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## The Case of Natural Obligations

David V. Snyder\*

In the twilight land of natural obligations,<sup>1</sup> suspended between the familiar realm of positive law on one side and the nether world of natural law on the other, starting with a working definition is probably a prudent step toward firmer ground. A "natural obligation" may be defined as an obligation that does not give rise to an action to enforce it, but that does have some cognizable legal effects. Natural obligations provide an odd instance where a creditor does have a right without a remedy, or at least the traditional remedy. This distinction—the lack of an action—is what separates natural obligations from more familiar civil obligations,<sup>2</sup> which are perfect in their recognition by the law.

Even without the traditional remedy, however, natural obligations are not bereft of legal effects. That the law grants them some grudging recognition is what separates natural obligations from obligations that lie purely in the moral realm. These obligations, sometimes called "moral" or "imperfect" obligations, have no effect at law. For example, the obligation to help a feeble fellow citizen cross a busy intersection may be binding in "the forum of the conscience,"<sup>3</sup> but that duty garners no recognition in the eyes of the law. In an attempt to avoid confusion, this Essay will refer to such obligations as "philosophical obligations." The other terms sometimes used for such obligations have second meanings that are similar to the meaning of "natural obligation," which hardly seems helpful when using a phrase to denote obligations that are distinct from natural obligations. (The closest common-law equivalent to a natural obligation is called a "moral obligation,"<sup>4</sup> and the closest German equivalent is sometimes referred to as an "imperfect

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1. See Georges Ripert, *La Règle Morale dans les Obligations Civiles* § 186, at 385 (1935) (with respect to natural obligations, "[w]e are in a nether region of the law" between night and day) (my translation).

2. This Essay will refer to obligations accorded full recognition by the law as "civil obligations," as is commonly done. As used here, the term "civil obligation" should not be confused with the law governing only Roman citizens. See *infra* notes 8-10 and accompanying text (discussing the *ius civile*).

3. The phrase comes from Robert Joseph Pothier, *A Treatise on the Law of Obligations* 2 n.(a) (William D. Evans trans., London, A. Strahan for Joseph Butterworth & J. Cooke 1806) ("*le for de la conscience*").

4. E.g., Restatement (Second) of Contracts § 86 cmt. a (1981). See generally *id.* §§ 82-94.

obligation."<sup>5</sup>) Although the point is obvious, it is important to note explicitly at the outset that not all philosophical obligations are natural obligations.<sup>6</sup>

As should be apparent from this brief introduction to natural obligations, they are *sui generis*. This unique character is the foundation of their appeal for scholars<sup>7</sup> and is part of the reason that examining them sheds additional light on the Romanist tradition in Louisiana. Their exceptionally close tie to natural law is part of the basis for the parallels between the Roman and Louisiana law of natural obligations. There are also obvious parallels in the substantive law of natural obligations in both the Roman and Louisiana systems, including the particular natural obligations recognized and the effects accorded to them. In addition, because of the relation of natural obligations to concepts of natural law (as applied to particular facts), parallels in the legal method of Rome and Louisiana can be detected to an unusual degree, even in the mixed regime found in Louisiana. For the recognition of natural obligations has been an invitation to the courts to create law, much as the men charged with administering the law in Rome were largely responsible for the development of private law quite apart from any action by a legislator or legislature.

#### I. THE PARALLEL DERIVATION OF NATURAL OBLIGATIONS IN ROMAN AND LOUISIANA LAW: THE ROLE OF NATURAL LAW

As implied by its name, the Roman institution of the natural obligation, or *obligatio naturalis*, "was a direct result of the conception of *ius naturale*"<sup>8</sup> and

5. 1 Saúl Litvinoff, Obligations § 329, in 6 Louisiana Civil Law Treatise (1969) [hereinafter Litvinoff]. Professor Litvinoff's 1969 treatise contains a magisterial treatment of natural obligations, including comparatist discussions. Unfortunately, the discussion of natural obligations in the current edition of the treatise is not as thorough. See 1 Saúl Litvinoff, Obligations §§ 2.1-.45, in 5 Louisiana Civil Law Treatise (1992).

6. See generally Carey J. Ellis, Jr., Note, *Contracts—Distinction Between Natural and Moral Obligations*, 17 Tul. L. Rev. 310 (1942).

7. Natural obligations have long received the attention of Continental writers. E.g., Pierre Cornioley, *Naturalis obligatio: Essai sur l'origine et l'évolution de la notion en droit romain* (1964); Giovanni E. Longo, *Ricerche sull' "Obligatio Naturalis"* (1962); Marcel Planiol, *L'assimilation progressive de l'obligation naturelle et du devoir moral*, 42 *Revue critique de législation et de jurisprudence* 152 (1913). Louisiana authors have also written on the subject. E.g., Fontaine Martin, Jr., *Natural Obligations*, 15 Tul. L. Rev. 497 (1941); Ernest G. LaFleur, Jr., Comment, *Natural Obligations*, 12 La. L. Rev. 79 (1951); John P. Woodley, Note, *Natural Obligations—Sufficiency As Consideration*, 7 La. L. Rev. 445 (1947).

