— Didn't indicate diff. between civs & French/Germ civs not positivistic tho, we can go beyond that

Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*

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*James L. Dennis***

In Louisiana, where the civil law meets the common, judges steeped in both traditions write opinions only in Anglo-American style, giving elaborate statements of facts and discussions of precedents—even when interpreting and applying the Civil Code. Although common-law methodology is not well suited to this civil-law purpose, our courts have not adequately developed distinct techniques for interpreting and applying the civil code and dealing with judicial precedent in that process. There appear to be at least two reasons for the lack of progress in our civil-law methodology.

First, the civil-law sources from which a separate civilian judicial methodology could be fashioned are not easy to access or to adapt to our mixed civil/common-law system. In this lecture I will attempt to explain how the seminal works of French and German civil-law scholars could be drawn upon to further develop a Louisiana civil-law judicial technique.

Further, although Louisiana judges are called upon to perform as civil-law jurists, and indeed must do so in order to be completely faithful to the Civil Code as substantive law, they also function as Anglo-American judges and share many attributes with their common-law colleagues. Their legal education includes, in addition to civil code subjects, common-law courses taught by the case method with emphasis on analysis of facts and policy. In the field of judicial process, they are exposed to little other than Anglo-American methodology. They are influenced by a system of reporting and digesting cases which mirrors and supports traditional common-law habits and thoughts about judicial process, as in the United States generally.[1] The system by which Louisiana judges are recruited—popular election from the ranks of practitioners and public officials—tends to produce judges with strong personalities and to encourage them to leave their mark on the law, following the example of great Anglo-American judges, rather than that of the more anonymous Continental jurists.[2] Because little can or should be done to change these judicial characteristics, Louisiana jurists must be mindful of them and guard against allowing them to interfere with their duty to support the Civil Code as part of the law of the state.

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** Justice, Louisiana Supreme Court; J.D., L.S.U., 1962; LL.M., U. Va., 1984.

1. Arthur T. von Mehren & James R. Gordley, The Civil Law System 1127-42 (2d ed. 1977); *see also* H.F. Jolowicz, *Bench and Bar: The Civil Law in Louisiana*, 29 Tul. L. Rev. 491 (1955).
2. *See generally* von Mehren & Gordley, *supra* note 1, at 1149-50.

Because of our cross-training, Louisiana judges are knowledgeable in both civil and common law. We generally have the ability to operate with ease in both systems.[3] There is a draw back in this judicial switch-hitting program, however, that we have not completely figured out. We understand well how precedents, *ratio decidendi*, and holdings work in the common law. Despite considerable effort over the years, however, we still do not have a clear view of the role that our common-law style opinions should have as precedents in cases to be decided under the Civil Code.[4] Jurists agree that the role and impact of jurisprudence must be different on the civil- and common-law sides of our legal system. But so far, there has been little articulation of theory or methodology by which a judge can determine how influential a previously decided case should be in a subsequent case under the Civil Code.

In this lecture, I will attempt to outline a theory of how the decisions of our appellate courts that interpret and apply the Civil Code should be regarded and used by our judges in subsequent civil-law cases. This is a task which should be undertaken not merely out of a fear that our jurisdiction might eventually lose its "civilian heritage" by adopting common-law techniques.[5] Rather, it merits our attention because it is our duty to develop realistic and fitting methods for the administration of the Civil Code as well as other areas of our diverse legal system. Furthermore, judges, by their oaths, owe litigants and the public consistent, faithful and equal application of the legislated laws.[6]

3. Jean-Louis Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, *in* The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions 3 (Joseph Dainow ed., 1974). Professor Baudouin further notes that "[t]his does not, however, necessarily imply that they are true comparatists, for being a comparatist implies the ability to judge one's own system through another; and in [Louisiana and Quebec] the system of reference is, to a certain degree, already integrated in the object of comparison." *Id.*

4. *Id.* at 10 (citing, relevant to the Louisiana experience, Harriet S. Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12 (1937); Joseph Dainow, *The Method of Legal Development through Judicial Interpretation in Louisiana and Puerto Rico*, 22 Rev. Jur. U.P.R. 108 (1952); H.F. Jolowicz, *The Civil Law in Louisiana*, 29 Tul. L. Rev. 491 (1955); Clarence J. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 Tul. L. Rev. 537 (1943); Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul. L. Rev. 475 (1933); C. Girard Davidson, Comment, *Stare Decisis in Louisiana*, 7 Tul. L. Rev. 100 (1932); Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 La. L. Rev. 727 (1962); John H. Tucker, Jr., *The Code and the Common Law in Louisiana*, 29 Tul. L. Rev. 739 (1955); David W. Robertson, *The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana*, 29 La. L. Rev. 78 (1968); Albert Tate, Jr., *Civilian Methodology in Louisiana*, 44 Tul. L. Rev. 673 (1970); Joe W. Sanders, *The "Civil Law" in the Supreme Court of Louisiana*, 15 La. B.J. 15 (1967); Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 Tul. L. Rev. 585 (1937); Clarence J. Morrow, *Civilian Codification under Judicial Review: The Generality of Immortality in Louisiana*, 21 Tul. L. Rev. 545 (1947); Robert A. Pascal and W. Thomas Tête, *The Work of the Louisiana Appellate Courts for the 1969-1970 Term: Law in General: The Obligatory Force of Decisions*, 31 La. L. Rev. 185 (1971)).

5. *Id.* at 1.

