LEGAL EDUCATION IN A "MIXED JURISDICTION": THE QUEBEC EXPERIENCE

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I. INTRODUCTION

That legal education plays an important role in the shaping and flourishing of a given legal system is undeniable. The law students of today will be the legal players of tomorrow, and, like any game, the legal one is only as dynamic as its players are skilled.

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Perhaps underestimated, however, is how particularly crucial the role of legal education becomes where the legal systems concerned fall into the category of so-called "mixed jurisdictions."[1] For in such systems, legal players must be capable of playing two games at once, which requires that they be trained to juggle with, and yet never confuse, two distinct sets of rules. Only if legal players can properly accomplish this will the integrity of the various games being played be preserved. In mixed jurisdictions, therefore, it is the very identity of the legal games, not just their respective dynamism, that is at stake for legal education.

As one such mixed jurisdiction, Quebec is faced with a singularly onerous educational challenge. Because all matters of private law are governed in Quebec by a system of rules rooted in the continental tradition of civil law,[2] law students in Quebec must be trained as civilian jurists. At the same time, Quebec's membership in the Canadian federation[3] entails its endorsement of the Anglo-Saxon tradition of

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1. THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS (J. Dainow ed., 1974); R. DAVID & J.E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (3d ed. 1985).

2. By the Treaty of Paris of 1763, France ceded to England what was then referred to as "Lower Canada"—a territory covering roughly that of the current Canadian provinces of Ontario and Quebec, but extending further south to Louisiana. A decade later, the Quebec Act of 1774 was enacted whereby the province of Quebec was allowed to return to the French tradition of civil law that had ruled it before the conquest of 1759. Indeed, Section 8 of the Quebec Act provided that:

> all his Majesty's Canadian Subjects within the province of Quebec, the religious Order and Communities only excepted, may also hold and enjoy their Property and Possessions, together with all customs and usages thereto, and all other their civil rights, in as large, ample, and beneficial manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made, and as may consist with their Allegiance to the Majesty, and subjection to the Crown and Parliament of Great Britain.

Quebec Act, 14 Geo. 3, ch. 83 (1774) (Eng.); R.S.C., app. II, no. 2 (1970) (Can.). In this provision, the phrase "laws of Canada" was understood as referring to the French civil law which governed Quebec before 1759. For detailed studies of the Act, see H. NEATBY, THE QUEBEC ACT (1972), and THE ADMINISTRATION OF JUSTICE UNDER THE QUEBEC ACT (1937).

3. The Canadian Confederation was born out of the British North America Act of 1867, 30-31 Vict., ch. 3 (Eng.), which succeeded the Quebec Act of 1774. The BNA Act proceeded to allocate constitutional powers between the federal and the provincial governments as follows:

> Before Confederation, each province bore the traits of sovereignty; but in joining the federal union each province gave up this sovereignty in its entirety, and with it gave up the revenues to be derived from the exercise of concomitant privileges, prerogatives and attributes. By virtue of the B.N.A. Act, the central power returned to the provinces some of these rights.

common law with respect to matters of public law,[4] with the result that Quebec law students must also be educated as common lawyers. In this sense, "the Quebec jurist has had a split personality."[5]

The task of properly integrating two distinct legal traditions within the same educational program is not an easy one, if only because legal traditions that differ in important ways are likely to present different philosophies of education and thus are also likely to require different educational agendas. Indeed, if this is the case, their integration cannot be successful unless such difference are accommodated in the process.

It is now widely acknowledged that the civil-law and common-law traditions differ fundamentally[6] and that this fundamental difference extends to their respective perspectives on legal education.[7] Their concurrent teaching in Quebec faculties[8] would therefore ideally entail

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Church v. Blake, 1 Q.L.R. 177 (Sup. Ct. 1876) (Taschereau, J.); 2 Q.L.R. 236 (Q.B. App. 1876). According to Section 92(13) of the BNA Act, one of the rights thus "returned to the provinces" by the central federal power is that of exclusive legislating power on matters concerning "Property and Civil Rights in the Province." On the early days of the BNA Act, see generally J.E.C. BRIERLEY & R.A. MACDONALD, QUEBEC CIVIL LAW—AN INTRODUCTION TO QUEBEC PRIVATE LAW 1-32 (1993); J.G. CASTEL, THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC 1-58 (1962); P. HOGG, CONSTITUTIONAL LAW IN CANADA 21-31 (2d ed. 1985); A.I. SILVER, THE FRENCH CANADIAN IDEA OF CONFEDERATION: 1864-1900 (1982); M. WADE, THE FRENCH-CANADIANS: 1760-1945, at 63-68 (1955).

