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# Keep Calm and Teach Gaius

Nicholas Kasirer\*

## INTRODUCTION

Total information in the digital age gives a picture of law that is distressingly unruly, but this is decidedly not so for the civil law taught in the universities. For centuries, civilian categories of thought have neatly organized the law across continents in a seemingly straight line, and none of the vagaries of human experience seem to deflect it from a Cartesian path. Following in those tracks would be one way to teach the civil law while others lose their way in the darkness brought on by too much law. Today's students can swap their anxieties and their search engines for a pocket civil code.<sup>1</sup> As for faculty, they would do well to stick to the well-trodden *Professorenrecht*. Keep calm and teach Gaius.

Yet while the finest teachers recognize that a focus on timeless principles helps unclutter the mind, they are also wary of the pitfalls associated with essentialism in the civil law. It is indeed best to acknowledge the limits of any way of knowing the law that refuses to deviate from the narrow path of abstract rationality.<sup>2</sup> Despite appearances, the civil law tradition has never walked an entirely straight line, consistently making room for local context and even bending substantially to accommodate one or another historical moment or curiosity.<sup>3</sup> It has strayed far enough to include, as well, the occasional conceptual misfit on its otherwise rationalist way forward, including institutions and ideas that challenge the civil law's mythical ambition to "remain a whole with its own cohesion, logic and requirements."<sup>4</sup> There are family heirlooms that

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1. By presenting Louisiana's *droit commun* in a format stripped of distracting observations, case notes, and potted history, Alain A. Levasseur embraces some of this fine pedagogical ideal. See LOUISIANA POCKET CIVIL CODE (Alain A. Levasseur ed., 2014).

2. For an influential account of the sometimes uneasy relationship between method and history for the civil law in the French tradition, see Alain A. Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762 (1969).

3. A nuanced picture of the checkered development of this "explicit rationality in [civil] law" is found in H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 146 (3d ed. 2007).

4. CHRISTIAN ATIAS, FRENCH CIVIL LAW: LE DROIT CIVIL 25 (Alain A. Levasseur trans., 2002).

upset the unity of succession: the *jus ad rem trans personam* that can give real trouble to a lessor, and the rarely trustworthy civilian “fiduciary obligation.” Other such annoyances include the liberty-threatening innominate personal servitude; the abandoned immovable (that perfect patrimonial orphan); the cemetery plot containing, or not, the remains of the dead; materialist ownership that somehow clings to immaterial sources of wealth; as well as the *infans conceptus* and civil death that confound, from start to finish, the law of persons.

Epistemically speaking, these problem concepts are often depicted as exceptions that prove the very rules they might otherwise undermine or, more despairingly, as *sui generis* notions to be contained in order to preserve the rectitude of the general theory of private law.<sup>5</sup> Only occasionally are they championed as opportunities to understand the civil law’s simultaneous penchant for order and tolerance of disorder. This Essay points to the virtue of teaching in a manner that freely acknowledges the occasionally meandering ways and means of the civil law as a modest tribute to the career of the professor celebrated in these pages.

A striking feature of *Louisiana Law of Obligations: A Methodological & Comparative Perspective*,<sup>6</sup> is the authors’ thought-provoking decision to begin the book with a protracted consideration of one of these civilian misfits, the “natural obligation.” One might have expected the atypical natural obligation to be banished to back pages or buried footnotes because it fails to line up with the primary definition of a civil obligation.<sup>7</sup> Not so: the materials on this topic begin on page 5, after a modest two-page presentation of “Obligations: Principles.”<sup>8</sup> The readings on natural

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5. One author provides critical comments on what he characterizes as the “Handicap of French Legal Thinking” by reason of its formalism and its ties to a rigid theory of sources of law. See Christian Atias, *American Legal Culture and Traditional Scholarly Order*, 46 LA. L. REV. 1117, 1119–21 (Alain A. Levasseur ed., 1986).

6. ALAIN A. LEVASSEUR, RANDALL TRAHAN & SANDI VARNADO, *LOUISIANA LAW OF OBLIGATIONS: A METHODOLOGICAL & COMPARATIVE PERSPECTIVE* 1–4 (2013).

7. A leading French textbook on obligations begins its account of the natural obligation—on page 707 of an 856 page treatise—with a challenging opening sentence that refers back to the idea of the civil obligation considered in the preceding 706 pages: “The natural obligation is not truly obligatory; it nevertheless produces some of the effects of the civil obligation. To understand the notion and its rules of application, the natural obligation must be compared to the civil obligation, to which it stands in opposition.” PHILIPPE MALAURIE, LAURENT AYNÈS & PHILIPPE STOFFEL-MUNCK, *LES OBLIGATIONS* 707 (5th ed. 2011) (Author’s translation).

