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ARTICLE

LOUISIANA: THE UNITED STATES' UNIQUE CONNECTION TO ROMAN LAW

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AN INTRODUCTION TO THE 1993 BRENDAN F. BROWN LECTURE, THE ROMAN CONTRIBUTION TO THE COMMON LAW

INTRODUCTION

The Brendan F. Brown Lecture Series, initiated in 1986, comprises an annual lecture at Loyola University School of Law. The

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program is named in honor of the late Brendan Brown, who is universally recognized for his contribution to legal education and natural law jurisprudence. The Brendan Brown Natural Law Institute, which was established through the generosity of Professor Brown, sponsors the program.

I had the pleasure of introducing the speaker for the 1993 lecture, Judge Edward Re, Distinguished Professor of Law at St. John's University and Chief Judge Emeritus of the United States Court of International Trade. Judge Re's impressive achievements as both scholar and jurist were outlined by me in that introduction and have been noted in numerous forums.[1] I will not repeat all of them here.[2] Instead, I shall take the opportunity in this short written introduction to reflect briefly on the subject matter of Judge Re's talk and its special appeal to the legal community of Louisiana. Judge Re has graciously allowed his lecture to be reprinted in the *Loyola Law Review*; it follows this introductory comment.

When we first met and discussed the possibility of Judge Re delivering the 1993 Brendan Brown lecture, he tentatively described his topic as the impact of Roman law on "our law." Quicker than one could say usus, fructus, and abusus, I reminded Judge Re that he could not give such a lecture in Louisiana. He immediately recognized why: the impact of Roman law on what he referred to as "our law," that is, the common law of England and the rest of the United States, is quite different, much more diffuse

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1. At the lecture, I noted that the description of Judge Re's academic and juristic achievements only touched on two of his careers. A discussion of his distinguished tenure at the United States Department of State, as well as his stint as a drummer in the bands of jazz greats such as Lionel Hampton, had to be omitted because of time. The latter achievement is of course especially appreciated here in New Orleans.

2. Judge Re's judicial career is notable for his tenure as the first Chief Judge of the United States Court of International Trade, as well as his service on eight federal circuit courts of appeal and four district courts throughout the United States; these assignments were pursuant to fifty-two separate designations by Chief Justices Burger and Rehnquist of the United States Supreme Court.

Academically, Judge Re's achievements include presently serving as Distinguished Professor of Law at St. John's University Law School; he has also taught at Georgetown University Law Center and New York Law School. He has authored a number of texts and has received seventeen honorary degrees, but given the topic of his talk, I would be remiss in not mentioning what Romanists at least must regard as his highest honor: in 1988, on the occasion of the 900th anniversary of its founding, the University of Bologna granted the honorary degree of Doctor of Jurisprudence to Judge Re. An honorary degree in Jurisprudence from the university of Irnerius and the Glossators is an honor whose magnitude perhaps can only be fully appreciated in a jurisdiction with Roman law roots.

and attenuated, than the impact of Roman law on the law of Louisiana. This distinction explains one aspect of the reference to Louisiana's *unique* connection to Roman law.

Louisiana's connection to Roman law, however, is not unique solely in comparison with the other states of the Union: Roman influence on Louisiana's law distinguishes it from other jurisdictions of the French Civil Code family as well.[3] Louisiana is unique not only because Roman law has had a much greater impact on Louisiana's law than on the law of the other forty-nine states of the Union, but also because the impact of Roman law is more pronounced on Louisiana's law than it is on the law of many of our sister jurisdictions with French-style civil codes. The first aspect of Louisiana's tie to Roman law is obvious, the second less noted. I shall briefly consider each link to illustrate the point.