8. W.W. Buckland & Peter Stein, *A Text-Book of Roman Law* § 20, at 55 (1963). One might debate this point, and indeed it was debated to some extent at the colloquium. Given the very name "*obligatio naturalis*," it would seem difficult to quarrel over whether there is at least some link between the Roman conception of natural obligations and the *ius naturale*, and I do not believe that any of the participants would do so. Buckland's statement, then, can be taken at face value. Undoubtedly, however, some natural obligations are so called but would not be recognized by the *ius naturale*, especially those dealing with the obligations of slaves. If the *ius naturale* would not recognize slavery, it could hardly provide that slaves' transactions would only have the limited effects of natural obligations.

its close cousin, the *ius gentium*.<sup>9</sup> The *ius naturale*, or natural law, is a slippery concept, especially for the modern grasp. Even the Romans used the phrase *ius naturale* in several different senses. The concept might best be defined by what it is not. The *ius civile* is the law that applied to Roman citizens. The *ius gentium*, on the other hand, is comprised of the rules that apply to everyone, regardless of their citizenship. Although the *ius naturale* and the *ius gentium* are close cousins, they are quite distinct. The *ius naturale*, in the sense that is relevant for purposes of this Essay, might be considered the law that should, ideally, apply to everyone. The example of slavery provides a neat illustration: in the Roman mind slavery was a fact, and was recognized everywhere by the law. It was thus an institution of the *ius gentium*. Because the Romans conceived of people as naturally free, however, slavery was not a part of the *ius naturale*.<sup>10</sup>

Like the Romans, the Louisiana law has linked natural obligations with natural law. The Civil Code article in effect from 1825 to 1984 read, "A natural obligation is one which can not be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice."<sup>11</sup> The reference in the Code to "natural justice" is only the slightest step from "natural law," or *ius naturale*.

That the Louisiana Civil Code would expressly refer to natural law is remarkable.<sup>12</sup> The Civil Code in particular and the civil law in general emphasize the will of the legislature, and thus positive law, as opposed to sources so ineffable as natural law.<sup>13</sup> Moreover, the Code in eschewing philosophical obligations underscores that obligations must be recognized by the positive law if they are to be accorded any legal cognizance: "If the duty created

9. Digest of Justinian [Dig.] 50.17.84.1 (Paul, *Quaestionum* 3).

10. Dig. 12.6.64 (Tryphoninus, *Disputationum* 7). See generally Barry Nicholas, *An Introduction to Roman Law* 54-55 (1992).

11. La. Civ. Code art. 1750(2) (1825); La. Civ. Code art. 1757(2) (1870). This Essay ignores minor differences in punctuation between the 1825 and 1870 provisions.

The English quoted in the text is the official translation of the original French: "*L'obligation naturelle est celle qui, sans donner un droit d'action, lie la partie qui l'a contractée, dans le for de la conscience, et selon la justice naturelle.*" La. Civ. Code art. 1750(2) (1825). This article appears to come from Pothier. Litvinoff, *supra* note 5, § 339. See *supra* note 3 and accompanying text.

12. Recognition by the Code might be distinguished from the recognition of moral rights by courts or doctrinal writers. See generally Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights*, 69 Tul. L. Rev. 935, 938-39 (1995) (*droit moral*, recognizing authors' and artists' rights in intellectual property, was judicially created on the Continent).

13. Under the current Code, legislation and custom are the sources of the law, and legislation is the more important. See La. Civ. Code arts. 1-3. Previous Louisiana Codes had similar provisions. La. Civ. Code arts. 1-2 (1870); La. Civ. Code arts. 1-2 (1825). Under the 1825 and 1870 Codes, a judge could resort "to natural law and reason, or received usages" only when the positive law was silent. La. Civ. Code art. 21 (1870); La. Civ. Code art. 21 (1825) ("*la loi naturelle et à la raison, ou aux usages reçus*"). The possibility of an appeal to natural law has been entirely eliminated from the current Code. La. Civ. Code art. 4 cmt. (b).

by the obligation operates only on the moral sense, without being enforced by any positive law, it is called an imperfect obligation, and creates no right of action, nor has it any legal operation."<sup>14</sup> Even within the context of Louisiana law generally, the natural obligation is an unusual creature.

From a wider perspective, this Code article is also noteworthy. It was enacted in the wake of a prominent American debate on natural law. The role of natural justice had been expounded by Justice Chase as an important limit on legislative power.<sup>15</sup> Justice Iredell at the time rejected such notions as too "speculative."<sup>16</sup> Justice Iredell's view seemed to prevail in *Marbury v. Madison*, when the existence of written, positive law was used to justify the power of judicial review, implicitly rejecting the notion that the Supreme Court would apply unwritten natural law concepts to strike down a legislative act.<sup>17</sup> Although Supreme Court opinions continued to allude to natural law concepts, the Court seemed to be moving away from them and generally resisted basing a holding on such principles.<sup>18</sup> In this context, Louisiana's apparently unhesitating adoption of natural justice as an explicit source for obligations is not only remarkable but also emphasizes that the Louisiana redactors' eyes were firmly fixed on well-established Romanist ideas.