8. LEVASSEUR ET AL., *supra* note 6, at 3–5.

obligations follow a classically civilian format commencing with the codal sources of private law, followed by doctrinal commentary, before turning to the decided cases relating to this profoundly jurisprudential topic.<sup>9</sup> But why, in this superbly high-church setting, should teaching this basic course start with and linger upon the natural obligation?

Even if the Louisiana Civil Code devotes a surprising amount of space to the topic when compared to other codes in the civil law tradition, the natural obligation does seem to be something of an awkward place to start the study of the *vinculum juris*.<sup>10</sup> However juridical, the natural obligation cannot be enforced by action before the courts.<sup>11</sup> If binding on the person who makes it, the natural obligation only holds the debtor to account, as the Louisiana Civil Code once made explicit, “in conscience and according to natural justice.”<sup>12</sup> Yet at the same time, the natural obligation seems much more than a tug at conscience: performance of a natural obligation constitutes, as the civil law dictionaries remind us, payment in law.<sup>13</sup> These apparently contradictory features show that if the natural obligation is not quite a civil obligation, neither is it merely a moral one. Beginning with

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9. This ordering of the texts stands as a symbolic form for the classical methods of legal interpretation in a codified system, plainly the model for civil law teaching that this excellent book promotes. The resolutely civilian countenance of the materials—not a casebook—is to be applauded. The authors are allying themselves with the methods of interpretation that François Gény advanced, where the text of the Civil Code is understood as the non-exclusive center of the “freely scientific search for meaning.” See ALAIN A. LEVASSEUR, *DECIPHERING A CIVIL CODE: SOURCES OF LAW AND METHODS OF INTERPRETATION* 74 (2015).

10. Part of the explanation certainly rests in the considerable place that natural obligations take up in the present Louisiana Civil Code and its antecedents. See Shael Herman, *The Uses of Analogia Iuris in the Louisiana Code of Practice (1825)*, 12.3 ELECTRONIC J. COMP. L. 1, 9–29 (2008).

11. LA. CIV. CODE art. 1761 (2016).

12. LA. CIV. CODE art. 1757 (1870).

13. The definition of “*obligation naturelle*” that Gérard Cornu prepared, as recast by the team of scholars and jurilinguists led by Professor Levasseur, is most helpful:

As opposed to a civil obligation, a natural obligation is one the specific performance of which may not be had from a court, but one whose free and voluntary performance cannot be reclaimed, in as much as it is the fulfillment of a moral duty (gambling debt, duty of maintenance between brothers).

GÉRARD CORNU, *DICTIONARY OF THE CIVIL CODE* 389 (Alain A. Levasseur & Marie-Eugénie Laporte-Legeais et al. trans., 2014) (citations omitted).

this misfit<sup>14</sup> thus seems to highlight the civil law's disorder rather than the orderly grid of abstract rationality that, for so many, is thought of as the legal tradition's fundamental construct.

Confronting first-year law students with the natural obligation at the beginning of their education is, however, no accident. Beyond whatever value is to be had from knowing the technical contours of the natural obligation, the choice serves two special purposes that best justify why an apparent "anomaly"<sup>15</sup> is the right place to start teaching obligations. First, identifying the natural obligation provides an opportunity to teach some of the fundamentals of civilian methodology. Second, because the natural obligation appears to rest on a twin divide—between natural law and positive law on one hand and between common law and civil law on the other—teaching this topic also offers an early chance to introduce problems of legal theory and comparative law that too often are shunted aside in a first-year curriculum. When embraced by teachers like Alain Levasseur, the natural obligation serves as a reminder that the law of obligations is a unique site for learning the civil law.

#### I. CLASSIFICATION OF OBLIGATIONS AND CHARACTERIZATION OF DUTIES

The decision to start teaching obligations with this topic reflects a commitment to methodology that is part of the Louisiana civil law tradition. Emphasizing the natural obligation is designed to help forge, at the start of a student's path in the law, his or her identity as a civilian by placing sources of law, techniques of classification of obligations, and characterization of duties and juridical facts at the core of learning. Teaching the natural obligation involves all of these: What are the sources of obligations? How can they be classified into coherent taxonomies? How are duties characterized so that they can be properly depicted as moral, natural, or civil obligations? The organization of *Louisiana Law of Obligations: A Methodological & Comparative Perspective*, along with

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14. It is perhaps best to acknowledge, as David V. Snyder noted in a rich study of natural obligations in Louisiana law, that scholars are in part drawn to the topic because of the concept's *sui generis* qualities. David V. Snyder, *The Case of Natural Obligations*, 56 LA. L. REV. 423, 424 (1995).