Before beginning a comparative analysis of the impact of Roman law on Louisiana, however, two preliminary matters should be observed, starting with the noting of two opposing historical footnotes. The first illustrates that Louisiana's strong connection to Roman law did not have a particularly auspicious beginning: in 1712, when King Louis XIV made Louisiana a proprietary colony, the charter granted to Antoine Crozat specifically made the Custom of Paris applicable, as it was in other French colonies.[4] This collection comprises large areas of ancient Germanic and feudal customary law and is said to have been one of the main rivals of Roman law in the drafting of the French Civil Code.[5] Despite this, as we will see, the Louisiana codes ultimately would prove to be more Romanist than many, if not all, of the other codes of the French family. The second, antipodal historical note involves Louisiana's distinction as a jurisdiction whose legislature once passed a

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3. It is generally agreed that the German Civil Code and its derivatives are more Romanistic than those based on the French model. The different historical processes of the reception of Roman law in the two jurisdictions and the reception's effect on codification in the two countries accounts for this. *See* KEVIN W. RYAN, AN INTRODUCTION TO THE CIVIL LAW 15-18 (1962). For this reason, the comparison is limited to the Louisiana Code and other codes derivative of the French. For a discussion of the propriety of classifying Louisiana as a member of the French Code family, see infra note 17.

4. William W. Howe, *Roman and Civil Law in America*, 16 HARV. L. REV. 342, 347 (1902-1903).

5. JEAN BRISSAUD, GENERAL SURVEY OF CONTINENTAL HISTORY 216, 262 (Vol. I, Continental Legal History Series 1912) discusses the sources of the Custom of Paris; *see also* John P. Dawson, *The Codification of the French Customs*, 38 MICH. L. REV. 765 (1940); *infra* note 18.

law specifically adopting the Institutes, Digest, and Code of Justinian as official sources of law.[6]

These opposing historical footnotes may not seem precisely relevant to the topic at hand; besides being intriguing, however, they underline the diverse nature of Louisiana's legal history as a colony of France (1682-1762), then Spain (1762-1800), then France again (1800-1803), and finally as a territory of the United States after the Louisiana Purchase in 1803.[7] A recognition of this chequered jurisdictional history contributes to an understanding of the strength of our Roman law background.

A second preliminary matter is more relevant and important: it concerns a narrowing of the area of Louisiana law from which Roman influence will be noted. Whether Louisiana remains a civil law jurisdiction, let alone one with strong Roman roots, has been the subject of debate.[8] Few would argue, however, that Louisiana does not at least substantively remain a civil code jurisdiction.[9]

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6. The act was passed by the Legislative Council and the House of Representatives of the Territory of Orleans in 1806. Its language reads:

> An act declaring [that] the laws which continue to be in force in the Territory of Orleans . . . are the laws and authorities following, to wit: . . . The Roman Civil Code, as being the foundation of the spanish law, by which this country was governed before its cession to France and to the United States, which is composed of the institutes, digest and code of the emperor Justinian . . . .

The act was immediately vetoed by the territorial governor, William C.C. Claiborne. For a description of these events, as well as a text of the entire act, and a list of other fascinating, even occasionally droll official sources of law, see Mitchell Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law From Louisiana*, 16 TUL. L. REV. 319, 323-24 (1942).

7. The dates of the treaties do not always coincide with the periods of actual administration. See generally FRANCOIS XAVIER MARTIN, THE HISTORY OF LOUISIANA FROM THE EARLIEST PERIOD (1882) and JOE G. TAYLOR, LOUISIANA, A HISTORY (1964) for a description of these historical events.

8. See the famous debate in the Tulane Law Review, Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937); Harriet S. Daggett, et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937), as well as a thoughtful contemporary analysis in A. N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830 (1980).

9. See H.F. Jolowicz, *The Civil Law in Louisiana*, 29 TUL. L. REV. 491, 498-503 (1955), where a renowned Romanist comments on Louisiana's Civil Law system and suggests that the methodology used in applying the Code, rather than the loss of substantive civilian principles themselves, may pose a greater threat to our treasured civilian heritage. On this point, one should consult the recent, fascinating 21st John H. Tucker, Jr. Lecture on Civil Law by Justice Dennis of the Louisiana Supreme Court. James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. (forthcoming Fall 1993). The erudition and thoughtfulness displayed are impressive. Would that some of the current Justices of our United States Supreme Court displayed the knowledge of interpretive techniques illustrated in this paper in interpreting our federal constitution.