6. La. Const. art. X, § 30.

The basic ideas of the theory of civil-law precedent that I propose are simple. A previously decided case under the Civil Code, even in Anglo trappings, stands for something different than a case in a case-law system. In the common law, judicial precedent plays a leading role, serving both as a source of law and as an example of a prior judge's methodology in reasoning from the case-law materials. On the other hand, a civil-law judicial precedent plays only a supporting role. The Civil Code is the primary source of law, and precedent serves merely as an example of a prior judge's interpretation and application of legislated law.[7]

For a case decided within the context of the Civil Code to serve as a good example or precedent it must illustrate that the judge followed sound legal methodology in interpreting the law and applying it to the case. Aside from the fundamental concept of the Civil Code as the primary source of law, valid methodology is based upon several other principles. The Civil Code, as a human act, is not complete, unambiguous, or free of contradiction. The judge is nevertheless obliged to decide the case, even when no rule is provided for a particular situation, while adhering as closely as possible to the values of the Code in his legal reasoning.[8] This means that the precedent court, in order to set an influential example, must use the code as its starting point and apply it directly to the case when there is a rule for the particular situation. In cases in which there is no such rule, the court must use the code as its source of guiding values in formulating a rule for the situation, either by analogy or by rulemaking. Therefore, a subsequent judge can gauge how much influence the previously decided case should have by how well the precedent court performed the foregoing judicial process.

I intend, if I can, to lay down in more detail the basic principles of the legal method that I believe should be followed in interpreting and applying the code. Before doing that, however, I want to describe briefly the common-law theory and practice of judicial precedent. After all, we are explaining legal methodology here as a means of evaluating a judicial decision as a precedent. Therefore, it will help to have before us the contrasting example of the common-law doctrine of precedent before I attempt to describe a theory of civil-law precedent more fully.

7. *See* La. Civ. Code arts. 1, 2, 3. Legislation, as contemplated in Civil Code articles 1 and 2, may include more than the Civil Code articles. This discussion is limited to the Civil Code for the sake of theoretical simplicity. Also, through *jurisprudence constante*, judge-made law may take the form of law by being accepted as custom. La. Civ. Code art. 3. See also the discussion of such "acquiescence" in a line of decisions in Breedlove v. Turner, 9 Mart. (o.s.) 353 (La. 1821). The theory expressed in this paper does not attempt to address all of these possibilities but only to clarify the interpretive processes applied in dealing with the Civil Code.

8. La. Civ. Code art. 4.

I. COMMON-LAW PRECEDENT

The basic pattern of the doctrine of common-law precedent has been aptly described as "a process . . . in which a proposition descriptive of the first case is made into a rule of law and then applied to a . . . similar situation."[9] The process involves at least three separate but closely related steps in judicial reasoning: recognition of a similarity between cases; announcement of a rule fashioned from the material facts of the first case; application of the rule to the second case.[10]

The common-law theory of precedent allows the court in the controversy before it to exercise a great deal of flexibility in deciding which previous case is sufficiently similar to be chosen as a precedent and in formulating a rule based upon the material facts of the precedent case. That flexibility is well evidenced by Professor Julius Stone's classical analysis of the case of *Donoghue v. Stevenson*,[11] in which a Scotswoman sought to recover damages from the manufacturer of a bottle of ginger-beer which contained the decomposed remains of a snail. The ginger-beer had been purchased for her at a cafe; the bottle was made of dark opaque glass; she drank some of the contents before the snail floated out of the bottle; and she resultingly suffered from shock and severe gastro-enteritis. As Professor Stone has demonstrated with reference to *Donoghue*, the material facts of a case usually may be stated at various levels of generality, each of which is correct for that case. Insofar as the rule or *ratio decidendi* of the precedent case is determined by each material fact, a number of different *rationes* may be extracted depending on how the material facts are selected and generalized by the subsequent courts. For example, the agent of harm, a dead snail, may be generalized to include any noxious element, regardless of whether or not it is physical or foreign to the product; the vehicle of harm, an opaque bottle of ginger beer, might be expanded to include any container of commodities for human consumption; the plaintiff's relation to the vehicle of harm, as donee of a purchaser from the retailer who bought directly from defendant, might be generalized to include any person into whose hands the product comes; and the fact as to discoverability of the agent of harm, a snail which was not discoverable under opaque glass by inspection of any intermediate party, could be generalized to include all noxious elements except when obvious to the ordinary consumer.[12]

Thus, the rule of the case could be lightened to hold liable only a manufacturer who sold directly to the plaintiff's retailer when the beverage is sold in opaque containers and the consumer is made physically ill by ingesting liquid containing a noxious foreign physical substance. Or it might be widened to hold any manufacturer for any harm caused by any noxious quality of its product, regardless of how packaged, to any person into whose hands it comes.

