigan* represents in my judgment the greatest misjustice I have ever read in the Southern Reporter. I cannot distinguish it. Please take an appeal, maybe someone else can distinguish it and in that distinction may come justice, but right now I am bound by that outrageous decision, please transcribe those notes for inclusion in the record on appeal.¹³⁷

This short statement is an excellent example of the importance Louisiana judges place on court hierarchies. The judge in *Roby* felt compelled to follow the decision of a superior court even if it was "outrageous" and would lead to "great[] misjustice."¹³⁸ The importance of hierarchy is further highlighted by the Court of Appeal's affirmation in a perfunctory decision that "*Majesty* . . . does, indeed, apply under the fact situation existent here."¹³⁹ Then-Judge Lemmon concurred, stating: "I agree that the decisions in [*Majesty*] and [*Bowerman*] are controlling, but I disagree with those decisions. Nevertheless, I yield to the authority of a higher court and therefore concur."¹⁴⁰

Thus, despite their strongly expressed disagreement, and in

133. *Roby v. Owens-Illinois, Inc.*, 357 So. 2d 99, 100 (La. App. 4 Cir. 1978).

134. *Id.*

135. 296 So. 2d 271 (La. 1974), *overruled by* *Ray v. Alexandria Mall*, 434 So. 2d 1083 (La. 1983).

136. *Id.* at 274 (citing *Bowerman v. Pac. Mut. Ins. Co.*, 212 La. 999, 1007 (1948)).

137. *Roby*, 357 So. 2d at 100 n.1.

138. *Id.* *But see* *Tate, The Role of the Judge*, *supra* note 127, at 239 ("[A] lower court may refuse to follow a higher court precedent which is contrary to the statute it interprets.").

139. *Roby*, 357 So. 2d at 100.

140. *Id.* (Lemmon, J., concurring).

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the face of what was clearly a manifest injustice, all judges felt compelled to follow the Supreme Court's decision.¹⁴¹

Similarly, in *Toups v. Chevron Pipeline Co.*,¹⁴² plaintiff Scott Toups was injured while working as a subcontractor at a Chevron facility. Toups sued Chevron, who claimed that it was Toups' statutory employer under the Worker's Compensation Act and thus immune from suit in tort.¹⁴³ The argument on Chevron's motion for summary judgment centered on the Fourth Circuit's decision in *Prejean v. Maintenance Enterprises, Inc.*,¹⁴⁴ which favored the plaintiff's position. There were several reasons the *Toups* court could have given to justify treating *Prejean* as non-binding. The lead opinion in *Prejean* was signed by only two judges of a five-judge panel.¹⁴⁵ It has been criticized by the Civil Law Treatise,¹⁴⁶ been disapproved of by later cases,¹⁴⁷ and arguably conflicts with several earlier decisions from both state and federal courts.¹⁴⁸ In short, *Prejean* presented nothing

141. *Majesty* was overruled by the Louisiana Supreme Court in *Ray v. Alexandria Mall*, 434 So. 2d 1083 (La. 1983). Justice Lemmon, who by then had acceded to the high court, joined the majority opinion.

142. *Toups v. Chevron Pipeline, Co.*, No. 56-715, 25th JDC, Parish of Plaquemines.

143. *See id.* The statutory employer doctrine states that, for the purposes of worker's compensation law, a contractor may, in certain circumstances, be treated as if he were the employer of its subcontractor's employees. *See* LA. REV. STAT. § 23:1061 (1997).

144. *Toups v. Chevron Pipeline, Co.*, No. 56-715, 25th JDC, Parish of Plaquemines; *Prejean v. Maint. Enter., Inc.*, 2008-0364 (La. App. 4 Cir. 3/25/09); 8 So. 3d 766.