Therefore, although there are other areas of Louisiana law where civilian and Roman influence still exist,[10] for the purpose of this paper, I will focus mainly on sketching some of the Roman law's influence on Louisiana's Civil Codes.

Louisiana has had three related works. The Digest of 1808, often referred to as the Civil Code of 1808, was the first; its redactors relied heavily on the Project of 1800 and French Civil Code of 1804 and incorporated a substantial amount of law directly from Spanish sources as well.[11] The Code of 1825 followed. It contains further borrowings from the French Civil Code, French commentators, and a variety of other sources. This accounts for the fact that the 1825 Code contained 3522 articles as compared to 2281 in the French Civil Code. Finally, the Code of 1870 was enacted after the Civil War and served in the main to delete the many provisions in the 1825 Code relating to slavery.[12]

The Louisiana legislature is currently involved in a piecemeal revision of the Code of 1870, and in fact has enacted significant new sections. The process is not complete, however, and an analysis of the sources of the revision would be both premature and beyond the scope of this survey.[13] It is certain that at least in some

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10. See, for example, Henry G. McMahon, *The Proposed Louisiana Code of Practice: A Synthesis of Anglo-American and Continental Civil Procedures*, 14 LA. L. REV. 36 (1953) for a discussion of the impact of civilian institutions on our procedural system. Much of the analysis therein remains relevant in large part to the present Louisiana Code of Civil Procedure.

11. As Professor Pascal of Louisiana State University Law Faculty has consistently emphasized, a digest does not serve the same function and should not be described as a code. *See, e.g.*, Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). As the Superior Court of the Territory of Orleans declared in 1812: "[W]hat we call the *Civil Code*, is but a digest of the civil law which regulated this country under the French and Spanish monarchs." Hayes v. Berwick, 2 Mart. (O.S.) 138, 140 (La. 1812).

12. For a general discussion of the formation of Louisiana's Codes, see A.N. Yiannopoulos, *The Civil Codes of Louisiana*, *in* LOUISIANA CIVIL CODE at XXV (A.N. Yiannopoulos ed., West 1993). A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 LA. L. REV. 5 (1992), contains a recent, fresh and insightful look at the unrevised Code of 1870.

13. A.N. Yiannopoulos, *supra* note 12, at XXXVI provides a list of sections revised to date. For preliminary (and opposing) views on the effect of the revision, see Julio C. Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147 (1989); Vernon N. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221 (1988); and Vernon N. Palmer, *Revision of the Code or Regression to a Digest? A Rejoinder to Professor Cueto-Rua*, 64 TUL. L. REV. 177 (1989). *See also The Great Debate Over the Louisiana Civil Code's Revision*, 5 TUL. CIV. L. FOR. 49 (1990).

sections the Roman law influence remains;[14] in others, it may actually have been strengthened. For example, the drafting of the obligations section[15] was directed by Professor Saul Litvinoff of Louisiana State University Law School, an Argentine scholar with a strong background in Roman law. Hence, the supposition exists that Roman sources have at least held their own in this area. In any event, the influence of Roman law on Louisiana law will be limited in this article mainly to the effect on the 1808, 1825, and 1870 enactments, concentrating on the unrevised 1870 Code as the latest of the series.[16]

LOUISIANA COMPARED TO OTHER STATES OF THE UNITED STATES

With regard to the relative impact of the Roman law on Louisiana vis-à-vis the other states of the American Union, Louisiana is the only state whose private law is contained in a European-style civil code, based to some degree on the French model.[17] Although there exists some disagreement, most observers agree that Roman law influence is present in large degree in important areas of the French-style codes.[18] Furthermore, even a cursory comparative