Any honest description of the use of precedent in Anglo-American law must admit the following: First, there is no single correct method for determining the rule for which a case stands. Consequently, there usually can be more than one acceptable formulation of the rule to be extracted from a precedent, and any rule extracted from a case is subject to two types of creative judicial activity: narrowing of the rule by admitting some exception not before considered and widening of the rule by discarding a restriction in the rule as formulated from the earlier case, on the ground that it has not been required previously by any rule of statute or precedent.[13]

This is not the time to set forth the theory of common-law precedent in detail. Much more can and has been said on the subject. But what I am trying to do now is only to show that the common-law theory of precedent is extremely flexible and that judges using case-law techniques can freely expand, contract, and manipulate the *ratio decidendi* of a previously decided case. In short, unlike the civilian legal methodology, the common-law case techniques are designed to allow the judge to be the primary lawmaker and the previously decided case to be his primary source of law. This is antithetical to a civilian legal system which mandates legislation as the primary source of law.[14]

II. CIVIL-LAW METHODOLOGY

Civilian legal methodology is designed to serve the practical ends of law as set forth in the Civil Code. It aims at finding those principles which judges should follow in deciding cases, and, therefore, is important not only for judges but for all legal scholars who wish to assist judges in their functions.[15] The central debate over legal method in civil-law jurisdictions stems from the argument that the Civil Code contains a complete and perfect system of laws from which principles may be deduced for the just resolution of all controversies within its purview, regardless of whether each newly arising case or problem had been envisioned by the drafters. This view was not held by the drafters of the French Civil Code, which was adopted before the mechanical conception of the judicial process gained its greatest popularity.[16] As was recognized by Portalis:

> A code, however complete it may seem, is hardly finished before a thousand unexpected issues come to face the judge. For laws, once drafted, remain as they were written. Men, on the contrary, are never

9. Edward H. Levi, An Introduction to Legal Reasoning 1 (1951).
10. *Id.*
11. (1932) A.C. 562.
12. Julius Stone, Legal System and Lawyers' Reasonings 267-74 (1964).
13. H.L.A. Hart, The Concept of Law 131 (1961).
14. *See* Mitchell Franklin, *The Annotation of the Civil Code Texts on Obligations*, 33 Reports of the La. St. Bar Ass'n. for 1933 and 1934 100, 102 (1935).
15. Philipp Heck, *The Jurisprudence of Interests: An Outline, in* The Jurisprudence of Interests 31, 31 (M. Magdalena Schoch trans., 1948) [hereinafter Heck, *Jurisprudence of Interests*].
16. von Mehren & Gordley, *supra* note 1, at 1137-38.

> at rest; they are constantly active, and their unceasing activities, the effects of which are modified in many ways by circumstances, produce at each instant some new combination, some new fact, some new result.[17]

At later periods, French thinking came closer to that of the drafters of the German Civil Code, who viewed the codified, legislatively given law as a perfect, complete and self-contained system.[18]

Conceptual or mechanical theory of jurisprudence believed that general legal concepts, such as the contract being the law between the parties to it, "were the causal basic concepts of law, that they were perceptions and notions which *caused* legal rules and thereby, indirectly, the effects of rules on social life."[19] This theory of causality is abandoned today.[20]

> Greatly as opinions differ concerning the origin of law, there is general agreement to the effect that historically legal commands precede the formation and arrangement of general concepts. Commands result from the practical needs of life and their evaluation and adjustment, and not from notions of general concepts. . . .
>
> As a rule, the legislative history of modern statutes is fully known, so that we are able to perceive the motivating forces behind them. The struggle is not for accuracy of definitions of concepts or consistent application of definitions agreed upon; it is a struggle for the protection of interests. . . . Law is, from the point of view of history, the product of interests. This may be taken to be the generally accepted view today.[21]

Reacting against the trend of conceptualism in France and Europe, Francois Gény in 1899, in his classic work, Method of Interpretation and Sources of Private Positive Law, issued a powerful and extremely influential statement of a non-mechanical conception of the judicial process. Gény's theory of "free scientific research"[22] provides that judges are bound by the text of the written law only when, and to the extent that, the text is clear. Otherwise, they must

17. Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 Tul. L. Rev. 762, 769 (1969) (citing Portalis' Preliminary Discourse, M. Shael Herman trans.).

18. von Mehren & Gordley, *supra* note 1, at 1137.

19. Heck, *Jurisprudence of Interests*, *supra* note 15, at 33-34. At least insofar as the Civil Law developed in Germany, the theory of the causality of general concepts came into power through the Historical School of jurisprudence. The Historical School taught that law originated in the subconscious mind of the people and that in an advanced stage of civilization jurists and jurisprudence took over the role of the people in creating concepts. *Id.* at 34.

20. *Id.* at 34.

21. *Id.* at 34-35.

22. Jaro Mayda, *Gény's Méthode After 60 Years: A Critical Introduction*, *in* François Gény, Méthode d'Interprétation et Sources en Droit Privé Positif v, x (Louisiana State Law Institute trans., 2d ed. 1954).

consider, within the context of the basic principles and values reflected in the legal system as a whole, the social, economic, and moral factors involved in the particular case and arrive at a rule that best promotes justice and social utility for the given situation.[23] The Swiss Civil Code in its famous Article 1, provided that judges should decide cases not clearly covered by the text of the code on the basis of customary law or, where no such rule exists, in accordance with the rules that the judge would have established as a legislator.[24]

In Germany the Jurisprudence of Interests school of legal thought was one of several that promoted a nonmechanical approach to the judicial process. Philipp Heck, the leader of this school, summarized its principles:

> What the legislator intends is the protection of interests. He wishes to delimitate conflicting interests. At the same time, however, he realizes that he is unable to capture the variety of life situations and to regulate them so completely that logical subsumption furnishes the correct delimitation in each individual case. The legislator can put into effect his intentions and satisfy the demands of practical life only if the judge is more than a legal automaton functioning according to the laws of logical mechanics. What our law and our life need is a judge who stands by the legislator's side as an intelligent helpmate, who does not merely consider the words and the commands of the law but who enters into the intentions of the legislator and applies the value judgments embodied in the law to situations not expressly regulated by the law, with the aid of his own evaluation of interests.[25]

In my opinion, the legal method that should be applied in interpreting and applying the Louisiana Civil Code is substantially the same as the nonmechanical methodology advocated by Portalis and Gény with additions and modifications taken from the works of Philipp Heck, Heinrich Stoll, and other scholars of the Jurisprudence of Interests school. In essence, a nonmechanical judicial process treats the Civil Code, the courts, and the public with more honesty and respect than a methodology based on the fiction that the legal order is a "complete," "gapless" system of legal concepts that was intended to be an inexhaustible source of new material and that for each concrete factual situation a decision must be deducible from existing abstract legal rules by means of juridical logic.