15. French authors Marcel Planiol and Georges Ripert used the word to describe the natural obligation in their *Traité Pratique de Droit Civil Français*, which Levasseur quotes in his translation. LEVASSEUR ET AL., *supra* note 6, at 24 (citing 7 MARCEL PLANIOL & GEORGES RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 314, 316–18 (Paul Esmein rev., 2d ed. 1954)).

the questions asked at the end of each of the proposed readings, show these methodological concerns to be at the heart of the authors' teaching project.<sup>16</sup>

The opening pages devoted to the natural obligation in this student text bear on "Louisiana Sources of Law." The authors give voice to their first-order preoccupation with sources, specifically the necessity of setting the Civil Code apart from decided cases as part of an effort to highlight, from the early days of teaching, the hierarchy of sources of law and centrality of that enactment as a statement of Louisiana's private law of general application.<sup>17</sup> This focus is especially opportune in that reading decided cases will be held out, elsewhere in the curriculum, as the all-important moment for learning the law and cataloguing legal ideas. Moreover, as one scholar with experience teaching in Louisiana and other civil law jurisdictions has convincingly argued, the local jurisprudence itself—perhaps because of a discursive style that reflects judicial method prevalent elsewhere in the United States—tends to deflect attention away from the Civil Code as a source of the law.<sup>18</sup>

Teaching the natural obligation is thus, methodologically speaking, about introducing the sources of the law and presenting students with the special status of a civil code as the primary articulation of private law of general application in this field. As *In re Atkins*,<sup>19</sup> the first case in the readings, makes plain, the Louisiana Civil Code—unlike the codes of France and Quebec—has provided the student with a list of natural obligations that may or may not be closed.<sup>20</sup> The first part of Professor

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16. See, e.g., LEVASSEUR ET AL., *supra* note 6, at 9. Levasseur provides a series of questions for the student-reader to consider, which emphasizes the primary role of legislation, as against judicial pronouncement, in "creating" Louisiana private law. *Id.*

17. The authors object, for example, to a judicial turn of phrase in one of the cases under study suggesting that the courts, not the code, establish what obligations are natural ones. See *id.* at 23.

18. Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe*, 5 J. CIV. L. STUD. 31, 46 (2012) ("When reading cases, students do not get a strong impression that the law is to be found in the code. Few cases offer a clear and full analysis and interpretation of code provisions. Lip service is paid to the code, with the judgments sometimes checking that the code's solution is not contradicted by the cases.").

19. See *In re Atkins' Estate*, 30 F.2d 761 (5th Cir. 1929). The case deals with a parent's moral duty to treat children equally and how that duty is enforceable in Louisiana law. *Id.*

20. Article 1762—and before a reform of the law in 1984–85, article 1758 in the Code of 1870—contrasts with the Civil Code of Québec, for example, which has no such list and where the codal references to the natural obligation are, at

Levasseur's pedagogical design is thus an invitation to his students to locate the place of enactment, as against decided cases, among the sources of the civil law of obligations and—beyond its account of positive law—to understand that the Civil Code is itself a sort of classroom for learning the civil law.<sup>21</sup> He uses the problem of whether the Civil Code establishes a *numerus clausus* of natural obligations to explode the myth of the Code as a complete account of the law. Further, Professor Levasseur encourages students to explore ideas related to the natural obligation in successions, donations, and enrichment without cause to develop codal dexterity and a general understanding of the Civil Code as a coherent expression of Louisiana's "common law."

For the authors, this emphasis on methodology also includes an exercise in the ancient rite of "classification" of obligations, undertaken as part of the scholarly pursuit of organizing the law in the abstract.<sup>22</sup> Obligations may be "scientifically" grouped or classified, of course, according to their object, their intensity, their source, and even according to the differing sanctions that serve to distinguish natural, moral, and civil obligations.<sup>23</sup> Classification is a renowned organizing technique for the civil law generally, and the law of obligations in particular, which civilians understand to be the locus of the most subtle exertions of this kind. These classifications establish taxonomies that structure legal ideas and, eventually, structure the minds of the jurists who work with them. Beyond any role that natural obligations might have in regulating conduct, understanding how and why the concept is to be grouped in a category alongside moral and civil obligations is a reminder that classification is a

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best, a fragmentary account of the law. LA. CIV. CODE art. 1762 (2016); LA. CIV. CODE art. 1758 (1870). On rare occasion, this difference between Quebec and Louisiana has been highlighted by scholars, as in the excellent conspectus on the law of natural obligations in DIDIER LUELLES & BENOÎT MOORE, *DROIT DES OBLIGATIONS* para. 18 (2d ed. 2012).

21. Professor Levasseur thereby evoked the notion of a "pedagogical code," an expression usefully coined by civilian law teacher and scholar Michael McAuley. Michael McAuley, *The Pedagogical Code*, 63 LA. L. REV. 1293, 1299 (2003). McAuley linked the teaching vocation of a civil code to the vibrancy of the civil law tradition in Louisiana and elsewhere. *Id.* This Author expresses gratitude to Professor McAuley for discussions of several points in this Essay.