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14. *See, e.g.*, the revised version of the articles quoted in this article (LA. CIV. CODE ANN. arts. 448-461 (A.N. Yiannopoulos ed., West 1992)). The revised articles retain the Roman category of common, public, and private things, and the *Exposé des motifs* states:

> It seems that the redactors of the Louisiana Civil Code derived the definition of things from eighteenth century civilian doctrine as well as from Spanish and Roman sources. The second sentence refers clearly to the text of Gaius . . . since contemporary Louisiana statutes and jurisprudence adhere to the division of things according to their susceptibility of ownership, the traditional approach, though analytically questionable, has been maintained.

Exposé des motifs, *in* LA. CIV. CODE ANN. Vol. III at 5-6 (West 1980).

15. LA. CIV. CODE ANN. arts. 1756-2324.2 (West 1992).

16. LA. CIV. CODE Comp. Ed. (Dainow ed., West 1972).

17. The inclusion of the unrevised Louisiana Civil Code of 1870 in the French family of Codes is generally agreed on, with of course numerous caveats and reservations. *See* 1 ZWEIGERT & KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 126 (2d rev. ed. 1987); *see also supra* note 3; Jolowicz, *supra* note 9, at 491. "[B]oth Quebec and Louisiana . . . possess civil codes having close affinities with that of Napoleon . . . ." *Id.*; *see also infra* note 29 (referencing the series of debates in volume 46 of the Tulane Law Review regarding the sources of the Louisiana Civil Code).

18. The relative distribution of Roman versus customary law in the French Civil Code is the subject of some disagreement. As recently as 1922 the treatise of the great generalist Marcel Planiol expressed his characteristically confident view as follows: "Two currents met at the time of the unification of French law. They were the Roman spirit and the customary tradition. The latter carried the day . . . . There is therefore nothing surprising in the fact that Customs predominate in the Code." 1 M. PLANIOL ET G. RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, no. 89 (La. St. L. Inst. trans., 12th ed. 1959).

reading of the areas of the French Civil Code[19] and the Institutes of Justinian[20] which concern property, and to a lesser degree obligations and certain nominate contracts, illustrates the considerable impact of Roman and Romanist law in these areas.[21] These areas form an important part, if not the core, of all European-style civil codes.

Louisiana, therefore, in common with all members of the French Civil Code family, has had a healthy component of Roman law in its Civil Code. Whatever the judgment on the ultimate impact of Roman law on the common law may be, all would agree that it bears no comparison with Roman law's impact on continental law as expressed in European-style civil codes. As the only state in the United States with a European-style civil code, Louisiana is automatically the only truly Romanized legal jurisdiction in the

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Others disagree. For example, see the remarks of Professor Herbert Hausmaninger of the University of Vienna Law School:

> With the enactment of the Prussian Code of 1794, the Code Napoléon of 1804, and the Austrian Civil Code of 1811—the so-called natural law codes—Roman law ceased to be an official source of law in these territories. Yet, in many ways it merely changed its form but continues to display a powerful influence as to its substance . . ., the Roman law traditions still provided both [the codes'] conceptual framework and most of the substantive content of their rules.

Herbert Hausmaninger, *Roman Law and European Legal Science*, 43 VA. L. WKLY. 2 (1990). See also the comment of Mitchell Franklin: "By 1804 France itself, after years of preparation, had completed and made effective its own civil code, which transformed the Roman law to serve the needs of the French Revolution . . . ." Franklin, *supra* note 6, at 320. Much depends of course on the sections of the Code with which one is dealing. Planiol's statement, undoubtedly true with regard to some sections of the French Code, could not be applied to the important areas of property and obligations; even areas such as successions bear more Roman imprint than commonly thought.