The 1984 revision<sup>19</sup> of the obligations articles alters the wording of the relevant provision on natural obligations, but the rewording does not appear to reflect a substantial, if any, change in theory. "[M]oral duty"<sup>20</sup> is now cited as the source for natural obligations, instead of "natural justice." The change in the reference follows the language employed by modern doctrinal writers,<sup>21</sup> but the distinction between obligations founded on moral duty, as opposed to natural justice, is difficult to discern. In these modern times, which are especially skeptical of natural law and similar ephemeral concepts,<sup>22</sup> the connection of

14. La. Civ. Code art. 1750(1) (1825); La. Civ. Code art. 1757(1) (1870). The French reads, "Si le devoir créé par l'obligation n'est recommandé que par la morale, et n'est imposé par aucune loi positive, il est appelé obligation imparfaite, laquelle ne donne aucun droit d'action, et ne produit aucun effet légal." La. Civ. Code art. 1750(1) (1825).

15. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-89 (1798) (Chase, J.).

16. *Id.* at 398-99 (Iredell, J.).

17. 5 U.S. (1 Cranch) 137, 176-80 (1803) (Marshall, C.J.).

18. Compare, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.) ("certain great principles of justice, whose authority is universally acknowledged") with *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413-14 (1829) (Washington, J.) (declining to follow *Fletcher*). See generally David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* ch. 5 (1985).

19. See 1984 La. Acts No. 331, § 1 (codified at La. Civ. Code arts. 1760-1762).

20. La. Civ. Code art. 1760.

21. *Id.* cmt. e (citing Planiol, *supra* note 7; Ripert, *supra* note 1).

22. As mentioned above, the current Civil Code eliminated the reference to natural law in the Preliminary Title because "[t]he term 'natural law' . . . has no defined meaning in Louisiana jurisprudence." La. Civ. Code art. 4 cmt. b. Indeed, even a United States Supreme Court Justice's nomination was cast in doubt because of his supposed belief in natural law. See, e.g., Joseph R.

these Louisiana provisions to natural-law concepts betrays the ancient Roman heritage of this part of the law.

## II. PARALLELS IN THE SUBSTANTIVE LAW OF NATURAL OBLIGATIONS IN LOUISIANA AND ROME

### A. *The Obligations Recognized as Natural Obligations*

That not every obligation binding in conscience is recognized even as a natural obligation is an obvious point, but it gives rise to a difficult question. Which ones should gain recognition by the law? Legal systems have been occupied for millenia in determining the criteria to distinguish different kinds of obligations: those accorded the full status of a civil obligation, the partial status of a natural obligation, or the complete lack of status of a philosophical obligation. The question remains an important one for modern legal regimes as well.<sup>23</sup> Aside from the impossibility of knowing the precise content of the natural law, not all obligations that would be recognized in the ideal world of the natural law could be recognized as natural obligations, under the applied law of either Rome or Louisiana. The law must therefore choose which obligations to recognize. The obligations that the Roman and Louisiana systems recognize as natural obligations are strikingly similar.

#### 1. *Natural Obligations Recognized at Roman Law*

The list of natural obligations recognized in Roman times was gradually formed and is distinctly haphazard, but most of the major natural obligations that came to be recognized might be divided into the following groups. The reason for the groupings, and the rationale for which obligations are placed in each group, will become apparent in the next section, which considers the obligations recognized by the Louisiana Civil Codes.<sup>24</sup>

The natural obligations most typical of Group I are those that arise from certain nude pacts, or promises lacking the requisite formalities. Not every *nudum pactum* created a natural obligation, but some did.<sup>25</sup> Examples of nude

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Biden Jr., *Law and Natural Law: Questions for Judge Thomas*, Wash. Post, Sept. 8, 1991, at C1; Robert P. George, *Judges and Natural Law*, Wash. Post, Aug. 12, 1991, at A17.

23. For a discussion of one of these questions with respect to Louisiana law, see generally *Contracts*, *supra* note 6.

24. Others have also classified natural obligations. *E.g.*, 1 Friedrich von Savigny, *Le Droit des Obligations* §§ 9-11 (Paris, Auguste Durand 1863). The reasons for those classifications are different from the purposes of this Essay, and the categorization employed here therefore differs from previous classifications.

25. Buckland & Stein, *supra* note 8, § 189(c), at 553.

pacts that resulted in natural obligations are pacts for interest on a loan<sup>26</sup> and a slave's naked promise to pay her master for her liberty.<sup>27</sup> Other natural obligations that might be classified in Group I are the result of rules of law that extinguished civil obligations in certain situations but that left a natural obligation instead. A few instances will demonstrate the point: After a plaintiff brought his case, the civil obligation supporting the claim was often extinguished, and the right of action substituted for the old obligation. This stage of litigation was called *litis contestatio*.<sup>28</sup> If some impediment to final judgment arose, however, the plaintiff could collect neither under the old obligation nor the suit. In at least some cases a natural obligation survived, as when the plaintiff lost through a procedural error.<sup>29</sup> A natural obligation also remained when the judge's error deprived the plaintiff of a remedy.<sup>30</sup>

A natural obligation could also survive when a civil obligation was extinguished by a person's change in status. For instance, if a person were adopted or emancipated, he would undergo a change in civil status or *capitis deminutio minima*.<sup>31</sup> In such a case, natural obligations could replace civil obligations that were lost as a result of the change in status.<sup>32</sup> Similarly, civil obligations that were lost by confusion (the merger of debtor's and creditor's rights in one person) could leave a natural obligation.<sup>33</sup>

Group II includes the earliest natural obligations recognized by the Roman law.<sup>34</sup> Members of the same family, that is, those *in potestate*, could not enter into civil obligations with each other, but the law recognized a natural obligation in such situations.<sup>35</sup> In addition, as a result of abuses by a certain Macedo, the *Senatusconsultum Macedonianum* prohibited a son *in potestate* from contracting a monetary loan.<sup>36</sup> The son was still naturally obligated to repay such a loan,

26. Dig. 46.3.5.2 (Ulpian, Ad Sabinum 43). See also *infra* note 52 and accompanying text.

27. See Dig. 16.1.13 (Gaius, Ad Edictum Provinciale) (the slave's natural obligation is necessary to support the accessory *expromissio*).