22. For a rich presentation of the organizational virtues of classification and characterization, with useful comparative commentary, see Michelle Cumyn, *Les catégories, la classification et la qualification juridiques: réflexions sur la systématique du droit*, 52 LES CAHIERS DE DROIT [C. DE D.] 351 (2011).

23. See PHILIPPE JESTAZ, *L'obligation et la sanction: à la recherche de l'obligation fondamentale*, in *MÉLANGES OFFERTS À PIERRE RAYNAUD* 273 (1985).

veritable structure of knowledge in the civil law, and perhaps that it even constitutes law itself.<sup>24</sup>

Sometimes classifications of obligations are otherwise rather useless beyond their organizational role. In an age where the conceptual unity of the obligation is a dominant idea, for example, one wonders why Pothier's notion that obligations should be classified according to their source—contract, quasi-contract, delict, quasi-delict, and the law—retains such currency. And although classifying obligations according to their intensity—obligations of means, result, and warranty—assists in lending order to the messy and conceptually weak field of civil liability, the taxonomy is generally recognized as one achieved *ex post facto*, thereby limiting its prescriptive value. Indeed, classification by intensity has no real ambition to solve problems in advance of an analysis of the facts in any given case. The purpose of the classification, as has been convincingly argued, is thus primarily pedagogical and organizational: “it provides no basis for reasoning in positive law.”<sup>25</sup>

But classifying obligations according to their effects, with emphasis on when and how they are enforceable by the courts, has not only organizational importance but also carries considerable normative ambitions. Theoretically at least, an obligation can be classified according to its effect in advance of its performance or breach. Each of the civil, natural, and moral obligations has its own regime for enforcement, something that certainly cannot be said, at least in the modern law, for obligations divided up according to Pothier's sources. The civil obligation is enforceable before the courts; the effects of natural and moral obligations are, so to speak, less compelling. Voluntary performance of the natural obligation is payment, which is not the case for the moral obligation. The debtor of a natural obligation can, by unilateral act, change an unenforceable obligation into one that is civilly binding.<sup>26</sup> In a word, the classification of obligations according to their effects is *a priori* useful in that such classifications will tell the debtor in advance whether his or her performance is due and, once made, whether payment can be recovered.

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24. For a brilliant exposition of this idea, see Geoffrey Samuel, *Entre les mots et les choses: les raisonnements et les méthodes en tant que sources du droit*, 47 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 509 (1986).

25. CHRISTIAN ATIAS, *ÉPISTÉMOLOGIE JURIDIQUE* para. 309 (2002) (Author's translation). Although one might assume, for example, that the professional duty owed to a client by a lawyer or a notary is one of means, the technical nature of the act performed might reveal, after the fact, that a better characterization of the obligation would be one of result.

26. See, e.g., LA. CIV. CODE art. 1761 (2016).



To classify obligations properly on this axis, however, one must learn to recognize the natural obligation as against its taxonomic partners. Once that division is made, in the minds of the student, between the perfect civil obligation, and the imperfect moral obligation, the range of circumstances in-between in which the natural obligation can arise must be identified. Indeed, the infinite variety and number of moral duties that might weigh on a person's conscience still call for sorting out, in Louisiana and elsewhere. This all requires a distinct effort of *characterization* (in French, "*qualification*").<sup>27</sup> Characterizing obligations requires attention to context, just as in the parallel endeavor of characterizing contracts, where facts are never ignored.<sup>28</sup> Indeed, this facet of civilian methodology, having what has often been described as aspects both practical and scientific, is best understood as a central feature of the civil law of obligations that one must both learn and practice.<sup>29</sup>

This exercise in characterization of duty is generally said to begin with a distinction between the natural obligations flowing from pre-existing civil obligations that are no longer enforceable and those arising in circumstances where no pre-existing civil obligation exists.<sup>30</sup> Examples of the first category include obligations that are extinguished by prescription, invalid for a defect of form, or unenforceable because of a more substantial vice, such as a contract made by an alert but incapable minor.<sup>31</sup> The second category consists of purely moral obligations that, because of their compelling character, are elevated to the status of natural obligations. These obligations are notoriously hard to discern. Even of those types for which there may be some agreement—such as the natural obligation of aliment owed by collateral relations in the immediate family—their precise parameters are ever-changing.<sup>32</sup>

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27. Professor Carbonnier has explained that characterization ("*la qualification*") allows for facts to be organized and placed in legal categories. 1 JEAN CARBONNIER, DROIT CIVIL: INTRODUCTION para. 23 (2004) ("To give a fact or an object the name assigned to it by law is to undertake its characterization." (Author's translation)).