4. Quebec Act, *supra* note 2, § 11.

5. L. BAUDOUIN, LES ASPECTS GÉNÉRAUX DU DROIT PRIVÉ DANS LA PROVINCE DE QUÉBEC 20-21 (1967) (*"le juriste québécois a subi un dédoublement de personnalité"*).

6. *See, e.g.*, DAVID & BRIERLEY, *supra* note 1; M. GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL (1982); H.C. GUTTERIDGE, COMPARATIVE LAW (2d ed. 1949); F.A. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW (1953); J.H. MERRYMAN, THE CIVIL LAW TRADITION (1985); J.H. MERRYMAN & D.S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS (1978); K.W. RYAN, AN INTRODUCTION TO THE CIVIL LAW (1962); R.B. SCHLESINGER, COMPARATIVE LAW 222-329 (4th ed. 1980); A.T. VON MEHREN & J.R. GORDLEY, THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (1977); A. WATSON, THE MAKING OF THE CIVIL LAW (1981); 1 K. ZWEIGERT & H. KÖTZ, INTRODUCTION TO COMPARATIVE LAW (1987).

7. *See* M. Damaska, *A Continental Lawyer in an American Law School*, 116 U. PA. L. REV. 1363 (1967); W.K. Geck, *The Reform of Legal Education in the Federal Republic of Germany*, 25 AM. J. COMP. L. 86 (1977); E. Lambert & M.J. Wasserman, *The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law*, 39 YALE L. REV. 1 (1929); G.E. Ledain, *Teaching Methods in the Civil-Law Schools*, 17 CAN. BAR REV. 499 (1957); MERRYMAN, *supra* note 6, at chs. IX, X & XV; Merryman, *Legal Education There and Here*, 27 STAN. L. REV. 859 (1975).

8. The term "law faculties," as distinct from the term "law schools" is important here, for, as will be shown *infra*, text accompanying notes 57-66, one significant difference between the evolutions of the common-law and the civil-law traditions is that they emerged from, and were

the coexistence—in one and the same learning environment, university curriculum, and teaching body—of two different forms of teaching methods, styles, and tools. Otherwise, the chances that Quebec law students will master the art of juggling with, while not confusing, the two sets of rules are rather dim.

In this respect, Quebec bears no more than the lot immediately expected of a mixed jurisdiction that combines two nontrivially different legal traditions. But the difficulty of its educational challenge is further compounded by the fact that for complex reasons having to do in part with the structure of Canadian legal institutions, the two sets of rules are not nearly as clearly delineated as they would be in a healthy mixed jurisdiction.

I indeed argue elsewhere[9] that what had been planned in 1867 as the peaceful and mutually respectful alliance of two distinct legal traditions under the common roof of Canadian federalism evolved into the bleak tale of a largely unsuccessful struggle by civilian elements to preserve their distinctive juridical identity. The tale ends unhappily, I concluded, since it appears that beyond the skeletal remnants of some conceptual foundations, little of Quebec's contemporary private law qualifies as truly civilian. At best, the current legal scene in Quebec can be described as a hodge-podge of civilian and common-law instruments, at both the level of substantive rules of law, and that of juridical logistics and methodology.[10]

If such a depiction of the history of Canada's bijuralism is accurate, the mission of legal education in Quebec is more onerous than that of your average mixed jurisdiction. For then, it is not enough that law students be capable of playing two games competently. Before any game-playing can even begin, it is necessary to reconfigure the games to be played, that is, to sort out from Quebec's hodge-podge of legal rules

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accordingly also taught as, professional and academic disciplines, respectively. R. STEVENS, LAW SCHOOL—LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); SCHLESINGER, *supra* note 6, at 146; Geck, *supra* note 7, at 86.

9. *See* C. Valcke, *Quebec Civil Law and Canadian Federalism*, 21 YALE J. INT'L L. (forthcoming 1995).