I believe that most Louisiana judges would agree that it is more honest and realistic to admit that our code is not complete or unambiguous and that courts must sometimes evaluate conflicting interests and formulate rules for particular

23. von Mehren & Gordley, *supra* note 1, at 1138.

24. Max Rümelin, *Developments in Legal Theory and Teaching During My Lifetime*, *in* The Jurisprudence of Interests 3, 23 (M. Magdalena Schoch trans., 1948).

25. Philipp Heck, *The Formation of Concepts and the Jurisprudence of Interests*, *in* The Jurisprudence of Interests 101, 103-04 (M. Magdalena Schoch trans., 1948) [hereinafter Heck, *The Formation of Concepts*].

situations either with or without the benefit of a code analogue. Indeed, Article 4 of our Civil Code, and the legislative history of the French Civil Code, indicate that the Code was never intended to be a gapless system of legal rules, or to comprise such a system in latent form, or to be treated as such for the purposes of applying the law. Our colleague, Judge Albert Tate, Jr., observed that:

> as a practicing state appellate judge for twenty-five years prior to my federal service, I must confess that instances arise with increasing frequency in the present day in which, with all the judicial good faith in the world, no real legislative intent or text can be found to have been intended to govern a particular new conflict of interest.[26]

My own experience has been similar. Therefore, I believe that, if judges were confined to a function of subsuming facts under concepts deduced or construed from abstract legal rules, the jurisprudence would be less in touch with reality and more legalistic because judges and lawyers are more apt to disagree and split hairs about abstract concepts than the real human interests in conflict in particular situations.[27]

One of the most striking examples of the courts' response to a need for the application of the code realistically while remaining true to its principles, was the Louisiana Supreme Court's outstanding work in the development of our mineral law.[28] The phenomenon of oil and gas production, of course, was not foreseen by the Civil Code. Nevertheless, beginning with the case of *Frost-Johnson Lumber Co. v. Salling's Heirs*,[29] the court used the code articles relating to servitudes by analogy to develop a complete body of mineral law. These rules of law were not developed mechanically or by pure conceptualization; careful attention was paid to the conflicting and competing interests of landowners, developers, and the public at stake in this new natural resource industry.

Let us examine the legal methodology that I propose we use to evaluate precedent in greater detail. We commonly say that, in deciding a case, the judge selects the appropriate legal precept and applies it to the facts to reach the correct solution. This implies that the judicial process is a quasi-mechanical activity, somewhat like selecting the right piece for a puzzle.[30] But in the more difficult cases, the judge faces complex choices. Not only must he often choose between more than one legal rule that might apply, but also he can be faced with choices as to different interpretations of the same legal concept, as well as various ways

26. Albert Tate, Jr., *The "New" Judicial Solution: Occasions for and Limits to Judicial Creativity*, 54 Tul. L. Rev. 877, 885 (1980).

27. Francois Gény, Méthode d'Interprétation et Sources en Droit Privé Positif § 220 n.606 (Louisiana State Law Institute trans., 2d ed. 1954).

28. Joe W. Sanders, *The "Civil Law" in the Supreme Court of Louisiana*, 15 La. B.J. 15, 22 (1967).

29. 150 La. 756, 91 So. 207 (1922).

30. von Mehren & Gordley, *supra* note 1, at 1129.

that it might be applied to the facts. Often, there are multiple solutions for a case and good arguments for each of them.

Moreover, in selecting a rule for a case, a judge must understand the nature of a legal concept. Every legal concept is a shorthand expression for the adjustment of a conflict of interests and for the evaluation of those interests.[31] The function of every legal concept is to delimit contradictory or competing interests, and to decide the contest between two or more such interests. Necessarily, this decision must be based on the legislator's evaluation of each relevant interest, which in turn must rest on his value judgments emanating from his notion of a desirable social order.[32]

On the other hand, the legislator's decision as to which interest prevails and which is vanquished has an effect on the particular interests involved. Therefore, the judge, by analyzing the rule with a view to the basis and effect of the legislator's decision, may ascertain its interests and value content.

Therefore, the fundamental truth that the judge must bear in mind is that "each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant of these opposing forces. Protection of interests through the law never occurs in a vacuum."[33] As Professor Heck observes, even the granting of a copyright or a patent operates to restrain the interest of rival writers or subsequent inventors. Consequently, the judge must discover more than the purpose of the law, for this reveals only the interest which has prevailed. "The concrete content of the legal rule, the degree in which its purpose is achieved, depends upon the weight of those interests which were vanquished."[34] For example, because the purpose of every tax is to generate revenues for public expenses, the special character of a specific tax law can be determined only by careful attention to the way in which each class of taxpayers has been taken into consideration.[35]

Furthermore, in considering the interests that are protected and adjusted by the legal concept, the judge must not take a narrow view of this term. By interests we mean all of the interests of life that compete with one another, just as in everyday speech when we describe the demands of life as "interests." Our use of the word includes more than material or economic interests. In creating a legal rule or concept, the legislator also considers ethical, religious, moral interests, the interest of justice, of equity, of the public, and the highest interests of human kind.[36] Although we may disagree vigorously over which interest should prevail or be vanquished in a particular case, it is self-evident that every

31. Heinrich Stoll, *The Role of Concepts and Construction in the Theory of the Jurisprudence of Interests*, *in* The Jurisprudence of Interests 259, 260 (M. Magdalena Schoch trans., 1948).