28. On the rootedness of this civilian exercise in factual and theoretical concerns, see generally Alain A. Levasseur, *Sale of a Thing or Letting and Hiring of Industry*, 39 LA. L. REV. 705 (1979).

29. On how the "opération de qualification" is a difficult enterprise that takes years of practice, see ALAIN SÉRIAUX, LE DROIT: UNE INTRODUCTION 225–26 (1997).

30. QUEBEC CIVIL LAW para. 152 (John E.C. Brierley & R.A. Macdonald eds., 1993).

31. See, e.g., LA. CIV. CODE art. 1762.

32. A natural obligation can emerge to fill a fresh gap in the law. An amendment to the Civil Code of Québec that abolished the civil alimentary obligation between grandparents and grandchildren, Civil Code of Québec, S.Q. 1997, c. 28, art. 585 (Can.), may well have given rise to the immediate advent of

Sorting out whether a given set of facts gives rise to a civil, natural, or moral obligation is thus something of a character-building exercise for first-year civilians.<sup>33</sup> The readings that the authors of *Louisiana Law of Obligations: A Methodological & Comparative Perspective* set out suggest that this part of the project of teaching the natural obligation is, for them, a priority. Ultimately, given the limited application of the natural obligation, its pedagogical role in communicating some of the culture of the civil law to students justifies its place in the curriculum. One great scholar of the civil law has written that whatever its role as an instrument of social ordering, the law of obligations has a teaching function that serves to shape the mind of jurists and offer them skills and techniques they will deploy across the discipline.<sup>34</sup> The time and energy the authors devote to the natural obligation in this Louisiana text is a case in point.

## II. NATURAL OBLIGATION AS A COMPASS

In addition to providing students with an opportunity to encounter the categories and techniques used to organize private law—how the law is “mapped”<sup>35</sup> as has been famously said—studying the natural obligation inevitably shows up some of the ethical orientation of the civil law of obligations. By presenting students a chance to chart the precise boundaries between non-binding duties of conscience and obligations that are enforceable before the courts, the natural obligation is itself something of a moral compass for the civilian jurist. To quote a celebrated Louisiana scholar, this study reveals not just law’s mechanical workings but also some of the “soul of [the] law.”<sup>36</sup> The variance in how the natural obligation is welcomed across jurisdictions provides something of a

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a natural obligation to cover the moral duty between relatives in the direct line in the first degree. See LLUELLES & MOORE, *supra* note 20, at 28.

33. For a lively student perspective, written by a Louisiana “merry devil” under Shakespearean cover, see Launcelot Gobbo, *Perfect, Imperfect, and Natural Obligations*, 2 LOY. L.J. 41 (1920).

34. Paul-A. Crépeau, *La fonction du droit des obligations*, 43 MCGILL L.J. 729 (1998).

35. Peter Birks, *Equity and the Modern Law: An Exercise in Taxonomy*, 26 U.W. AUSTL. L. REV. 1, 7 (1996) (where the metaphor of the map, informed in part by classical civil law categories, is deployed by a scholar who might be the common law’s most famous cartographer since Blackstone).

36. Robert A. Pascal, *Louisiana Civil Law and Its Study*, 60 LA. L. REV. 1, 3–7 (1999). Professor Pascal cited several institutions of the civil law that pointed to its moral orientation—principles of unjust enrichment, certain heightened family obligations—to which, in our view, the natural obligation might usefully be added. *Id.*

geographic orientation to the law as well. Often depicted as a characteristically civilian idea, the natural obligation is sometimes said not to exist in the common law, or at least not in a readily recognizable form.<sup>37</sup> Both these moral and comparative dimensions of the topic further explain why the natural obligation is such a rich topic to begin teaching the law.

As to the first of these considerations, the natural obligation certainly introduces a student to the classical jurisprudential challenge of distinguishing between the moral duties that stand outside the law and those obligations that the law chooses to recognize formally. In this sense, the cases and materials placed before the readers of *Louisiana Law of Obligations: A Methodological & Comparative Perspective* do more than set out the law in force. Through technical problems—such as whether a juridical person can feel a moral duty, whether unenforceable moral duties owed to family members can be “novated” by juridical act into civil obligations, and whether a gambling debt of uncertain ethical status can support a natural obligation—teachers can use the topic to raise fundamental issues as to the meaning of law and its right ambitions as matters of legal theory with their students. With the “molding” of the legal mind comes an early opportunity to adopt a critical stance in teaching natural obligations, based on the student’s own conception of what are the right parameters of moral and legal obligations.<sup>38</sup>