10. While such a hodge-podge need not be problematic for the common law, where juridical authoritativeness is canonical, it is problematic for the civil law, where juridical authoritativeness derives from conceptual unity. This difference between the common law and civil law is briefly described *infra*, text accompanying notes 40-56. On the unity of the civil law in particular, see C. Valcke, *The Clash of the Titans: When the Civil Law Tradition Meets the Welfare* State, U. TORONTO L.J. (forthcoming 1996).

which are civilian and which are of common law, and to reconstruct the distinct set of rules which each legal game requires. Beyond training competent legal players, therefore, Quebec's system of legal education must aim to form individuals capable of undoing years of unskilled playing. As such, the educational mission of Quebec is far weightier than what it bargained for as just another mixed jurisdiction.

I argue here that Quebec has fallen short of discharging this onerous mission, for its typical law graduate cannot be described as a solid civilian jurist. If anything, law graduates from Quebec may in fact be better trained at playing the game of common law. At the very least, they are, from academic and professional standpoints alike, barely indistinguishable from their common-law peers. One can only conclude, therefore, that the civilian game has been neglected in Quebec law faculties.

The reasons behind this state of affairs are, as with most social phenomena, hard to pinpoint with certainty. Three factors can nonetheless be singled out, which have been especially instrumental in shoe-horning Quebec's legal education into the mold of the common law. The description of these three factors, which I label the "financial," the "Bar Association," and the "psychological" factors, is the object of Part II. In Part III, I show how these factors' combined influence particularly affected three major aspects of legal education, namely, the profile of curricula, the nature of scholarship, and the method of instruction.

II. THREE FACTORS DESCRIBED

A. *The Financial Factor*

As expected, the "financial factor" refers to a state of financial strain. More specifically, the reference is to the state of financial strain which has befallen all universities in Quebec since the provincial government decided, back in 1963, to follow the recommendations of the Parent Commission,[11] and undertake what was to become the most comprehensive process to democratize higher education in Quebec's history. Indeed, since the adoption of the Parent Report, education in

11. QUEBEC MINISTRY OF EDUCATION, RAPPORT DE LA COMMISSION ROYALE D'ENQUÊTE SUR L'ENSEIGNEMENT DANS LA PROVINCE DE QUÉBEC (1963-66) [hereinafter PARENT REPORT].

Quebec is virtually user-free at all levels, and nowadays almost exclusively state-financed.[12]

Law faculties suffered greatly in this democratization process, for they were made to bear more than their proportional share of the costs generated by this process at the university level. The great variation in costs-per-graduate ratios across university departments afforded an opportunity for financing through cross-subsidization, which was quickly seized by Quebec's Ministry of Education. As law studies are, like most other social studies, practically costless in comparison with, say, scientific studies,[13] they stand to offer the greatest profit potential. Thus intent on increasing enrollment in law studies, the Ministry determined that while the amount of tuition fees charged to law students would be fixed at a province-wide uniform standard, government subsidies to law faculties

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12. Students in Quebec usually go through thirteen years of schooling before entering university. After six years of elementary school, and five years of high school, students wishing to pursue their education may, depending on their elected field of studies, choose to do so at a College of General and Professional Education [hereinafter CEGEP] for two or three years. Born in the aftermath of the PARENT REPORT, these CEGEPs were initially established with a view to provide high school students with the kind of general advanced education which university programs were deemed already too specialized to properly dispense. All three levels of pre-university education are entirely free. Even among private schools and colleges, very few institutions are privately subsidized at more than 20%. At the university level, fees are minimal. Statistics for the years 1981 to 1991 reveal that, among the ten Canadian provinces, Quebec has maintained the lowest percentage of tuition fees to general operating income of universities (around 9%) and the highest percentage of provincial operating grants to general operating income of universities through that period. STATISTICS CANADA, UNIVERSITY FINANCE TREND ANALYSIS, No. 81-260 (1990-91). Tuition fees for the year 1992-93 were on average C$750 per semester, as appears from the 1992-93 catalogues of Quebec's five civil-law faculties, McGill, Montreal, Laval, Sherbrooke, and UQAM [hereinafter CATALOGUES]. Brierley notes that Quebec has always maintained the lowest fee schedules in the country. J.E.C. Brierley, *Quebec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities*, 10 DALHOUSIE L.J. 5, 9 (1986).