32. Heck, *The Formation of Concepts*, *supra* note 25, at 134.

33. Heck, *Jurisprudence of Interests*, *supra* note 15, at 35.

34. *Id.* at 36.

35. *Id.*

36. Heck, *The Formation of Concepts*, *supra* note 25, at 130-31.

statute affects these kinds of interests.[37] Accordingly, the Civil Code is an integrated system of concepts deciding conflicts of interests, a structure of commands based on value judgments and value ideals.[38]

Now let us examine carefully the three basic methods which a judge may use under the Code to select, adapt, or create a legal concept to apply in a case. First, in a clear case, which fortunately, is the normal case, the judge must apply the method of logical subsumption. Under our Constitution and Civil Code the judge is bound to uphold and abide by the law. Thus, when the judge finds that the legislator has weighed the particular constellation of interests involved in the instant case and has formulated a rule based on such an evaluation, the judge is absolutely bound by the legislator's delimitation of those interests, no matter if the judge himself would reach a different result.[39]

Some scholars contend this logical subsumption occurs simply because it is so clearly self-evident that the facts of the case should be classified as falling under the rule. Others argue that an analysis of interests is not absent, but rather is made "intuitively," without ever entering the conscious mind of the judge.[40] In any event, the simple procedure of logical subsumption should be employed only where its result is in harmony with that which would be reached by an analysis of interests, and when such is not the case a judge usually will intuitively feel reluctant to make the subsumption.[41]

Thus, in the case of *Ramirez v. Fair Grounds Corp.*,[42] the plain language of the Civil Code, which in the pertinent provision states that "[a]ny clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party,"[43] clearly controlled the situation where the defendant sought by contract to limit its liability in advance for the fall the plaintiff suffered on the defendant's premises. The plaintiff, a horse trainer, contracted for the use of stall space at the race track. The stall space contained a twelve foot high loft area which had no railing to protect those using it from a possible fall. The plaintiff fell from the loft area injuring himself. The contract of lease which the plaintiff entered into for use of the space contained a clause which expressly required the plaintiff to hold the lessor harmless in the event of any injury incurred as a result of using the premises. The court was required to analyze the situation on the narrow issue of whether this clause was binding upon the plaintiff. The court found that under the clear language of the Code, the clause was a nullity, which could not be enforced. The interest of one party, that it limit its liability, had been clearly vanquished in favor of the other

37. *Id.* at 131.
38. *Id.* at 168.
39. Stoll, *supra* note 31, at 262. *See also* Heck, *The Formation of Concepts*, *supra* note 25, at 178.
40. Heck, *The Formation of Concepts*, *supra* note 25, at 185.
41. *Id.*
42. 575 So. 2d 811 (La. 1991).
43. La. Civ. Code art. 2004.

party's interest, that he be protected from waiver of his right to compensation for physical injury, and no further inquiry was warranted. The judge does not need to delve laboriously into the conflict of interests when the code article so clearly applies to the circumstances.[44]

Legal concepts, like the concepts of ordinary life, are not sharply defined. Every concept has a definitive core and a penumbra which gradually shades off.[45] Thus, whether a judge must undertake a conscious analysis of interests may depend on whether the case falls within the core or the penumbra of the concept.

Legal subsumption may be appropriate when the legislator, knowing that he cannot foresee all possible factual situations, nevertheless frames a concept or rule abstractly and broadly for the very purpose of covering new and unforeseen cases.[46] Take the example in which a statute provides that "counterfeiting money" is punishable, at a time when coins are the only form of money. Subsequently paper money is introduced. Although all scholars do not agree, the conclusion that counterfeiting paper money is punishable under the statute is reached by a simple process of subsumption rather than of analogy.[47] Or, take a case from our own jurisprudence, in which the Supreme Court held that the abstract formulation of a code provision requiring that a will be "written" by the notary anticipates and includes the factual situation of a typewritten will although those machines were not specifically anticipated at the time the legislation was enacted.[48]

However, in the more difficult cases logical subsumption will not be appropriate. Our laws are sometimes inadequate, incomplete or contradictory when confronted with the wealth and variety of actual problems that keep arising in daily life. Whenever the judge finds such a gap in the Code, the Code expressly requires him to decide the case anyway, implicitly requiring that he resort either to analogy or to rulemaking in order to fashion a concept or rule to adjust the conflict of interests in the case before him.[49]

The method of analogy has always been used in the civil law.[50] Although the facts of a particular case may not have been foreseen by any code article, if

44. Stoll, *supra* note 31, at 261-62. Stoll explains that the subsumption of the case under the rule is an efficient function. It enables the judge to apply complex notions from which the concept arises without the ardor of reexamining their complexity.
45. Heck, *The Formation of Concepts*, *supra* note 25, at 147; *see also* Hart, *supra* note 13, at 119-20.
46. Stoll, *supra* note 31, at 263.
47. This example, used by Stoll, *id.*, is adapted from Jhering, I Geist Des Römischen Rechts, § 3 n.6.
48. Prudhomme v. Savant, 150 La. 256, 90 So. 640 (1922).
49. *See* La. Civ. Code art. 4. *See generally* Heck, *The Formation of Concepts*, *supra* note 25, at 155.
50. Heck, *Jurisprudence of Interests*, *supra* note 15, at 41. "Analogy" also includes the inverse, *argumentum e contraria*. Heck, *The Formation of Concepts*, *supra* note 25, at 180-81. *See also* Gény, *supra* note 27, §§ 107, 165, 166.