In French legal education, the natural obligation is generally encountered by a student in his or her course on “Introduction to Law,” traditionally taught by private law scholars, often professors of the law of obligations. The unspoken idea is that studying law can be usefully introduced using private law as a sort of laboratory, given in particular the importance of the civil code in French legal culture, and its impact on imagining law more generally. In this setting, the natural obligation is not taught for its importance as a problem-solving technique but as a topic in legal theory, principally as a means of introducing the difference between natural law

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37. The expert position is that the common law “rejected” the natural obligation, at least for the law of contract, on the strength of the idea that past consideration cannot be valid consideration. RENÉ DAVID & FRANÇOISE GRIVART DE KERSTRAT, *LES CONTRATS EN DROIT ANGLAIS* 135 (1973). Professor David explained that a person who undertakes to perform a natural obligation receives “nothing” in return at the time the undertaking is made. *Id.* The undertaking cannot therefore be said to rest on a valid consideration for the common law. *Id.*

38. The choice of the natural obligation as an early teaching topic is thus at once an occasion to “mold” and “unmold” the legal mind. On the phenomenon as a healthy approach to law teaching, see Ruth Sefton-Green, *Introduction, in ‘DÉMOULAGES’: DU CARCAN DE L’ENSEIGNEMENT DU DROIT VERS UNE ÉDUCATION JURIDIQUE* 20–21 (Sefton-Green ed., 2015).

and positive law as a basis for social ordering.<sup>39</sup> Where an author's sensibilities for natural law are particularly marked, the treatment of the natural obligation becomes an opportunity to challenge assumptions about the appropriate parameters of legal positivism.<sup>40</sup> The influence of one particularly moralistic book—*La règle morale dans les obligations civiles*<sup>41</sup>—often quoted uncritically, seems to be ubiquitous in the modern literature. The favor with which Professor Ripert's natural law explanation of the law of obligations is received suggests that, contrary to myth, France's much vaunted commitment to state-centered legal positivism may be much weaker than the doctrinal exposition on less spiritual topics in obligations would have us understand. Other scholars are more cautious, seeing the natural obligation as a true middle ground, or at least a "synthesis between law and social values,"<sup>42</sup> or endeavoring to set it apart from duties of "honor"<sup>43</sup> or of "conscience."<sup>44</sup> But the key point is that the natural obligation is taught as a matter of what law is, not merely how obligations work.

The texts of the Louisiana Civil Code seem almost undecided as to whether the natural obligation draws its juridical force from enactment or from a notionally higher authority. Some of the uncertainty can be linked to the challenging idea stated in article 1760, and left unexpressed in the French and Quebec enactments: "A natural obligation arises from circumstances in which the law implies a particular moral duty to render a performance."<sup>45</sup> The Civil Code thus describes the natural obligation so that it might properly be identified, but the normative source of the "particular moral duty" seems beyond legislative grasp. The definition in former article 1758, with its allusion to duties that are binding "according to natural justice," was even bolder in its acknowledgment that the source of the natural obligation, ultimately, was to be traced to some super-eminent, extra-codal principle. One is tempted to think that this aspect of

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39. See, e.g., FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT 16 (7th ed. 2006) (discussing natural obligations).

40. For a particularly high-minded example of this scholarship, see SÉRIAUX, *supra* note 29, at 64–65. He describes natural obligations as "obligations which flow from natural law but that have not yet been positivized." *Id.* (Author's translation).

41. GEORGES RIPERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES 192 (4th ed. 1949).

42. Maud Coudrais, *L'obligation naturelle: une idée moderne?*, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDciv.], July–Sept. 2011, at 453.

43. BERNARD BEIGNIER, L'HONNEUR ET LE DROIT 528 (1995).

44. DOMINIQUE LASZLO-FENOUILLET, LA CONSCIENCE 150 (1993).

45. LA. CIV. CODE art. 1760 (2016).

the law, despite the repeal of the definition, is probably unchanged. In addition, the use of the word “implies” in current article 1760 suggests that the foundation of the natural obligation that the Civil Code recognizes may still be located, at least in part, outside the enactment. Alternatively—and less spiritually—the legislature may prefer to give courts a mere standard for identifying natural obligations rather than constraining them with a fixed rule.<sup>46</sup> In any event, the legislature seems to hint at the interpretive ideal, associated with French authors Raymond Sallieilles and François Gény, of an understanding of law “through the civil code, but beyond the civil code,” a notion that has been influential in Louisiana.<sup>47</sup>

Fundamental issues as to the boundary between law and non-law may also be taken up through the concrete examples raised in the student textbook written by Alain Levasseur and his colleagues. One scholar helpfully described the natural obligation as a civil bond that is *en sommeil*, or asleep,<sup>48</sup> such that a half-conscious debtor or creditor would place the natural obligation on a conceptual middle ground, from the point of view of legal sources, between law and non-binding moral imperative. This idea of the natural obligation in a middle space, associated with France’s great legal sociologist Jean Carbonnier,<sup>49</sup> may be an instance of what Canadian comparatist H.P. Glenn called non-classical logic in legal reasoning.<sup>50</sup> That idea is also echoed in the response of the law of obligations to new commercial arrangements that fail to fit adequately into existing categories. Agreements in commercial matters where the parties purport to bind themselves to one another, but somehow not in law, are a case in point. Sometimes, rather than being simply consigned to the non-legal dustbin, the obligations flowing from these agreements are placed on the same uneasy middle ground of the natural obligation. The honor

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46. On the balance between “rules” and “standards” in Louisiana’s fundamental law, see John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923 (2012).