13. The *Conseil des universités* of Quebec estimated that for the school year 1975-76, the average cost per law student was C$2,038, as compared to a cost per student of C$12,614 in medicine, C$3,334 in mathematics, and C$2,420 in literature. CONSEIL DES UNIVERSITÉS, AVIS AU MINISTRE DE L'ÉDUCATION SUR DEUX RAPPORTS RÉALISÉS PAR LE CENTRE DE RECHERCHE EN DROIT PUBLIC DE L'UNIVERSITÉ DE MONTRÉAL: LA PLACE DU JURISTE DANS LA SOCIÉTÉ QUÉBÉCOISE. L'ADÉQUATION DES FACULTÉS DE DROIT AUX FONCTIONS DE TRAVAIL DE LEUR DIPLÔMÉS 11 (1979) [hereinafter CONSEIL DES UNIVERSITÉS]. The proportions, almost identical three years earlier, *see* André Poupart, *A hue et a dia . . . ou les changements dans la filière à suivre pour devenir avocat*, 7 REVUE JURIDIQUE THÉMIS [R.J.T.] 273, 275 (1972), are comparable today according to a recent study commissioned by Quebec's Ministry of Education. In the 1991-92 school year, the average cost per student were C$4,253 in law, C$10,216 in medicine, C$7,054 in pure sciences, C$4,615 in literature, and C$4,710 in the humanities. QUEBEC MINISTRY OF EDUCATION, MÉTHODOLOGIE DU CALCUL DES COÛTS MOYENS DISCIPLINAIRES 15 (1994).

would be set in proportion of the number of full-time admissions each year.[14] As Quebec law faculties are almost entirely dependent upon their provincial government for funding,[15] they took the bait. Hence firmly determined to fill their classrooms to a maximum,[16] law faculties proceeded—as any maximizing enterprise would have—to assemble service packages likely to please the average consumer,[17] that is, to offer educational packages molded to the preferences of the average Quebec law student.

In and of itself, such a marketing policy bears no obvious implication for the issue of the ideal form of legal education in a world of two distinct legal cultures, given that, other things being equal, there is no reason to assume that the average Quebec law student would prefer noncivilian law studies. If anything, there would be reason to assume the contrary, given the chosen locus of study. But other things were far from equal, owing in part to the second of the three factors listed above: the "Bar Association" factor.

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14. The problem is not new. *See* J. Boucher, *Évolution récente de l'enseignement du droit: méthodes d'enseignement: Canada; droit civil,* 11 COLLOQUES INTERNATIONAUX DU DROIT COMPARÉ 138, 143 (1974); Poupart, *supra* note 13, at 276.

15. *See supra* note 12. One major difference between continental and Anglo-Saxon systems of legal education concerns their financing structure: the strong alumni tradition present in the latter system is simply nonexistent in the former. *See* Merryman, *supra* note 7, at 863. From telephone conversations with the alumni officials of various Quebec universities, it appears that money gifts from graduates create more embarrassment than satisfaction among administrators. Because of the fear that such gifts may be mistaken for bribes, gifts of tangible objects are commonly substituted for money gifts. Sadly, Quebec university libraries need more Harrap dictionaries than they do Riopelle paintings. McGill is an important exception to this rule. *See* R.A. Macdonald, *The National Law Programme at McGill: Origins, Establishment, Prospects,* 13 DALHOUSIE L.J. 211, 329-31 (1990).

16. According to the latest annual statistics compiled by the Committee of Canadian Law Deans on Canadian law schools, student-teacher ratios for Quebec law faculties have been among the worst in the country for many years. COMMITTEE OF THE CANADIAN LAW DEANS, REPORT CONCERNING THE SIXTH CANADIAN LAW TEACHING CLINIC 34 (1985) (The statistics are for 1984-85 and earlier years; more recent statistics are unavailable due to confidentiality requirements.); *see also* M. Cohen, *The Condition of Legal Education in Canada,* 28 CAN. BAR REV. 267, 271-74 (1950).

17. As would be explained in a basic economics textbook, *see, e.g.,* R.H. PALGRAVE, DICTIONARY OF MICRO-ECONOMICS § 397 (1982), this policy contrasts with that of enterprises in a private market, which usually seek to reach what amounts to the optimal—rather than maximal—number of consumers, as determined by reference to the preference curve of the marginal—as opposed to the average—consumer. The standardization of tuition fees chargeable by law faculties makes it impossible for them to adjust prices in the way necessary to reach marginal consumers, however.