145. *Prejean*, 8 So. 3d 766. Judge Bonin authored the primary opinion, which Judge Murray joined. *Id.* at 767. Judge McKay concurred, finding a disputed issue of fact which would make summary judgment inappropriate. *Id.* at 777. Judge Lombard, joined by Judge Tobias, dissented with reasons. *Id.* at 777-80. Arguably, Judge McKay's concurrence should be treated as the controlling opinion, as it is decided on the narrowest grounds. *See* *Marks v. United States*, 430 U.S. 188, 193 (1977).

146. 14 H. ALSTON JOHNSON III, LA. CIV. L. TREATISE, WORKERS' COMPENSATION LAW AND PRACTICE § 364, n.51 (5th ed. 2011) ("With all respect, [*Prejean*] seems inconsistent with the Act . . . *Prejean* adds a requirement to achieving tort immunity as a statutory employer which is not in the Act.").

147. *See* *McClain v. Motiva Enters., L.L.C.*, No. 09-5806, 2010 WL 3614310, at *3 (E.D. La. Sept. 8, 2010); *Dean v. Baker Hughes, Inc.*, No. 10-385, 2010 WL 5463422, at *5-6 (W.D. La. Dec. 29, 2010); *Cantu v. Shaw Grp., Inc.*, 2009-1774 (La. App. 1 Cir. 5/3/10); 2010 WL 1752511, at *2 & n.3 (unpublished).

148. *See* *Johnson v. Tenn. Gas Pipeline Co.*, 99 F. Supp. 2d 755, 758 & n.3 (E.D. La. 2000); *Everett v. Rubicon, Inc.*, 2004-1988 (La. App. 1 Cir. 6/14/06), 938 So. 2d 1032, 1041-42 & n.7; *Smith v. Marathon Ashland Petroleum LLC*, 04-517 (La. App. 5 Cir. 10/26/04), 887 So. 2d 613, 617. The *Prejean* plurality opinion attempts to distinguish each of these cases. *See* 8 So. 3d at 775-76.

approaching the “constant stream of uniform and homogenous rulings having the same reasoning” necessary to constitute *jurisprudence constante*.¹⁴⁹ Indeed, the district court judge harbored his own misgivings about following *Prejean*: “[T]he Court has a lot of concern with the criticism, the treatises of Prejean and also the Federal Circuit’s [sic] treatment of Prejean as well.”¹⁵⁰

Nonetheless, the court felt obliged to follow the Fourth Circuit: “It’s not to say I’m in a hundred percent agreement with [*Prejean*], but I think as a District Court I am bound to follow the law.”¹⁵¹ Tellingly, the phrase “the law” here refers not to the Worker’s Compensation Act itself, but to the Fourth Circuit’s interpretation of that Act. Both parties’ counsel also unquestioningly accepted that a decision by the Fourth Circuit would be binding. At no point during the hearing did Chevron’s counsel reference *jurisprudence constante* or argue that the trial court was free to disagree with the court of appeal and issue a ruling based on its own interpretation of the statutory language.¹⁵² *Toups* therefore demonstrates the *ne plus ultra* of the hierarchical theory of jurisprudential authority—an opinion from a higher court shall be followed even if it appears to conflict with the statute, has been criticized by later authorities, is an outlier in the jurisprudence, and even if the judge honestly believes that the decision is simply wrong.¹⁵³

B. JURISPRUDENCE AS SOURCE OF STABILITY

The hierarchical structure of the court system explains the tendency of lower courts to follow the rulings of superior courts with power of review. It does not, however, explain the tendency

149. See *Doerr v. Mobil Oil Corp.*, 00-0947, p. 13 (La. 12/19/00), 774 So. 2d 119, 128, *reh’g granted*, 782 So. 2d 573 (La. 2001); Dennis, *supra* note 90, at 15.

150. Transcript of Hearing at 15, *Toups v. Chevron Pipeline, Co.*, 25th JDC, Parish of Plaquemines (No. 56-713).

151. *Id.* at 15.