In an article that should be read by anyone interested in this topic, Professor Shael Herman of the Tulane law faculty, after analyzing various Roman institutions therein, categorically characterizes the Louisiana Civil Code as Romanesque. *See* Shael Herman, *The Influence of Roman Law Upon the Jurisprudence of Antebellum Louisiana*, 3 STELLENBOSCH L. REV. 143 (1992).

19. *See, e.g.*, HENRY CACHARD, THE FRENCH CODE CIVIL arts. 516-710 (1930) (of property and the different kinds of ownership); *see also id.* at Tits. II-IV, VI, VIII, IX & XIV of III (covering conventional obligations and selected nominate contracts).

20. J. INST. 2.1.1-2.5.6, 3.13.1-3.29.4.

21. The term Romanist law in addition to Roman law is an acknowledgement of the contribution of generations of Europeans in transforming the original Roman sources, both in the medieval era and in the age of the Enlightenment. Briefly, the medieval European Roman scholars induced general conceptions implied in the mass of Roman materials, while the later codifiers, using the genius of the Enlightenment, arranged these principles in codal form. Rene David, in his classic work, *Major Legal Systems in the World Today*, calls the modern civil law systems Romano-Germanic, in deference to the later European contribution. RENE DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1906).

union, although a few other states can properly claim a smattering of Roman law influence as part of their historical heritage.[22]

LOUISIANA COMPARED TO OTHER JURISDICTIONS WITH FRENCH-STYLE CIVIL CODES

Louisiana's unique tie to Roman law is not limited to a comparison with the other forty-nine states. Even among the various members of the French Civil Code family, Louisiana's pre-revision codes stand out.[23] These codes, which have properly been described as eclectic,[24] have more borrowings from Roman law than many, if not all, of the other civil codes deriving from the French Code Civil.

A comparison of a few selected articles of the unrevised Louisiana Civil Code of 1870 with excerpts from the Institutes of Justinian will illustrate the point. First, the unrevised Louisiana Civil Code of 1870:[25]

> Art. 449. "Things are either common or public. Things susceptible of ownership belong to corporations, or they are the property of individuals."
> Art. 450. "Things, which are common, are those the ownership of which belongs to nobody in particular, and which all men may freely use, conformably with the use for which nature has intended them; such as air, running water, the sea and its shores."
> Art. 451. "Sea shore is that space of land, over which the waters of the sea spread in the highest water, during the winter season."
> Art. 452. "From the public use of the sea shores, it follows that every one has a right to build cabins thereon for shelter, and likewise to land there, either to fish or shelter himself from the storm,

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22. As a result of Spanish rule in their early history, the law in a few other states, including Texas, New Mexico and California, still contains some atavistic Spanish, hence in some instances Roman, influenced institutions. The resulting traces of Roman law in some of these states is said to be important. *See* Jolowicz, *supra* note 9, at 492. The author's observation has been that these civilian remnants are treated more or less as historical jurisprudential artifacts, trotted out on convenient occasions much like a new opera house in Houston, Dallas or Los Angeles might be, to give a cultural cachet to a self-consciously parvenu society.

23. A general discussion of the various codes deriving from the French Code Civil is found in ZWEIGERT & KÖTZ, *supra* note 17.

24. See Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 13 (1971), where the author describes a problem with the English-French translation peculiar to articles adopted from Blackstone's Commentaries!

25. *See generally* LA. CIV. CODE arts. 449-52 (1870).

to moor ships, to dry nets, and the like, provide no damage arise from the same to the buildings and erections made by the owners of the adjoining property."

Now, the Institutes of Justinian:[26]

J. Inst.2.1.1. "Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally."

J. Inst.2.1.3. "The sea-shore extends to the limit of the highest tide in time of storm or winter."

J. Inst.2.1.5. "Again, the public use of the sea-shore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea."

Again, the Code of 1870:

Art. 455. "The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like."

"Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands."