28. W.W. Buckland, A Manual of Roman Private Law § 167, at 401-02 (2d ed. 1939).

29. See Dig. 20.1.27 (Marcellus, Dig. 5) (the natural obligation would support extraordinary remedy granted by praetor). See also *infra* note 61.

30. Dig. 12.6.28 (Paul, Ad Edictum 32); Dig. 12.6.60 (Paul, Quaestionum 3).

31. Buckland, *supra* note 28, § 32, at 85. The change was only "*minima*" because it involved a mere loss of family rights; greater losses, such as loss of liberty, could result in *capitis deminutio maxima* or *media*. *Id.*

32. Buckland & Stein, *supra* note 8, § 189(i), at 553-54.

33. *Id.* at 554. Whether *confusio* resulted in a natural obligation is subject to some doubt, however, as are some of the other instances mentioned in the text. *Id.*

34. Great debate has raged over when Roman law first recognized natural obligations. The bibliography in Cornioley, *supra* note 7, lists the most prominent contestants in the debate. The consensus seems to be that the earliest natural obligations were recognized in the classical period sometime after Labeo. Buckland & Stein, *supra* note 8, § 189, at 552, 554 & nn.6-7. (Labeo lived during the reign of Augustus. Hans J. Wolff, Roman Law: An Historical Introduction 104 (1951).)

35. Dig. 4.5.2.2 (Ulpian, Ad Edictum 12); Dig. 12.6.38 (Africanus, Quaestionum 9).

36. Dig. 14.6.1 (Ulpian, Ad Edictum 29).

however.<sup>37</sup> Others were similarly situated: *Pupilli* who were past the age when they could not reason but who still were not endowed with complete capacity<sup>38</sup> were able to contract but required the approval or *auctoritas* of a guardian if they could be put in a worse position.<sup>39</sup> Thus, *pupilli* who lacked *auctoritas* and who did not profit were not subject to a civil obligation, but a natural obligation did result from the transaction.<sup>40</sup> *Minores* (under twenty-five)<sup>41</sup> appear to have been similarly situated.<sup>42</sup>

The law relating to slaves, which has been the subject of much learned discourse at the colloquium,<sup>43</sup> also provides a particularly interesting example of natural obligations in Group II. Slaves could be highly educated in Roman times, and such slaves commonly engaged in commerce for the benefit of their masters. They could well be charged with the management of large businesses.<sup>44</sup> Eventually, as a result of praetorian reforms, their transactions could result in the civil obligation of the master to the extent of the fund (called the *peculium*)<sup>45</sup> that slaves might be given for their own account, but the ownership of which remained in the master.<sup>46</sup> The existence of the *peculium* in this circumstance made slaves particularly useful for engaging in commerce because limited liability trading (liability being limited to the *peculium*) was thus possible centuries before the creation of the corporation.<sup>47</sup> As might be imagined, however, slaves' transactions were not always limited to the *peculium*, and the fact that the law considered the slave to have contracted a natural obligation could therefore become significant.<sup>48</sup>

37. Dig. 12.6.40 (Marcian, Regularum 3); Buckland & Stein, *supra* note 8, § 163, at 466, and § 189, at 553.

38. Originally the time that the child became capable of reasoning was a question of fact to be settled on a case-by-case basis, but the later law set the age at seven. Nicholas, *supra* note 10, at 93.

39. *Id.*

40. Dig. 36.2.25.1 (Papinian, Quaestionum 18); Dig. 46.3.95.4 (Papinian, Quaestionum 28). *But see* Dig. 12.6.41 (Neratius, Membranarum 6).

41. Dig. 46.3.95.3 (Papinian, Quaestionum 28).

42. Buckland & Stein, *supra* note 8, § 189(f), at 553.

43. *See* Judith Kelleher Schafer, *Roman Roots of Louisiana's Slave Law*, 56 La. L. Rev. 409 (1995); Vernon V. Palmer, *Roman Law Foundations of the Code Noir*, 56 La. L. Rev. 363 (1995); Hans Baade, *The Bifurcated Romanist Tradition of Slavery in Louisiana*, 70 Tul. L. Rev. (forthcoming May 1996).