47. For a Louisiana perspective in English, see John H. Tucker, Jr., *Au-delà du Code Civil, Mais par le Code Civil*, 34 LA. L. REV. 957 (1974) (supporting the recognition of a mineral servitude in the civil law).

48. Mario Rotondi, *Quelques considérations sur le concept d’obligation naturelle et sur son évolution*, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDciv.], Jan.–Mar. 1979, at 1.

49. CARBONNIER, *supra* note 27, at 165.

50. H.P. Glenn, *Choice of Law and Choice of Logic*, in H.P. GLENN & LIONEL SMITH, *LAW AND THE NEW LOGICS* (forthcoming 2016). Professor Glenn argues for a recognition of the logic of the “middle ground” in the law that admits answers other than right and wrong and values other than true or false. This Author is grateful to Professor Smith for the discussion of this point and for providing a draft of this manuscript.

agreement—analyzed helpfully as an atypical obligation, but not completely “ajudicial”—shows, as does the natural obligation, the theoretical weaknesses of the all-or-nothing characterizations.<sup>51</sup> However destabilizing these questions might be for the first-year student, the natural obligation plainly offers a happy opportunity for an early engagement with legal theory at the very start of legal studies.

Alongside these fundamental questions of legal theory, the natural obligation holds a special promise, in a jurisdiction like Louisiana, where students will necessarily be confronted over time with the challenge of imagining law from the perspective of different legal traditions. The authors rightly seize on the peculiarly civilian character of the natural obligation to draw explicit links between Louisiana law and modern French law. Students are introduced to the scholarship of French authors who speak in a voice—conceptually and, thanks to careful civilian translation, lexically—that is wholly recognizable. The purpose is as plain as it is noble: Professor Levasseur and his colleagues seek to identify shared words and shared ideas to locate the Louisiana law of obligations within a continental legal tradition not necessarily beholden to Anglo-American law. At the same time, they disabuse students of the idea that Louisiana law is necessarily a parochial or exclusively inward-looking legal order by inviting comparison with cognate jurisdictions. Finally, by insisting through the pages of their book on a rigorous use of civilian vocabulary in English, the authors gently show readers that the law’s language and its sources are linked. The insistence on using civilian English is properly understood as an encouragement for students to understand the tradition-specific influences on the law in the “mixed” legal jurisdiction in which they study.<sup>52</sup>

Later in their careers—Louisiana jurists often have far-flung destinies—Alain Levasseur’s first-year students may wonder why so little is said about the natural obligation in the common law. Here, their professor’s “open window” to comparison, to invoke Vernon Palmer’s helpful idea for the intellectual opportunities offered to jurists working in

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51. The debate in Quebec law as to whether a new category of ajudicial obligations exists alongside moral, civil, and natural obligations to accommodate honor pacts or “gentlemen’s agreements” is already rich and spirited. See JEAN-LOUIS BAUDOIN ET AL., *LES OBLIGATIONS* 41–42 (Yvon Blais ed., 6th ed. 2013); Jean-Guy Belley, *Les ‘obligations ajudiciaires’: Les oubliés du Code civil?*, in *LES OUBLIÉS DU CODE CIVIL DU QUÉBEC* 148–49 (Vincent Caron et al. eds., 2014).

52. Much of Alain Levasseur’s comparative law scholarship is devoted to this topic. For a rich overview, see Alain A. Levasseur & Vicenç Feliú, *The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware!*, 69 *LA. L. REV.* 715 (2009).

a mixed jurisdiction, will prove invaluable.<sup>53</sup> In a sense, a common lawyer without civilian sensibilities might entirely miss the natural obligation as manifested, for example, in the law of unjust enrichment and restitution.<sup>54</sup> Long ago, Lord Mansfield, a cosmopolitan judge with a culture in Scots law and Roman law,<sup>55</sup> famously raised the natural obligation in *Moses v. MacFerlan*.<sup>56</sup> Yet the natural obligation has faced steady resistance in common law circles over the years, explained by some critics as the failure to see the roots of the idea in natural justice that are so plain to a civilian.<sup>57</sup> One assumes that, wherever they practice law, students of the Louisiana law of obligations will not likely fall prey to that narrow view.