152. *Id.*

153. See *Arrington v. ER Physician Grp.*, 12-995, p. 6 (La. App. 3 Cir. 2/6/13); 110 So. 3d 193, 197 (holding that “courts of appeal are bound to follow the last expression of law of the Louisiana Supreme Court” (quoting *Oliver v. Magnolia Clinic*, 2011-2132, p. 7 (La. 3/13/12); 85 So. 3d 39, 44)); *Taylor v. Clement*, 12-996, p. 1 (La. App. 3 Cir. 2/6/13); 110 So. 3d 199, 200 (Thibodeaux, J., concurring) (mem.) (“I must sacrifice my intellectual independence and judicial beliefs to . . . the clear pronouncement of the Louisiana Supreme Court . . .” (citing *Oliver*, 85 So. 3d at 44)).

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of a court to follow its own previous rulings. If anyone has the power to overrule, modify, or distinguish a precedent, it would be the court that issued the precedent in the first place. Yet panels of the Louisiana courts of appeal regularly claim to be “bound” by their prior decisions.¹⁵⁴ Despite these statements, no one believes courts are literally or irrevocably bound by such precedent. Louisiana courts of appeal unquestionably have the authority to overrule or modify their own prior decisions.¹⁵⁵ However, they do not do so lightly.

The courts’ reluctance to overrule precedent is explained in part by the inherent value of stability in the law. A stable and predictable legal system benefits the courts themselves, whose burden is eased by not reinventing the wheel with every dispute. More importantly, it benefits private parties who are attempting to determine how best to comply with the law. As Justice Tate explained, an “underlying fundamental purpose of any legal system” is the establishment of “a certainty of legal rule, and a predictability of outcome in its application in the event of litigation, upon which men regulated by that system of laws can rely in their everyday dealings.”¹⁵⁶ The need for judicial predictability and order¹⁵⁷ was a recurring theme in Judge Tate’s extrajudicial writings: “[O]ur legal system requires not only that equity be reached wherever possible in individual cases; it also requires some consistency and predictability of result based upon past decisions.”¹⁵⁸

154. See, e.g., *Marchand v. Asbestors Defendants*, 2010-0476, p. 6-7 (La. App. 4 Cir. 11/10/10); 52 So. 3d 196, 200; *Aguillard v. Aguillard*, 2008-1131, p. 9 (La. App. 1 Cir. 12/23/08); 9 So. 3d 183, 188; *Boutte v. Kelly*, 2002-2451, p. 34 (La. App. 4 Cir. 9/17/03); 863 So. 2d 530, 553; *Prince v. K-Mart Corp.*, 01-1151, p. 5 (La. App. 5 Cir. 3/26/02); 815 So. 2d 245, 247.

155. See *Roundtree v. New Orleans Aviation Bd.*, 2004-0702, p. 10 n.17 (La. App. 4 Cir. 2/4/05); 896 So. 2d 1078, 1085 n.17 (“In accordance with this court’s established procedure [the] issue was submitted to the court *en banc* . . . judges voted to overrule the prior jurisprudence from this Circuit . . .”). The internal rules of the 1st and 4th Circuits forbid a panel from overruling a prior decision without an *en banc* vote. See *id.*; *Capone v. Ormet Corp.*, 2001-0060, p. 21 n.4 (La. App. 1 Cir. 6/21/02); 822 So. 2d 684, 702 n.4 (citing 1ST CIR. INTERNAL R. 2.1(d)(1)). To the best of my knowledge, neither circuit has addressed whether these rules also apply to unpublished opinions.

156. Tate, *Techniques*, *supra* note 95, at 748.

157. These writings echo Professor Lon Fuller’s concept of the “internal morality of law,” which imposes on judges a moral obligation of consistency and predictability—both of which are served by following precedent. LON L. FULLER, *THE MORALITY OF LAW* 41-42 (rev. ed. 1969).

158. Albert Tate, *Forum Juridicum: The Judge as a Person*, 19 LA. L. REV. 438, 445 (1959) [hereinafter Tate, *Forum Juridicum*].