44. Nicholas, *supra* note 10, at 70.

45. Dig. 15.1.41 (Ulpian, Ad Sabinum 43).

46. Nicholas, *supra* note 10, at 202. Slaves' transactions could also be binding on the master when the master expressed his consent to the contracting party. *Id.*

47. *See id.*

48. Dig. 12.6.13 (Paul, Ad Sabinum 10); Dig. 15.1.50.2 (Papinian, Quaestionum 9); Dig. 44.7.10 (Ulpian, Ad Sabinum 47); Dig. 45.1.126.2 (Paul, Quaestionum 3); *see* Dig. 46.1.35 (Paul, Ad Plautium 2); Dig. 44.2.21.4 (Pomponius, Ad Sabinum 31); *see also* Dig. 12.6.64 (Tryphoninus, Disputationum 7) (master can contract natural obligation to his slave). *See generally* Buckland & Stein, *supra* note 8, § 189(a), at 552. In assessing some of the cited Digest provisions, one must remember that accessory obligations could exist in these cases only if a natural obligation would support them, as a civil obligation would be lacking. *See also infra* note 64 and accompanying text.

The list may be rounded out with the addition of a third "group," although Group III consists of only one item. A claim at Roman law might be barred by time. In that case, the civil obligation thus extinguished could leave in its place a natural obligation.<sup>49</sup> With this example, the classification of the most salient<sup>50</sup> natural obligations recognized at Roman law is complete, and we turn to the natural obligations recognized by Louisiana.

## 2. *Natural Obligations Recognized by Louisiana Law*

From 1825 to 1984, the Louisiana Civil Code had one article governing what natural obligations would be recognized. It listed four "kinds" that would be accorded legal cognizance:

Natural obligations are of four kinds:

1. Such obligations as the law has rendered invalid for the want of certain forms or for some reason of general policy, but which are not in themselves immoral or unjust;
2. Such as are made by persons having the discretion necessary to enable them to contract, but who are yet rendered incapable of doing so by some provision of law;
3. When the action is barred by prescription, a natural obligation still subsists, although the civil obligation is extinguished;
4. There is also a natural obligation on those who inherit an estate, either under a will or by legal inheritance, to execute the donations or other dispositions which the former owner had made, but which are defective for want of form only.<sup>51</sup>

49. Buckland & Stein, *supra* note 8, § 189, at 554. Professor Hans Ankum also noted the parallel between Roman and Louisiana law with respect to the natural obligation resulting from prescription when he delivered his paper, *Historical Origins of the Louisiana Law of Contracts*, at the colloquium.

50. The list enumerated here is not exhaustive; natural obligations that are of relatively little importance, or that shed no light on Louisiana law, have been omitted.

51. La. Civ. Code art. 1751 (1825); La. Civ. Code art. 1758 (1870). The original French version reads:

*Les obligations naturelles sont de quatre sortes:*

1. *Celles que la loi a défendues ou déclarées nulles par défaut de forme ou par quelque raison de bien public, mais qui en elles-mêmes ne sont pas immorales ou injustes;*
2. *Celles qui sont faites par des personnes qui ont assez de raison pour pouvoir contracter, mais que la loi n'en a pas encore rendues capables;*
3. *Celles dont le droit d'action est éteint par la prescription, mais qui subsiste encore dans le for de la conscience après cette extinction;*
4. *Celles des héritiers légitimes ou testamentaires, qui, dans le for de la conscience, doivent exécuter les donations ou autres dispositions de leur prédécesseur, qui ne sont nulles que par défaut de forme.*

La. Civ. Code art. 1751 (1825). Professor Litvinoff has found the influence of Toullier in this provision. Litvinoff, *supra* note 5, § 339, at 592 & n.9 (citing 3 Toullier, *Le Droit Civil Français Suivant l'Ordre du Code* 467-74 (1833)). I regret not having access to a sufficiently early edition of Toullier in order to verify his influence on the 1825 version of the Code.

The rationale behind the groups listed in the previous section should now be clear. Paragraph 1 of the cited Code article concerns obligations that would be civil obligations, except for some rule of law that prevents the formation of a civil obligation for policy reasons. A nude pact provides a literally classic example, and the Louisiana courts even recognized a natural obligation to pay interest not stipulated, precisely as the Romans did.<sup>52</sup>

The other natural obligations listed in Group I—those resulting from *litis contestatio*, *capitis deminutio*, and *confusio*—also fit within the parameters of paragraph 1. Without the rules extinguishing the civil obligation in *litis contestatio*, *capitis deminutio*, and *confusio*, serious legal and analytical problems would arise. To take the example of *litis contestatio*, the law could hardly provide both a right of action and a civil obligation giving rise to another right of action, and the original civil obligation was therefore extinguished for a reason of general policy having nothing to do with immorality. A similar analysis can be applied to *capitis deminutio* and *confusio*: civil obligations were extinguished for reasons of general policy, but natural obligations subsisted. These natural obligations, recognized by the Roman law, were the precursors to the natural obligations recognized by paragraph 1.

Group II and paragraph 2 also match, as do Group III and paragraph 3. The examples listed in Group II, involving family members, minors, slaves,<sup>53</sup> and *pupilli*, consist of persons who have the factual capacity to reason but not the legal capacity to contract, at least in the circumstances enumerated above. And "Group" III is precisely the same situation as paragraph 3: when a civil obligation is extinguished by prescription, the natural obligation remains.