B. *The Bar Association Factor*

That the Quebec Bar Association mostly retains the last word in all matters relating to the licensing of legal professionals in Quebec[18] clearly was destined to have a major effect on the condition of civilian legal education in that province. A major adverse effect has been that the average law student in Quebec has come to prefer—and thus obtain from law faculties—educational packages of questionable quality from the perspective of forming competent civilian jurists. Like the "financial" factor described above, therefore, the Bar Association's contribution to legal education in Quebec has been detrimental.

The story of the role of the Quebec Bar Association in legal education is one of relentless confrontation with the universities.[19] It begins with this Association, created as a professional corporation in 1849,[20] ostensibly with a view to provide a form of quality control mechanism that would serve the public interest by double-checking on the competence of law graduates entering the provincial market.[21]

The professional corporation took its mission very much to heart. Although its intervention was discrete at first, merely requiring that new recruits write qualifying examinations and/or undergo a period of internship with a corporate member,[22] it quickly became more daring.[23]

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18. The Quebec Bar Association is only one of Quebec's two professional corporations in law. The *Chambre des notaires* is the other. Act for the Organization of the Notarial Profession in that part of this Province called Lower Canada, S. PROV. C., ch. 21 (1847) (Can.). Although the *Chambre des notaires* has obviously also had influence over legal education in Quebec, *see* Macdonald, *supra* note 15, at 217-96, this influence has been neither as important (largely due to the fact that notaries are not nearly as numerous as advocates in Quebec), nor as perverse, as that exerted by the Bar Association. *See generally* J. Mackay, *La loi sur le notariat, son évolution et son histoire*, 91 REVUE DU NOTARIAT 421 (1989). For this reason, it is not discussed here.

19. *See generally* H. Le Bel, *Formation juridique et formation professionnelle: Quelques réflexions*, 7 R.J.T. 305 (1972); E. Colas, *Le Barreau, les facultés de droit et le stage*, 33 REVUE DU BARREAU [R. DU B.] 1 (1973); Macdonald, *supra* note 15; J. Moisan, *Barreau et universités*, 7 R.J.T. 287 (1972); M. Nantel, *L'étude du droit et le barreau*, 10 R. DU B. 97 (1950); G. PÉPIN, LA FORMATION PROFESSIONNELLE ET LES FACULTÉS DE DROIT: QUELQUES ÉLÉMENTS D'UN VOLUMINEUX DOSSIER (1981); Poupart, *supra* note 13.

20. Acte pour l'incorporation du Barreau du Bas-Canada, S. PROV. C., 12 Vic., ch. 45-6, § 325 (1849) (Can.).

21. *See* BARREAU DU QUÉBEC, GUIDE DES ARCHIVES INSTITUTIONNELLES DU BARREAU DU QUÉBEC (1994).

22. Bar Act, S.Q., ch. 27, § 44 (1881) (Can.); Bar Act, S.Q., (1st Sess.) ch. 5 (1936) (Can.). The period of apprenticeship is referred to as *le stage* in Quebec, and as the period of "articles" in the other Canadian provinces. Between 1944 and 1947, one could be admitted to the practice of

Before long, strict standards of university education were edicted,[24] and aspiring new entrants in the profession were required to attend eight months of courses administered and documented by the Bar Association prior to writing the qualifying examinations and undertaking the mandatory period of professional internship.[25] While the Bar Association recently modified the format of its professional training program with a view to emphasize professional skill training over legal knowledge testing,[26] the checklist of licensing criteria has, in substance, remained unchanged.[27]

Although the Bar Association claims that such professional training is the necessary complement to the universities' academic agenda,[28] many have questioned the purity of its motives.[29] Purity of

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law either by writing the required qualifying examinations or by undergoing a longer *stage*. An Act Modifying the Bar Act, S.Q., ch. 41 (1944) (Can.).

23. For a general description of the Quebec Bar Association's increasing intervention in university education, refer to 28 R. DU B. at 276-77 (1968).

24. In 1886, the Bar Association was given the legislative power to monitor the content of university studies in law in the province. *See* BARREAU DU QUÉBEC, *supra* note 21. In 1947, university studies in law became mandatory prior to writing the professional entrance examinations. Bar Act, S.Q., ch. 62 (1947) (Can.); *see* W. Meredith, *A Four-Year Course of Theoretical and Practical Instruction*, 13 R. DU B. 878 (1953).