Now, the Institutes:

J. Inst. 2.1.4. "Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land . . . ."

These few quotations illustrate one area of the unrevised 1870 Louisiana Code where language from original Roman law sources is employed almost verbatim. There are others.[27] As these articles and some others using Roman language have no counterparts in the French Code, one can conclude that borrowing from Roman sources is stronger in Louisiana's codes than it is in most other codes of the French family.[28]

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26. *See generally* THE INSTITUTES OF JUSTINIAN (J.B. Mayle, trans., 5th ed. 1913).

27. *See, e.g.*, LA. CIV. CODE arts. 3412-3420 (Dainow ed., West 1961); J. INST. 2.1.12-.19 (dealing with the institution of occupancy and detailing specific rules as to its application in various fact situations).

28. The specific articles quoted, as well as those cited *supra* note 27, have no real analogues in the French Civil Code nor, presumably, in most of its derivatives, although the

One must add a note of cautionary explanation when speculating on the original source of Louisiana Civil Code articles, even where verbatim or near verbatim quotations are used. As a well-known series of unfortunately somewhat acerbic articles in the *Tulane Law Review* attests, the "source" of Louisiana's Civil Code articles is a complicated matter.[29] The author realizes that verbatim or near verbatim language from Roman texts does not necessarily mean that the redactors of the various Louisiana codes used the original Roman sources themselves in drafting the codes.

As a colony of Spain from 1762 to 1800, Louisiana was subject to Spanish law, which historically has been heavily Romanized both in its primary and secondary sources.[30] A specific example is provided by the articles from the unrevised Louisiana Civil Code of 1870 quoted in this paper as proof of borrowing from Roman law.[31] The parallel language quoted from the Institutes of Justinian is replicated in Las Siete Partidas, an important source of Spanish law (albeit officially a secondary source) since its completion about 1265.[32] The drafters of Louisiana's codes may well have

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author must note that he has not examined each of them for verification. The French inspired codes of Latin America in particular, because of this area's Spanish influence, deserve more research on this point. This is not to say that there is no direct borrowing of Roman language in the French Civil Code. *See, e.g.*, C. Civ. arts. 578-710; J. Inst. 2.3.1-4, 2.4.1-4 & 2.5.1-6, dealing with personal and predial servitudes, as well as corresponding sections of the Digest. The pre-revision Louisiana codes, in common with the other French-style codes, contain these secondhand Roman borrowings as well as those borrowings unique to themselves. *See* La. Civ. Code arts. 533-822 (Dainow ed., West 1961).

29. *See* Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4 (1971); Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 Tul. L. Rev. 628 (1972); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972); Joseph M. Sweeney, *Tournament of Scholars Over the Sources of the Civil Code of 1808*, 46 Tul. L. Rev. 585 (1972). The term "source" itself is part of the problem, as the protagonists at times seem to be ascribing differing meanings to the word. In any event, the author has no desire to rush into this unpleasant imbroglio; hence the inclusion of this footnoted apologia for what may otherwise seem exaggerated textual circumspection.

30. *See generally* Edwin M. Borchard & Thomas W. Palmer, Jr., Guide to the Law and Legal Literature of Spain (1915); *see also* William C. Atkinson, A History of Spain and Portugal 35 (1960) ("The gains from centuries of close association with Rome were permanent and laid the foundations on which peninsular civilization would develop. In language, literature, law, administration and religion Spain and Portugal are the product of Rome . . . .").

31. *See* La. Civ. Code arts. 449-52, 455 (1870) and the corresponding articles from Justinian's Institutes quoted in this article.

32. Las Siete Partidas, partida third, tit. XXVIII, laws II-X (S. Scott trans., 6th ed. 1931); *see also* Las Siete Partidas (L. Moreau Lislet & Henry Carleton trans., 1820). The Lislet and Carleton translation includes only those parts of the Las Siete Partidas that still had the force of law in Louisiana; given the heavy content of Roman law in this collection,

copied this quoted language from the Las Siete Partidas or other Romanized Spanish sources rather than from the original Roman documents.[33] The point, of course, is that Louisiana's codes carry more verbatim or near verbatim language of Roman law than most, even if it were copied by the redactors secondhand, from a source that itself directly borrowed the original Roman language.