So far as we have been able to discover, paragraph 4 had no exact counterpart in Roman law. Interestingly, the situation is recorded in Roman literature outside the realm of the law; Pliny addressed the situation in two of his letters. In one, the testator had failed to confirm codicils to his will, but Pliny emphasized the importance of observing the wishes of the decedent, even if the statement of those wishes was legally void.<sup>54</sup> In the second situation, the testator had attempted a donation that was legally void, but Pliny promised to pay his share anyway.<sup>55</sup> Even aside from Pliny's extra-legal practice, paragraph 4 of the Louisiana law does not represent a major departure. It is essentially the

52. *Garland v. Lockett*, 5 Mart. (n.s.) 40, 41-42 (La. 1826).

53. We did not discover any cases involving natural obligations of slaves under Louisiana law. The Code does not strictly prohibit such a result, and the antebellum laws recognized the concept of the *peculium*. Schafer, *supra* note 43, at 412; Palmer, *supra* note 43, at 380. The lack of cases dealing with the scenario is not surprising. Slaves played a far different role in Louisiana than in Rome. Schafer, *supra* note 43, at 410. As Professor Nicholas observed, "The labourer on the plantation provides little scope for the private law. It is quite otherwise with the manager of a large business." Nicholas, *supra* note 10, at 70.

54. Pliny, Letter [Ep.] 2.16. I would like to thank Professor Dennis Kehoe for the references to and explanations of Pliny's letters.

55. *Id.* 5.7; see also *id.* 4.10.

same situation as in paragraph 1, but the natural obligation lies in the heir or legatee instead of the testator.

The four kinds of natural obligations discussed above remained the law of Louisiana until the revision of 1984.<sup>56</sup> The revision refined the law but left its essence intact.<sup>57</sup> Instead of listing the kinds of obligations, the Code now provides a generic article: "A natural obligation arises from circumstances in which the law implies a particular moral duty to render a performance."<sup>58</sup> Examples are given, including the cases of the obligation extinguished by prescription, the obligation incurred by one endowed with discernment but lacking capacity, and the natural obligation of heirs and legatees to fulfill void dispositions. The Louisiana law, as it has been exposed above, remains the same.<sup>59</sup>

The natural obligations recognized by Louisiana, then, are hardly identical to those recognized by Rome. The influence of the Roman law, though, is easy to detect in the natural obligations that were recognized by the Code for over 150 years, and they continue as viable natural obligations after the revision. This aspect of the Louisiana law owes a significant debt to Roman forebears, as does the law that governs the effects of natural obligations.

### B. The Effects of Natural Obligations

At Roman law, different natural obligations could produce different effects.<sup>60</sup> The one effect that was definitely common to all was that a payment made on account of a natural obligation could not be recovered; to put it in Roman terms, no *condictio indebiti* lay.<sup>61</sup> As a corollary, the Romans considered amounts transferred because of a natural obligation a payment.<sup>62</sup> Roman law also allowed at least some natural obligations to support accessory obligations like suretyship and pignorative contracts.<sup>63</sup> Natural obligations

56. See 1984 La. Acts No. 331, § 1 (codified at La. Civ. Code arts. 1760-1762).

57. See La. Civ. Code arts. 1760 & cmt. (a), 1761 & cmt. (a), 1762 & cmts. (a)-(d).

58. La. Civ. Code art. 1760.

59. The refinements made by the revision are not discussed above. See La. Civ. Code art. 1762 & cmts. (a)-(d).

60. Buckland & Stein, *supra* note 8, § 189, at 552.

61. *Id.*; see Dig. 44.7.10 (Ulpian, Ad Sabinum 47); Dig. 46.1.16.4 (Julian, Dig. 53). The latter provision, like Dig. 20.1.27 (Marcellus, Dig. 5), requires an explanation of the working definition given at the beginning of this Essay. Julian's reference to a natural obligation giving rise to an action probably refers to an action against the surety, whose accessory obligation is supported by the natural obligation. Marcellus's reference, including Ulpian's note, suggests that the obligation is natural and not civil because no remedy exists to enforce it. That the praetor might grant a remedy would (according to the definition used in this Essay) convert the natural obligation into a civil one. Before any action by the praetor (and that he would take such action is merely speculative), however, the obligation would remain natural.

62. See Litvinoff, *supra* note 5, § 307(2), at 553; 2 Ambroise Colin & Henri Capitant, *Cours Élémentaire de Droit Civil Français* 336 (10th ed. 1948).

63. Dig. 46.1.16.3 (Julian, Dig. 53); Litvinoff, *supra* note 5, § 307(3), at 553.

could also support a novation.<sup>64</sup> In certain circumstances, natural obligations also came to have other effects, such as set-off.<sup>65</sup>

The effects of natural obligations under Louisiana law, from 1825 to the present, are more limited, but the effects that are recognized show the impress of the Roman law. The Code article in effect from 1825 to 1984 provided,

Although natural obligations can not be enforced by action, they have the following effect[s]:

1. No suit will lie to recover what has been paid, or given in compliance with a natural obligation.
2. A natural obligation is a sufficient consideration for a new contract.<sup>66</sup>

The current article, promulgated as part of the 1984 revision,<sup>67</sup> reproduces the substance of the former article:<sup>68</sup>

A natural obligation is not enforceable by judicial action. Nevertheless, whatever has been freely performed in compliance with a natural obligation may not be reclaimed.