Stability is perhaps the most basic and least controversial source of jurisprudential authority in Louisiana. The concern for stability is one of the explicitly stated goals of *jurisprudence constante*, which is based upon a “constant stream of uniform and homogenous rulings.”¹⁵⁹ A number of opinions reaching the same conclusion evidences an established legal practice; that is, a “custom” within the meaning of Civil Code article 1.¹⁶⁰ Once such a custom is established, and a rule of law is widely accepted, it should not be lightly overturned. As the Louisiana Supreme Court has recognized: “Fundamental and elementary principles recognize that certainty and constancy of the law are indispensable to orderly social intercourse, a sound economic climate and a stable government. Certainty is a supreme value in the civil law system to which we are heirs.”¹⁶¹

Judges are thus well aware that their decisions will serve as “a guide for the disposition of scores and perhaps hundreds of unlitigated cases and unappealed decisions.”¹⁶² This is because, in the absence of a clear and unambiguous statute directly on point, judicial precedent is often the best evidence of the law. Attorneys expect precedents to be followed in the absence of intervening legislative action and act accordingly. Courts follow precedent “in order not to unsettle the public, who are presumed to know of a well established court practice.”¹⁶³

This effect may occur with as little as a single court decision, due to what has been called the “lock-in” effect of jurisprudence.¹⁶⁴ If a court finds a certain contractual clause unenforceable, attorneys will begin omitting that clause from their clients’ contracts.¹⁶⁵ Eventually, the offensive clause may disappear from usage, thus rendering that original judicial decision *de facto* binding.¹⁶⁶ In theory, this effect may occur from

159. Dennis, *supra* note 90, at 15.

160. See Yiannopoulos, *supra* note 89, at 77.

161. Johnson v. St. Paul Mercury Ins. Co., 236 So. 2d 216, 218 (La. 1970) (citing JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 50 (1969)), *overruled by* Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973).

162. Tate, *Forum Juridicum*, *supra* note 158, at 445.

163. Robert L. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A. J. 11, 12 (1929).

164. See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 822-26 (1998) (analyzing “lock-in” as it exists in the common law).

165. See *id.* at 819.

166. *Id.*

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a single court decision and is not necessarily limited to the jurisdiction that the decision was issued in.¹⁶⁷ As Justice Dennis has stated, “the practice suggested by the [appellate] decisions may have originated usages containing the germ of future custom.”¹⁶⁸

C. JURISPRUDENCE AS DOCTRINE

The final source of jurisprudential authority comes from the strength of an opinion’s legal reasoning and analysis. If a case is well-reasoned and cogently explains an uncertain question of law, later courts will follow it not because it is binding but because it is correct. Jurisprudence can therefore serve the purpose of doctrine.

Notably, an opinion’s value as doctrine is independent of the court’s position in the hierarchy. It is purely meritocratic. Higher courts occasionally adopt the legal reasoning of a lower court where that reasoning is found persuasive.¹⁶⁹ Similarly, courts citing out-of-state decisions almost always do so for doctrinal reasons,¹⁷⁰ and favorable citations from other jurisdictions are often seen as proof that an opinion is

167. Similarly, a judicial decision holding a certain clause enforceable may encourage its widespread use in future contracts. *See, e.g.*, *Am. Roll-On Roll-Off Carrier, LLC v. P & O Ports Balt., Inc.*, 479 F.3d 288, 291 n.2 (4th Cir. 2007) (noting the widespread adoption of the “*Himalaya* clause” after it was held valid in the English Court of Appeal decision of the same name).

168. Dennis, *supra* note 90, at 15.

169. *See, e.g.*, *Sharpe v. Sharpe*, 536 So. 2d 434, 437 (La. App. 4 Cir. 1988) (“[S]ince we also agree with the reasoning of the district court, we adopt it as our own and quote *in extenso* from that opinion.”); *St. Landry Parish Police Jury v. Clerk of Court of St. Landry Parish*, 536 So. 2d 1283, 1285-86 (La. App. 3 Cir. 1988) (“[T]he trial court’s decision is imminently correct [W]e are compelled to adopt its reasoning as our own.”).