One question remains as to how and when teachers and students should take the comparative turn for the natural obligation and the materials that follow in their course on obligations. Is it best to teach the natural obligation to civilians in a resolutely civilian mode, thereby allowing the genius of the civil law and its language to make its impression fully on the first-year student before, in some upper-year setting, he or she contends with the competing perspective in the common law? Is it pedagogically more defensible to teach the natural obligation in both traditions at once, in a “transsystemic”<sup>58</sup> mode, where the common law and the civil law are integrated notwithstanding their differences in ideas, language, history, and

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53. Writing in particular about comparative exchanges between jurists working in mixed jurisdictions, Professor Palmer evoked “a method which opens windows in the closed laboratories of comparative law.” Vernon Valentine Palmer, *Saliency and Unity in the Mixed Jurisdictions: The Papers of the World Congress*, 78 TUL. L. REV. 1, 4 (2003).

54. McInnes provides an excellent comparative analysis, presented as a means in which to show the common lawyer a civilian way forward. Mitchell McInnes, *Natural Obligations and Unjust Enrichment*, in EXPLORING PRIVATE LAW 175 (Elise Bant & Matthew Harding eds., 2010).

55. On his cosmopolitanism in law, see NORMAN S. POSER, LORD MANSFIELD: JUSTICE IN THE AGE OF REASON 42–43 (2013).

56. *Moses v. Macferlan* (1760) 97 Eng. Rep. 676, 680–81 (K.B.); 2 Burr 1005, 1011–12. Lord Mansfield wrote that restitution is barred “for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law.” *Id.* at 680. He gave examples that, with hindsight, seem drawn from the not yet enacted Louisiana Civil Code.

57. See, e.g., Tang Hang Wu, *Natural Obligations and the Common Law of Unjust Enrichment*, 6 OXFORD U. COMMW. L.J. 133, 146–51 (2006).

58. For the perspective of a scholar who teaches civil law and common law obligations together, in an integrated manner, to first year-students in Quebec, see Rosalie Jukier, *Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom*, 50 MCGILL L.J. 789 (2005).

setting? Perhaps no single answer to these questions exists, even within the family of mixed jurisdictions, where varying social, linguistic, and cultural circumstances all have an impact on choices made in the classroom and at play in the curriculum in any given law faculty.<sup>59</sup> What is plain, however, is that the topic of natural obligations has immense potential for comparative legal studies.

#### CONCLUSION

It may well be true to say that “Gaius has never really been lost from view,”<sup>60</sup> but teaching the modern law of obligations from classical texts, along the lines suggested by the title of this paper, is not a realistic teaching plan for most.<sup>61</sup> But starting one’s legal education with a study of the natural obligation, with reference to venerable civilian sources, may well have special pedagogical virtues. And although the experts may quibble as to whether this justifies teaching Gaius,<sup>62</sup> the ancient traditions can plainly influence a civilian teaching style that remains effective today.

Students, naturally enough, celebrate teachers who bring certainty to a curriculum that, on first encounter, seems so complex that it defies understanding. First-year law students crave clarity more than most, and one can well understand the professorial temptation to stay away from anomalies like the natural obligation. Yet good teachers are prepared to acknowledge that, here and there, the law itself is likely to be as chaotic as the messy world it purports to represent. They welcome the chance to teach the misfits on that basis. Alongside the spare rules in a pocket code designed to make things simple, the study of law should always leave room for an inquiry into the occasionally maladroit ways and means of legal knowledge. For the very

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59. For a sign of the importance of civil law culture in the history of the law school at the Paul M. Hebert Law Center at Louisiana State University, see Paul R. Baier, *100 Years of LSU Law, 1906–2006: A Centennial Gloss*, 67 *LA. L. REV.* 289 (2007). Professor Baier, a constitutional law scholar who acknowledges the civil law’s imprint on his own work, provides an engaging historical sketch of the civil law at LSU Law.

60. Donald R. Kelley, *Gaius Noster: Substructures of Western Social Thought*, 84 *AM. HIST. REV.* 619, 619 (1979).

61. One is inclined nevertheless to celebrate teachers like Alain Levasseur whose own learning in the field extends to Roman sources. See ALAIN A. LEVASSEUR, *COMPARATIVE LAW OF CONTRACTS: CASES AND MATERIALS* 3 (2008) (commencing with quotations from Justinian and Gaius).

62. The Author makes no claim as to the proper attribution of origins of the natural obligation to Gaius or another, content to leave that matter to the experts. See, e.g., PHILLIP LOUIS LANDOLT, *NATURALIS OBLIGATIO AND BARE SOCIAL DUTY* 182–85 (2000).



best teachers—like the one feted in these pages—it is something of a duty that is binding in conscience and according to natural justice.