This reference to the applicability of Spanish law in Louisiana leads to two final examples of the impact of Roman law that do not involve a comparative look at Louisiana's codes. In addition to governing in the period of Spanish ownership from 1762-1800, it is generally agreed that Spanish laws remained in force in Louisiana during the second short period of French sovereignty from 1800 to 1803.[34] This led to a certain contretemps between the legislature of Louisiana and its courts regarding the continued applicability of the former Spanish laws even after the Territory of Orleans became the State of Louisiana.[35] It was well into the nineteenth century before the Louisiana Supreme Court finally confirmed that these legal sources from Rome and Spain had been abrogated in Louisiana unless the principle they embodied had already been confirmed by judicial decisions.[36] If the territorial legislature of Louisiana of 1806 was correct in its assertion that the "institutes, digest and code of the emperor Justinian"[37] were part of the Spanish laws in force in Louisiana, then it was not until 1839 that our supreme court definitively stated that the original Corpus Juris of Justinian no longer had effect in Louisiana.[38]

A second, recently stumbled upon historical note illustrates the pervasiveness, subtlety, and depth of Roman influence. In reading a recent edition of the local Sunday newspaper, the author fortuitously discovered a reference to two monographs by Professor

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the fact that the Louisiana legislature of 1819 mandated this translation further illustrates the strength of Roman influence.

33. An analysis of the articles in this section of the Code indicates that they probably were taken from the Las Siete Partidas as articles 453-455, 458, and 460 of the Louisiana Code do not have analogues in the Institutes, but do have analogues in the Las Siete Partidas. *See* LAS SIETE PARTIDAS, law VI; LA. CIV. CODE arts. 435-455 (1870); LAS SIETE PARTIDAS, laws IX, X; LA. CIV. CODE arts. 454, 458, 460 (1870).

34. *See, e.g., supra* notes 6 & 32.

35. The story of this struggle has been recounted in other places and will not be repeated here. *See, e.g.*, THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL 25-29 (Shael Herman et al. eds., 1981)).

36. Reynolds v. Swain, 13 La. 193 (1839).

37. *See* Franklin, *supra* note 6, at 324.

38. *See Reynolds*, 13 La. at 198.

Louis Sala-Moulin of the Université de Toulouse regarding the administration of the French Code Noir by the Spanish during their stewardship of Louisiana.[39]

According to these monographs, the Spanish, because of their strong Roman imprint,[40] were more liberal than the French in executing the Code Noir's provisions on manumission or freeing of slaves.[41] This, combined with some of the Code's other Roman law inspired provisions,[42] gave rise to the community, unique to New Orleans, known as the "free people of color," a group whose considerable contribution to the culture of New Orleans is still felt today.[43]

The Roman policies on manumission were of course focused on the elite group of more sophisticated slaves from Greece and the eastern half of the Empire, who taught the Romans' children, served as their doctors and ran their businesses.[44] Such is the bizarre concatenation of historical events that, given that most of the free people of color were freed by Spanish or French families and adopted their surnames,[45] one could posit the following scenario: it

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39. The Code Noir was the French legislation governing slavery, first promulgated in 1685 and revised for Louisiana and other French colonies in 1724. The change in sovereigns from France to Spain in 1763 did not end the effect of the Code in Louisiana, as the Spanish governor Alejandro O'Reilly confirmed its continued applicability by an edict issued in 1769. *See* Jon Kukla, *Breaking the Code*, THE TIMES-PICAYUNE, August 8, 1993, at E7.

40. *See supra* note 30.

41. *See* Kukla, *supra* note 39.