170. *See* David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC’Y REV. 337, 344 (1997) (“To the extent that citations, particularly those to cases from other jurisdictions, help accomplish [changing the law], greater citation frequency and breadth can be expected when the case outcome is adoption of a new legal doctrine.”). Some out-of-state citations may be attributable to the desire for judicial stability; if the courts of all or almost all states have adopted a certain rule of law, the remaining courts may adopt the same rule in the interest of nationwide unanimity. *See generally* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 131-35 (2006) (discussing the practice of courts consulting “the laws of ‘other states’”). This probably applies with somewhat less force in Louisiana, as our legal tradition has long been outside the mainstream of American law.

particularly scholarly or well-written.¹⁷¹

The concept of jurisprudence as doctrine is long established in civilian legal theory. In 1800, distinguished French legal commentator Portalis called judicial decisions a kind of “written reason” which later courts could rely on in making their decisions.¹⁷² “If someone else has already considered a similar problem, it is only logical to look to the prior reasoning. If it seems sound, the interpreter may well adopt it as his own. But if it fails to persuade him, then he must arrive at his own conclusions.”¹⁷³

European civilian jurisdictions are more likely to consider learned legal treatises as primary source of legal doctrine. Louisiana, first as a colony then as a young state, lacked this academic tradition. For most of the 19th century, there was no civilian law faculty in the state.¹⁷⁴ There were no law reviews or journals focused on Louisiana law until 1916, when the *Southern Law Quarterly* (later renamed the *Tulane Law Review*) began publication.¹⁷⁵ Although imported French and Spanish sources were theoretically available, Louisiana attorneys had become increasingly monolingual,¹⁷⁶ and most continental sources were difficult to obtain and effectively out of reach for most Louisiana attorneys.¹⁷⁷ Louisiana attorneys relied on court decisions to fill

171. See Richard Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AM. L. & ECON. REV. 381, 387-88 (2000) (“A citation by the same or a lower court, for which the cited case is authoritative, is a weaker signal of respect or regard for the cited case or its author than a citation by a higher or coequal court, which is not required as a matter of *stare decisis* to follow, distinguish, or otherwise refer to the cited case.”); see also Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & CONTEMP. PROBS. 157, 198-99 (1998) (using number of citations from other jurisdictions as a proxy for the quality of a judges’ opinions).

172. William Thomas Tête, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 TUL. L. REV. 1, 4 (1973) (citing *Discours Préliminaire du Projet de Code Civil*, Pronounced by Portalis on the 24th of Thermidor, the Year VIII, upon the Presentation drafted by the Government Commission and signed by Portalis, Tronchet, Bigot-Premeau and Maleville, in 1 Fenet, *Recueil complet des travaux préparatoires du code civil* 463 *et seq.*).

173. *Id.* at 6.

174. A.N. Yiannopolous, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830, 838 (1980).

175. *Id.* at 839.

176. Ferdinand F. Stone, *The Louisiana State Law Institute*, 4 AM. J. COMP. L. 85, 86 (1955).

177. Justice François X. Martin translated and printed Pothier’s treatise on Obligations in 1802. MARTIN, *supra* note 11. Otherwise, it was not until the founding of the Louisiana State Law Institute in 1940 that French doctrinal sources

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this doctrinal void.¹⁷⁸ Thus, Louisiana jurisprudence took on a more explicitly doctrinal role based on historical necessity.

This also affected the style of the Louisiana judicial opinion. The stereotypical European civilian judicial decision is structured as a brief syllogism. The controlling codal article is quoted, the relevant facts are briefly set forth, and the law is applied to those facts.¹⁷⁹ Because continental civilian judges do not write with the intent of creating precedent,¹⁸⁰ there is little reason to formulate a more general rule of law than is necessary to decide the particular case. Thus, many continental decisions are considerably shorter than their Louisiana counterparts. In Louisiana, judges tend to discuss both the facts and the law in greater detail, yielding comparatively longer decisions.