the same conflict of interests underlying the dispute before the court has been expressly regulated by a legislated rule or concept, the judge must balance the interests or resolve the conflict between them in the same manner in the instant case. Whenever the facts of a particular case are not foreseen by the code article, the judge must first determine the conflict of interests which underlies the dispute. Then he must examine whether or not that same conflict of interests underlies other factual situations which have been expressly regulated by legislation. If the answer is in the affirmative, he must transfer the value decision, or the balance of interests, contained in the article to the facts of the dispute presented before him, that is to say, he must decide the identical conflict of interests in the same way.[51]

For example, the court in *Langlois v. Allied Chemical Corp.*,[52] found that the conflict of interests between a chemical company and a fireman who was asphyxiated while answering a call on neighboring property was substantially identical with the conflict of interests delimited by Civil Code articles 667 and 669, which make a person strictly liable if operations on his land cause neighbors inconvenience by diffusing smoke or nauseous smell or otherwise deprive a neighbor of the liberty of enjoying his own property. Among other precepts, the court applied the rules of neighborhood by analogy to decide that the company was strictly liable for damages done to the fireman by its escaping gas. As noted by the court, "[t]he activities of man for which he may be liable without acting negligently are to be determined after a study of the law and customs, a balancing of claims and interests, a weighing of the risk and the gravity of harm, and a consideration of individual and societal rights and obligations."[53]

The judge may sometimes find himself in a position in which he is required to resort to the method of rulemaking in order to perform his duty to decide the case. This may happen in two situations. First, he may be required to formulate concepts in those frequent cases where the Code refers the judge to his own judgment,[54] either by express delegation (judicial discretion),[55] or by the use of indeterminate words which demand appraisal of values, such as "fault,"[56] "good faith,"[57] "public order," or "public policy."[58] Most of our tort and

51. Heck, *Jurisprudence of Interests*, *supra* note 15, at 41.

52. 258 La. 1067, 249 So. 2d 133 (1971).

53. *Id.* at 1083, 249 So. 2d at 140 (citing Yommer v. McKenzie, 257 A.2d 138 (Md. 1969)).

54. Heck, *Jurisprudence of Interests*, *supra* note 15, at 41.

55. *See, e.g.*, La. Civ. Code arts. 372, 1589, 1852, 1960, 1986, 1999, 2033, 2324.1.

56. *See, e.g.*, La. Civ. Code arts. 112, 577, 599, 614, 628, 799, 973, 1250, 1260, 1261, 1268, 1270, 1386, 1506, 1569, 1701, 1772, 1800, 1804, 1812, 1813, 1814, 1873, 2004, 2057, 2298, 2312, 2315, 2315.2, 2323, 2324(B), 2374, 2433, 2489, 2536, 2552, 2597, 2695, 2699, 2721, 2723, 2759, 2760, 2902, 3003, 3018, 3022, 3167, 3217(9), 3237(11). "Fault" is also delineated into relative degrees of severity in La. Civ. Code art. 3506(13).

57. *See, e.g.*, La. Civ. Code arts. 96, 468, 486, 487, 488, 496, 518, 522, 523, 524, 528, 529, 670, 742, 1759, 1770, 1950, 1963, 1975, 1983, 1996, 2021, 2028, 2035, 2311, 2480, 2529, 2811, 2814, 2822, 2830, 2831, 3033, 3050, 3158(B), 3475, 3480, 3481, 3482, 3486, 3490, 3491, 3536.

58. *See, e.g.*, La. Civ. Code arts. 7, 1851, 1968, 2012, 2030, 2329, 3520, 3538, 3540.

products liability cases are examples of courts' rulemaking by evaluating and delimiting conflicting and competing interests under the indeterminate general concept of "fault."[59] *Langlois* was an example of the court using neighborhood articles by analogy to define "fault." Second, such an appraisal of interests on the part of the judge is required in cases where statutory concepts or rules are contradictory or entirely lacking, thus creating a "gap" in the Code.[60] In such cases the judge must render that decision which he would propose if he were a legislator using his own assessment of social, economic, and moral factors, while following the guiding ideas or values pervading the Code and the legal system as a whole. This is the rule contained in the famous Article I of the Swiss Code.[61] It is substantively valid for the Louisiana judge as well as the Swiss judge. This is really what is meant by the numerous provisions, such as article 4 of our Civil Code, which make it the judge's duty to decide according to "equity," "justice," or "fairness."[62]

In truth, when there is a "gap" or potential "gap" in the legislation, the judge rarely, if ever, relies *exclusively* on his own independent evaluation of the conflicting interests or the underlying social, economic and moral factors. Usually, he relies at least in part on principles or values within the code or the legal system in formulating a rule or concept. Recent examples of how judges might fill gaps in the code by rulemaking appeared in *Loyacano v. Loyacano*[63] and *Corpus Christi Parish Credit Union v. Martin*.[64] In those cases, a minority of the court would have found gaps in the code because of unconstitutional gender biased provisions failing to afford men alimony and prohibiting women from community property management. The minority would have filled the gaps by making rules to provide equal rights for spouses as to alimony and community property transactions. However, it is clear they would have relied to some

59. *See, e.g.*, 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989); Pitre v. Opelousas General Hosp., 530 So. 2d 1151 (La. 1988); Halphen v. Johns-Manville Sales, Inc., 484 So. 2d 110 (La. 1986); Hill v. Lundin & Assoc., Inc., 260 La. 542, 256 So. 2d 620 (1972); Weber v. Fidelity & Casualty Ins. Co., 259 La. 599, 250 So. 2d 754 (1971); Dixie Drive It Yourself Sys. New Orleans Co. v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962).