42. The Code itself guaranteed all freed slaves and their progeny the same legal rights enjoyed by other citizens. The other states of the Union based their laws of slavery on the British model and were less apt to have such provisions. In this as in other matters, the more recent tribal past of the Germanic influenced cultures probably contributed to a less sophisticated perspective regarding tolerance of other cultures and peoples than that exhibited in the more Latin influenced jurisdictions.

43. Many of the manumitted free people of color were craftsmen, artists, scholars, etc. For the early development of this subgroup that gave the social development of New Orleans a distinctive character, see GILBERT E. MARTIN, CREOLES-A SHATTERED NATION (1981).

The members of this group were freed mainly by Spanish and French families. The large number of African-American leaders in all fields in New Orleans with French and Spanish surnames is a testament to the continuing contribution of this group to the New Orleans area.

44. *See* PERRY ANDERSON, PASSAGES FROM ANTIQUITY TO FEUDALISM 21-28, 59-67 (1974). The Romans were the first to introduce field gang slavery to antiquity. These field gangs, in contrast to the mostly Eastern slaves who served as skilled craftsmen, artists, doctors and teachers, tended to be from the more primitive and unlettered peoples of Northern and Western Europe. *See also* G.M. TREVELYAN, A SHORTENED HISTORY OF ENGLAND 30 (1942) ("As Cicero complained to his cronies, the famous British gold was secured in very inadequate quantities; the slaves were too ignorant to fetch fancy prices in the market.")

45. *See supra* note 43.

could be argued that the first African-American mayor of New Orleans was named Morial rather than Jackson or Young because King Philip IV of Macedon had the bad judgment to ally himself with Carthage during the Second Punic War, causing the Romans to march on Greece. "For lack of a nail," etc. This bit of historical speculation seems an appropriately whimsical example with which to conclude an eclectic overview of the impact of Roman law on Louisiana.

CONCLUSION

This brief survey of the relative special strength of Roman law influence on Louisiana law leads us to the topic of Judge Re's lecture today. As Judge Re graciously noted in his introductory remarks, the topic of Roman law as well as its influence on English, and hence American, law is of special interest in Louisiana. As a mixed jurisdiction, we are in an advantageous position to evaluate the question. Our familiarity with large areas of the common law and its methodology are complemented by the strong acquaintance with Roman law that we perforce must have as a result of the study of our own Civil Code. Louisiana students who have never directly studied Roman law are nevertheless steeped in its basic concepts and institutions.[46]

It was in this spirit of interest and anticipation that we welcomed Judge Re's provocative and insightful address. While most interpreters of Roman law influence on the common law concentrate on the unquestioned influence of Roman law on the equity system, Judge Re challenges us to examine Roman influence stemming from three earlier and relatively ignored eras; namely, the Roman occupation of Britain from roughly the mid-first century A.D. to the fifth century A.D.;[47] the period following the conversion of Britain to Christianity by the agents of Pope Gregory I, in the person of St. Augustine and his band;[48] and finally, and more importantly in my view, the early years of the reign of William the

46. For example, the concepts of usus, fructus, and abusus referred to at the beginning of this paper, while immediately recognizable to any first-year Louisiana law student, would be unintelligible to most common law lawyers.

47. *See* TREVELYAN, *supra* note 44, at 32-50.

48. *Id.* at 53-69.

Conqueror and his successors.[49] We welcome Judge Re's presentation, and assure him that his assumption that there probably would be more interest in Louisiana concerning Roman influence on the common law than there is in most American common law jurisdictions, is well grounded.[50]

49. Judge Re's comments on the influence of Lanfrac, an Italian clergyman and scholar of Roman law, in the implanting of Roman law during this period are especially intriguing. His observations regarding Lanfrac's importance during this period of English history are echoed in H.R. LOYN, THE NORMAN CONQUEST 46-48 (1965).

50. "In America there is no [market] for such things." FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE 84 (1st ed. 1972).