Justice Barham believed that a major goal of the opinion-writing process is to produce a work that clearly explains the law in such a way that it is useful to readers beyond simply the parties to the case: “Our jurisprudence is dissertative in comparison with the terse, succinct French jurisprudence; but the difference is intentional, for our jurisprudence is meant to teach.”¹⁸¹ By contrast, when an opinion does not provide a thorough discussion of the relevant legal principles—for instance, if it is a *per curiam* opinion—it is likely to be given somewhat lesser weight as a persuasive authority.¹⁸²

began to be translated into English. Stone, *supra* note 176, at 86-87.

178. Algero, *supra* note 115, at 813 (arguing that in Louisiana, precedent has taken the place of doctrine, which was a “highly valued secondary source” of law in civilian legal systems “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.”); *see also* Yiannopolous, *supra* note 174, at 840 (“Louisiana civilian doctrine was found in law reports rather than treatises.”).

179. *See* Michel Troper & Christophe Grzegorzczak, *Precedent in France*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 103 (D. Neil MacCormick & Robert S. Summers eds., 1997) (discussing, in France, “the judicial function was conceived as a mere application of statutes, by way of syllogisms”).

180. *See* RENÉ DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY 180-81 (1972).

181. Barham, *supra* note 93, at 485.

182. *See, e.g.*, State v. Jackson, 439 So. 2d 622, 628 (La. App. 1 Cir. 1983) (acknowledging an apparent conflict among two Louisiana Supreme Court decisions and finding the “fully considered decision” to be better authority than the *per curiam*).

III. UNPUBLISHED DECISIONS UNDER LOUISIANA LAW

Thus far, this Article has considered the authoritative effect of jurisprudence generally, without regard to whether the decisions are published or unpublished. This section discusses whether an opinion's publication status affects any of the three factors listed above and thus relegates unpublished opinions to a form of "lesser" authority under Louisiana law. There is essentially no legal authority addressing this issue. Unlike the prior section, which reasoned inductively from prior opinions and other judicial writings, this section reasons deductively from first principles.

The first factor, court hierarchy, is completely independent of an opinion's publication status. Unpublished opinions, no less than published ones, constitute an explicit statement of how a court has decided a certain question of law in a particular instance. Thus, unless there have been significant intervening developments in the law, it is reasonable to expect that the same court will decide the legal issue the same way in the future and will reverse a trial court judgment that adopts a different interpretation. Therefore, to the extent that a primary reason for following precedent is to avoid needless reversal, a court should pay equal heed to published and unpublished decisions.

However, this assumption only holds if the higher court rules consistently from case to case. For courts who sit *en banc*, such consistency can be expected—the same seven justices sit on the Louisiana Supreme Court for every case, and, absent some intervening change in the law, each justice can be expected to reach the same conclusions on a legal issue that he or she has in the past.¹⁸³ For courts that sit by panel, such as the Louisiana Courts of Appeal, things are not that simple. Such a court is not a unitary entity, and each opinion reflects the judicial reasoning only of that particular panel. The next panel to address the same issue may be composed of different judges who completely disagree with the first panel's disposition. If the original opinion is published, the later panel will likely follow that opinion or, in the alternative, make an *en banc* call to discuss whether the prior precedent should be overruled.¹⁸⁴ But if the first decision is

183. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817-20 (1982). This would be true even absent *stare decisis* or *jurisprudence constante*. *Id.*

184. See *supra* note 155, discussing the internal rules of the First and Fourth

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unpublished, the second panel may feel less constrained to follow it.