60. Heck, *Jurisprudence of Interests*, *supra* note 15, at 41. *See also* the *infra* discussion at notes 62-64.

61. Swiss Civ. Code art. 1 (1907) provides:

> The Law must be applied in all cases which come within the letter or the spirit of any of its provisions.
>
> Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rule which he would lay down if he had himself to act as legislator.

62. Paul Oertmann, *Interests and Concepts in Legal Science*, *in* The Jurisprudence of Interests 51, 72 (M. Magdalena Schoch trans., 1948).

63. 358 So. 2d 304 (La. 1978) (on original hearing), *id.* at 314 (on rehearing), *vacated sub nom.* Loyacano v. LeBlanc, 440 U.S. 952, 99 S. Ct. 1488 (1979). *See* Tate, *supra* note 26, at 888-92.

64. 358 So. 2d 295, 299 (La. 1978) (Tate, J., et al., dissenting).

extent by analogy upon the civil-law concepts of alimony for women and co-ownership of property found in the code.[65]

Although I have not found the analysis of interests methodology articulated frequently in our cases, most of our appellate judges seem to reach results similar to those that the above techniques would produce. This is because a judge may also reach a decision conforming to the principles outlined by using intuition, aided by his sense of justice, or *judicium*, as it is sometimes called. This really means that the judge decides a case and determines the conflicting interests by using his subconsciousness. Whether the judge decides the underlying conflict of interests properly depends on whether he possesses the necessary fundamental knowledge of law and life and whether any disturbing elements interfere.[66] A judge gains a *judicium* through his actual experience on the bench; his judicium in various fields of law, therefore, will vary in degree reflecting cases he has heard and decided.[67] An experienced judge has gained an ability he did not have as a novice and that is the ability to adjudicate by intuition. "What we are dealing with are abbreviated mental operations, rendered possible by habit, that is, the constant action of previous processes of consciousness, such as the speaking of a language, upon the subconscious mind."[68] Judges who possess these prerequisites and whose intuition acts with sufficient celerity, have the *judicium* which is so highly regarded in the administration of justice.

Just as it happens with the intuition of any practitioner of a learned art, however, the intuitive judgment of a judge may be influenced by unwarranted or extraneous factors. Consequently, his intuition should be controlled by a checking-up process involving the conscious application of the principles explained.[69] Furthermore, the fact that we admire and respect the result reached by a judge making brilliant use of his judicium does not mean that the methodology of his opinion necessarily deserves emulation. In such a case, it is necessary for the subsequent court to reconstruct the rationale of the decision using appropriate methodology before accepting it as a persuasive example to be followed in deciding the instant case.

It should be evident that the common-law or case-law theory of precedent is incompatible in many ways with the legal method of deciding a case within the context of the Civil Code. First, in a pure case-law system, the grounds of decision in the instant case may be derived only from a previous case. Obviously, this is contrary to the mandate of our law, particularly when the Civil Code contains a concept of law precisely covering the instant case and accommodating a conflict of interests identical to that before the court. Second, when no rule for a particular situation in the instant case can be found in the

65. *See id.* at 299 (Tate, J., et al., dissenting); *Loyacano*, 358 So. 2d at 304 (on original hearing).
66. Heck, *The Formation of Concepts*, *supra* note 25, at 182.
67. *Id.* at 182 n.19.
68. *Id.* at 182.
69. *Id.* at 183.

Code, case-law methodology would lead the judge to formulate a rule exclusively from the facts of a previous case. This is antithetical to civilian methodology, which requires the judge to search for legal concepts in the Civil Code delimiting a pattern of competing interests closely resembling the interests pressing for recognition in the instant case. Instead of causing the judge to adhere as closely as possible to the code system the case-law methodology may cause him to depart radically from it. Finally, even when there is no legal precept in the Code upon which the judge may fashion a rule by analogy to govern the instant case, he still should not use pure case-law reasoning to arrive at a rule for the case. Doing so may cause him to fashion a rule for the case by selecting facts from a previous case in a way that is inconsistent with the guiding values of the Civil Code system. Thus, the judge may unwittingly contribute to the creation of amorphous case-law development inside but incompatible with the context of our civil law.