A contract made for the performance of a natural obligation is onerous.<sup>69</sup>

The first provision of both Louisiana articles precisely describes the situation at Roman law.<sup>70</sup> The *condictio indebiti*, which allowed a plaintiff to recover sums paid but not owed,<sup>71</sup> did not lie. The second paragraph follows from the Roman recognition that an amount transferred on account of a natural obligation is a payment, not a donation. The doctrine of cause, as used in modern civil-law systems, and the common-law consideration doctrine obviously did not exist at Roman law. The statements in the Louisiana Civil Codes, however, do no more than allow the payment to be considered a payment, rather than a donation.

The effects recognized by Louisiana are without question more constrained than those recognized in Roman times. For example, natural obligations cannot

64. Dig. 46.2.1 (Ulpian, Ad Sabinum 46); Longo, *supra* note 7, at 265.

65. Dig. 16.2.6 (Ulpian, Ad Sabinum 30).

66. La. Civ. Code art. 1759 (1870); see La. Civ. Code art. 1752 (1825). The bracketed "s" in the text corrects a mistranslation from the original French:

*Les obligations naturelles, quoiqu'on n'en puisse exiger l'exécution par les voies légales, produisent les effets suivans:*

1. *On n'a point d'action pour recouvrer ce qui a été payé en vertu d'une obligation naturelle;*
2. *Une obligation naturelle est une cause suffisante pour un nouveau contrat.*

*Id.*

67. 1984 La. Acts No. 331, § 1.

68. La. Civ. Code art. 1761 cmt. (a).

69. La. Civ. Code art. 1761.

70. See Litvinoff, *supra* note 5, § 356, at 620.

71. A.M. Prichard, Leage's Roman Private Law 385 (3d ed. 1961).

support accessory obligations in modern legal systems.<sup>72</sup> In the effects that it has accorded to natural obligations, though, Louisiana has followed the Romanist tradition. The Roman impress has left its mark.

### III. PARALLELS IN LEGAL METHOD

The unusual character of natural obligations has led to an unusual method of legal development in Louisiana. Despite the acknowledged Romanist tradition apparent in many civil-law jurisdictions, the legal method employed by the Romans is in many ways more closely aligned with that used by the common law, which is ironically the usual foil for the civil law. The importance of cases and judicial decisionmaking in the common law has become part of the "traditional mythology" of that legal system.<sup>73</sup> The case-centered approach of the Roman lawyers<sup>74</sup> is not far removed from the common-law approach. The relative independence of civilian systems from case law,<sup>75</sup> on the other hand, and the relatively exalted place of jurists<sup>76</sup> and legislatures<sup>77</sup> in such systems, is just as well established.<sup>78</sup> In the case of natural obligations, however, the legal method employed by Louisiana bears a much closer resemblance to Roman law than is usual.

The case-based approach of much Roman legal development is not hard to discern. The jurists' literature is largely based on cases, many of which arose in fact. One-third of the Digest is comprised of their problematic and other case-based literature.<sup>79</sup> In addition, much of a jurist's time would be occupied with providing responses to questions in particular cases that were in litigation, as evidenced by the existence of the *ius respondendi*.<sup>80</sup> Even after the role of the

72. Litvinoff, *supra* note 5, §§ 326-327, at 574-76.

73. Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 La. L. Rev. 241, 241-42 (1985).

74. Nicholas, *supra* note 10, at 33.

75. Compare the importance of judge-made law in the common law. See, e.g., R.C. van Caenegem, *An Historical Introduction to Private Law* 136 (D.E.L. Johnston trans., 1992); Roscoe Pound, *The Development of American Law and its Deviation from English Law*, 67 L.Q.R. 49, 49-50 (1951).

76. See generally Stein, *supra* note 73.

77. See La. Civ. Code arts. 1-3 (legislation and custom are the sources of the law, and legislation is the more important). Compare van Caenegem, *supra* note 75, at 136 (at common law, "[t]he role of legislation was merely ancillary"); Roscoe Pound, *The Spirit of the Common Law* 46 (1921) (explaining skeptical view of common law with respect to legislation).

78. The traditional mythology is sometimes reassessed. See, e.g., F.H. Lawson, *A Common Lawyer Looks at the Civil Law* ch. II (1955). There can be little doubt, however, that the summary in the text represents the usual view of the civil- and common-law systems. Nevertheless, the reader should note that this Essay does not attempt to cite the many works that compare Roman, civil, and common law and that discuss more fully the points in the text.

79. Nicholas, *supra* note 10, at 33. Admittedly, some of the cases in the literature were hypothetical.

80. See Wolff, *supra* note 34, at 116. The *ius respondendi* made a jurist's opinion binding at least in the case in which he issued his response.

classical jurist was eclipsed, rescripts and *decreta* issued in particular cases continued to play an important part in the development of the law.<sup>81</sup>

No essay on Roman law would be complete without a caveat about the length of the Roman period, the constantly changing nature of the law during that period, and the consequent difficulty in discussing exactly what the "Roman law" was. Still, regardless of the period in which the various natural obligations developed,<sup>82</sup> the central role of case-based legal development cannot be denied. The very list of recognized natural obligations, which was gradually formed<sup>83</sup> and which is haphazard in terms of the obligations recognized, strongly suggests that the particular natural obligations came to be recognized because of cases that had actually arisen.