This is where the second factor, jurisprudential stability, comes into play. As Justice Tate noted, courts must always be aware of the value of “certainty of legal rule, and a predictability of outcome in its application.”¹⁸⁵ A court of appeal that arbitrarily ignores prior unpublished decisions would undermine this core concept of jurisprudential stability. Judges also have a somewhat self-interested reason for following unpublished decisions. By respecting unpublished opinions authored by other judges, they make it more likely that their own unpublished opinions will, in turn, be respected.¹⁸⁶

These concerns were nonexistent before unpublished opinions became easily accessible—if a prior opinion were only known to the litigants, there would be no repercussions if a later panel which chose not to follow it—assuming the later panel was even aware of the first opinion, given Louisiana’s previously strict rule forbidding citation to unpublished cases. However, this only remains true so long as unpublished opinions remain inaccessible to the public. Widespread accessibility of unpublished opinions restrains such judicial freelancing, as judges face criticism if they apply the law inconsistently.¹⁸⁷ Moreover, as unpublished opinions become widely available, attorneys are likely to consider those opinions in advising their clients. By failing to follow prior unpublished opinions, a court risks upsetting the expectations of the parties and therefore weakening the stability and predictability that are essential elements of the civil law system.

Regarding the third factor, an opinion’s doctrinal value is wholly independent of its publication status. It is commonly claimed that unpublished opinions are, as a group, poorly reasoned and thus inferior to published decisions.¹⁸⁸ This claim may be true in the aggregate, but it is, at best, only a generalization and irrelevant as applied to any particular

Circuits regarding *en banc* sittings.

185. Tate, *Techniques*, *supra* note 95, at 748.

186. See Easterbrook, *supra* note 183, at 817.

187. See *id.* at 811-12.

188. See Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 247-48 (1998).

decision.¹⁸⁹ A judicial opinion stands on its own merits; if the opinion is thoughtful and well-written, it deserves careful consideration by future courts. High-quality legal analysis should not be disregarded simply because it is prefaced by the phrase “not designated for publication.” Similarly, the fact that an opinion has been selected for publication is no guarantee that it contains exceptional legal reasoning, or even that it is correct—innumerable published opinions are later overturned or abrogated.

In short, although many unpublished opinions lack the depth of reasoning and polish of published opinions, this is no reason to dismiss all unpublished opinions as doctrinally deficient. If unpublished opinions truly are the product of overworked or rushed judges and law clerks, they will indeed be cited less—not because they are unpublished, but because they are of inferior quality.

This bias against unpublished opinions is further flawed because it assumes that the judge who authors an opinion, and thus has first say on its publication, can accurately know ahead of time whether that opinion will be useful to later courts. Judges can make educated guesses; for instance, a two-paragraph opinion dismissing a *pro se habeas* proceeding is unlikely to lead to an important development in the law. But not all cases are so clear-cut. A judge may believe that the procedural posture or facts in a certain case are so unusual that they are unlikely to be repeated, and the case is therefore unlikely to provide useful guidance to future litigants. However, the same legal issues may well arise in another case some years later, and that seemingly inconsequential decision may prove dispositive.

IV. CONCLUSION

Louisiana Code of Civil Procedure article 2168 is a relatively recent statute and it is too soon to tell what effect it will have on Louisiana jurisprudence and practice. In the short term, many lawyers will likely continue avoiding citation to unpublished opinions. After all, if there is a chance that the judge will treat a published opinion as better authority than an unpublished authority, no lawyer in the country would cite the unpublished

189. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 224 (1999) (“Some unpublished opinions . . . are fairly elaborate. They go for as long as twenty pages. They contain citations and legal reasoning.”).

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opinion instead. Yet the workload of appellate courts remains ever-increasing, and unpublished opinions are here to stay. Eventually, perhaps soon, written reporters will no longer exist and the distinction between published and unpublished opinions will be even more tenuous than it currently is.¹⁹⁰ Article 2168, with its permissive citation rules and explicit reference to the Internet, is a step towards this future, but its underlying principles are well-rooted in Louisiana legal theory.

190. *See generally* Peter Martin, *Abandoning Law Reports for Official Digital Case Law*, 12 J. APP. PRAC. & PROCESS 25 (2011) (predicting the “widespread cessation of public law report publication” in favor of official digital publication). As a practical matter, for many attorneys, that day has already come. In drafting this Article, the ratio of cases and law review articles I read on-line as opposed to in a print was, at a minimum, fifty to one.