The foregoing general propositions may be superseded, however, by the doctrine of *jurisprudence constante*. When a series of decisions forms a constant stream of uniform and homogenous rulings having the same reasoning, the doctrine accords the cases considerable persuasive authority and justifies, without requiring, the court in abstaining from new inquiry because of its faith in the precedents.[70] *Jurisprudence constante* certainly does not represent legislative force in the proper sense, such as we attach to written law or custom; for whenever the legislature expressly rules, it cuts off further inquiry.[71] The doctrine is warranted on the ground that the long continuous use and influence of precedent indicates that it is in harmony with the code, that deviation from the precedent series more so than from a single precedent would impair the social values protected by precedent, and that the practice suggested by the decisions may have originated usages containing the germ of future custom.[72]

If the foregoing civil-law method is how lawyers and judges ought to go about their daily task of interpreting the Civil Code and applying it to cases, it can also be used to evaluate the performance of a judge in a previously decided case to determine whether the case should be imitated in a subsequent decision. If the previous judge's performance is flawed, that should cause the subsequent court to disregard or give little weight to the precedent case. Certainly, if a judge ignores a clearly applicable Code rule and follows another jurisdiction's case, his example of using the wrong starting point or source of law should not be influential at all. Similarly, if a judge misperceives the particular constellation of interests that must be adjusted in the case before him or in the legal concept he has selected to decide the case, a subsequent court should reject or give less weight to the previous case. Also, when a judge overlooks a Code rule that might have been applied by analogy, his performance may need to be disregard-

70. Gény, *supra* note 27, § 149; Daggett et al., *supra* note 4, at 15-26.
71. Gény, *supra* note 27, § 149 n.101.
72. *Id.* § 149 nn.104-05.

ed or at least not blindly followed. Under the theory of precedent proposed, it does not matter if the previous court reached the "right result." A previous case should be imitated only when it demonstrates knowledgeable and skillful use of the Civil Code by valid methodology. A previous case cannot be considered the primary starting point in law, but only as an example of legal methodology involving the evaluation of the conflict of interests presented in that case and in the particular concept used to decide the case. Even if we can sense intuitively that the previous case was decided justly and in harmony with Civil Code principles, this does not make it a valid precedent. We would still need to verify that the result was correct in the previous case by reconstructing its decision process with valid legal methodology. Therefore, a precedent which reaches a correct result with flawed methods can have little influence on our own decision in a subsequent case because we are forced to verify its result only through our own use of legal methodology, not by following the prior court's reasoning process.

A recent example of an attempt to determine the value of a precedent may be seen in *Daigle v. Clemco Industries*.[73] In that case, the court was called upon to decide whether the wife and children of a terminally ill worker could validly compromise, before his death, their own potential wrongful death claims against the manufacturers and executive officers who allegedly exposed him to dangerous industrial abrasives. Civil Code article 1976 provides that future things may be the object of a contract, except that the succession of a living person may not be the object of a contract other than an antenuptial agreement. In a previously decided case, a court of appeal had set aside a similar compromise by reasoning that such a compromise is analogous to the sale of a living person's succession or a contract having a succession as its object prohibited by Article 1976.[74] The supreme court, in effect, decided that the analogy was false because the constellation of interests decided by the legal concept of Article 1976 was not the same as those presented when a person seeks to compromise a potential wrongful death claim. One of the main conflicts that the legislator decided by Article 1976 was between the interests of persons whose lives might be jeopardized by pre-death sales of their successions and that of persons who might benefit from allowing successions to be the object of a contract. In effect, the supreme court reasoned that the same constellation of interests was not presented by the pre-death compromise of a potential wrongful death claim because such a transaction does not tend to jeopardize the life of any person. Instead, the court concluded that the compromise of this type of claim was subsumed under the general Code rules allowing persons freedom to make future things the object of their contracts and to compromise any difference they may have in the present or in the future. Therefore, the court concluded that the previous court of appeal decision was "not a persuasive example of the

73. 613 So. 2d 619 (La. 1993).
74. Schiffman v. Service Truck Lines, Inc., 308 So. 2d 824 (La. App. 4th Cir. 1974).

interpretation and application of the Code that should be followed in the present case."[75]

This brief description of legal methodology and how it may be used to analyze judicial decisions and decide what influence they should be allowed to have in deciding subsequent cases is by no means exhaustive. It builds on the basic ideas of Louisiana, French, and German jurists who struggled to gain a clearer view of the judge's role in interpreting and applying civil codes and statutory law. Essentially, it offers a suggestion of how the thoughts of Gény and the Jurisprudence of Interests scholars may be used to evaluate the methodology of a prior judicial decision to determine what weight it should be given in deciding a subsequent case. This recommendation does not suggest that appellate judges change the style of their opinions or even that they abandon the common-law doctrine of precedent in areas of our law where its use is appropriate. Louisiana is an original legal system that draws from both the civilian and the common-law families. Our judicial process, therefore, must be flexible enough to accommodate the variant patterns of that system and to further the goals of justice and social utility through the different means that it has prescribed. Accordingly, when dealing with the civil law, the judge's constitutional oath to support the law requires that he recognize that the Civil Code is the primary source of law. Nevertheless, the limitations of the Code require the judge to act as the legislator's helpmate by completing the rule adumbrated by the legislation in cases not clearly foreseen by the Code. In doing so, however, the judge does not have absolute discretion but is required to return again and again to the Code seeking its guiding values and adhering as closely to them as possible. This outline of legal method and theory of civil-law precedent hopefully will help a judge to visualize this process clearly both when he is interpreting and applying the Civil Code directly himself and when he is in the position of evaluating a previous court's performance of this function. By thus gaining a clear view of whether the court in the previously decided case followed the Code and sound legal method, the judge in the subsequent case will be in a better position to determine what influence, if any, the prior case should have upon his decision.

75. *Daigle*, 613 So. 2d at 623. *See* H. Alston Johnson, III, *Obligations, The Work of the Louisiana Appellate Courts for the 1974-1975 Term*, 36 La. L. Rev. 375 (1976); Stephen D. Juge, Note, *Tort—Wrongful Death—Release of Claim Before Death of Victim*, 50 Tul. L. Rev. 720 (1976).