The Louisiana law has undergone a similar development. The list of four kinds of natural obligations in the 1825 and 1870 Codes led to a controversy over whether the list was exclusive or illustrative. The more authoritative view, espoused by the Louisiana Supreme Court, suggested that only the natural obligations that were enumerated in the Code would be granted recognition.<sup>84</sup> The better view, however, was that the list was merely illustrative, and that the courts were free to recognize natural obligations in appropriate circumstances even when they fell outside the four categories listed.<sup>85</sup>

Despite the apparent disagreement over this question, the courts (including the Louisiana Supreme Court) indisputably recognized natural obligations from outside the codal list. As Professor Litvinoff has observed,<sup>86</sup> for example, Louisiana courts found natural obligations to pay debts discharged in bankruptcy<sup>87</sup> and to remunerate long employment at low wages.<sup>88</sup> Payments by the federal government to a disabled veteran have also been recognized as being paid in compliance with a natural obligation.<sup>89</sup>

81. Nicholas, *supra* note 10, at 18.

82. To make matters more difficult, there has been great debate over when the Roman law recognized natural obligations. See *supra* note 34 and accompanying text.

83. Buckland & Stein, *supra* note 8, § 189, at 552.

84. *Breaux v. Breaux*, 218 La. 795, 803-04, 51 So. 2d 73, 76-77 (1950); *Succession of Burns*, 199 La. 1081, 1094, 7 So. 2d 359, 363 (1942); *Succession of Miller v. Manhattan Life Ins. Co.*, 110 La. 652, 657, 34 So. 723, 725 (1903).

85. *Atkins v. Commissioner (In re Atkins' Estate)*, 30 F.2d 761, 763 (5th Cir. 1929). See generally Litvinoff, *supra* note 5, §§ 351-354, at 610-18. Professor Willem Zwolve pointed out at the colloquium that a growing body of law regarding natural obligations has mushroomed in the context of tax law in the Netherlands. The Louisiana law of natural obligations has also had an impact in the tax realm, reaching back into the nineteenth century. *E.g.*, *John Kyle Steamboat Co. v. New Orleans*, 13 F. Cas. 688, 689 (C.C.D. La. 1876) (No. 7,354).

86. Litvinoff, *supra* note 5, § 354, at 618.

87. *Irwin v. Hunnewell*, 207 La. 422, 433, 21 So. 2d 485, 488 (1945); *Bach v. Cohn*, 3 La. Ann. 101, 102 (1848); see *Glenn v. Dunbar's Adm'x*, 10 La. Ann. 253, 255 (1855); *Swift & Co. v. Abrams*, 3 La. App. 635, 638 (2d Cir. 1926); see also *Linton v. Stanton*, 4 La. Ann. 401, 406 (1849); *Blanc v. Banks*, 10 Rob. 115, 115-16 (1845).

88. *Barthe v. Succession of Lacroix*, 29 La. Ann. 326, 327 (1877).

89. *Succession of Scott*, 231 La. 381, 392-93, 91 So. 2d 574, 577-78 (1956).

The revision of the natural obligations articles further legitimates the case-by-case approach to the recognition of natural obligations. The new Code provisions dispel any doubts about the illustrative character of the natural obligations listed in the Code. No longer are specific kinds of natural obligations enumerated; rather, Article 1760 describes the circumstances in which a natural obligation may be found (when there is "a particular moral duty to render a performance").<sup>90</sup> Article 1762 provides a few "illustrative" "examples."<sup>91</sup> The doctrine that underlies the Code recognizes a growing association between moral duties and legal obligations.<sup>92</sup> The present Code therefore encourages the courts to recognize new obligations in particular cases.

Louisiana, as a mixed jurisdiction, already shares more with the Roman case-based method than purer civilian jurisdictions. The flexible character of natural obligations makes the role of cases even more pronounced in this area of the law. Louisiana thus has a developing list of recognized natural obligations. The particular ones that are accorded recognition will no doubt continue to have a somewhat haphazard character, as does anything that is dependent on cases for its development. In light of the encouragement that the current Code gives the courts, the law governing natural obligations in Louisiana should continue to grow by the same method that saw the rise and expansion of natural obligations in Rome.

#### IV. CONCLUSION

One could hardly argue that the Roman law of natural obligations came unaltered into the Louisiana law. The law has changed in light of modern circumstances, and natural erosion and accretion are inevitable. Still, the law in Louisiana bears the unmistakable stamp of the Roman law, largely as received through intermediate European sources. For the most part, the contours of the Roman stamp are quite sharp, where the Roman law on natural obligations has come into the Louisiana law with little alteration from intervening centuries. Although its impress is not as crisp in some areas, the Roman influence is still easily discernible. The substantive parallels are inexact, but both the obligations recognized as natural obligations and the effects accorded to them demonstrate the similarities of Roman and Louisiana law. The importance of cases in the development of the law also provides an unusual parallel between a modern civilian jurisdiction and the Roman legal method. Finally, the distinguishing mark of the natural obligation—its conceptual link to the *ius naturale*, natural justice, and moral duty—shows how Louisiana has followed in the Romanist tradition.

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90. La. Civ. Code art. 1760.

91. La. Civ. Code art. 1762 & cmt. (b).

92. La. Civ. Code art. 1760 cmt. (e) (citing Planiol, *supra* note 7; Ripert, *supra* note 1).