25. *See* C. Fortin, *Preparing for the Practice of Law in Québec*, 3 J. PROF. LEGAL EDUC. 101 (1985).

26. R. Morissette, *The Evaluation of Bar Admission Candidates in Québec—Testing Knowledge and Testing Skills*, J. PROF. LEGAL EDUC. 1 (1988). Since 1987, the Bar Association's eight-month course program consists of technical courses, clinical workshops, and simulated legal proceedings. Candidates are evaluated throughout the program by way of written assignments, oral presentations, practical exercises, and examinations. Règlement sur la formation professionnelle des avocats, 123 G.O.Q. II, 5047 (1991), *enacted under* An Act Concerning the Barreau du Québec, R.R.Q., ch. B-1, § 15, 44 (1981).

27. For the current standards of admission to the Bar Association's training program, see R.R.Q., ch. C-26, r. 1, § 1.03 (1981) (Can.), *enacted under* § 43 of An Act Respecting the Barreau du Québec, R.S.Q., ch. B-1 (Can.). Concerning the content of this program and the details of the mandatory period of professional internship, see Règlement sur la formation professionnelle des avocats, *supra* note 26.

28. *See* BARREAU DU QUÉBEC, *supra* note 21. In March of 1978, Mr. Viateur Bergeron, then Head of the Quebec Bar Association, delivered an address at the Faculty of Law of the University of Montreal in which he declared:

> I always considered that three distinct and separate stages, three essential stages moreover, are needed to form a competent advocate. There must be a solid juridical preparation at the university level. The faculties are in charge of it. There must be a professional formation well designed and well taught. The Bar . . . is in charge of it. Finally, there must be an internship . . . to learn the essential rudiments of professional practice. It is the concrete training, it is the

motives aside, however, the Bar Association's intervention into legal education in the province has clearly been, and still is, largely seen by the universities more as trespass than as collaboration.[30]

As I show in Part III, this enduring dispute has had two notably detrimental effects with respect to the preservation of the civil-law tradition in Quebec. The first is the polarization of what could have been allied forces in redressing the structural defects noted above.[31] The second is the partial erosion of Quebec's academic base. While much of the ammunition against assimilation that is most valuable in a mixed jurisdiction lies in academia, particularly when the besieged is the civil-law tradition, Quebec law faculties have been instilled with an overpowering preference for professional training over academic schooling.

> essential experience. These three periods seem to me essential to the formation, at any rate, of all future advocates.

The address appeared as V. Bergeron, *La valeur de l'enseignement dispensé face au présent et à l'avenir de la fonction juridique*, 9 REVUE GÉNÉRALE DE DROIT 430 (1978).

29. Drawing on contemporary economic writings on professional licensing, *see, e.g.*, T.G. Moore, *The Purpose of Licensing*, J.L. & ECON. (1961); B.P. Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53 (1977); M. SPENCE, ENTRY, CONDUCT AND REGULATION IN PROFESSIONAL MARKETS (Working Paper #2 prepared for the Professional Organizations Committee, Ministry of the Attorney General, Government of Ontario) (1978); D. Stager & P. Foot, *Lawyers' Earnings under Market Growth and Differentiation, 1970-80*, XXII CAN. J. ECON. 150 (1989)), many have likened the Bar Association's dealings in legal education to a form of market monopoly, claiming that behind the notions of public protection and quality control heralded by the Bar Association as justifications for its interventionist policy lie truly protectionistic intentions. *See* Brierley, *supra* note 12, at 8; Le Bel, *supra* note 19, at 313; Nantel, *supra* note 19; Poupart, *supra* note 13, at 276; G. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971). These critics argue that one of the Bar Association's purposes in regulating the legal profession is to create barriers to entry so as to shelter its current members from potential competition. The Bar Association's apparently fading interest in a classic civilian legal education could also be explained in part as an exercise in political self-preservation. Indeed, if the arguments presented in Valcke, *The Clash of the Titans*, *supra* note 10, to the effect that a codal tradition clashes with the proliferation of state control are sound, then it would surely be in the interest of the Bar Association, itself an agent and beneficiary of state control, to steer Quebec's legal scene away from its civil-law lineage and towards an ideology that would better match the political aspirations of the modern welfare state.

30. The resentment felt by the *Association des Professeurs de Droit du Québec* is clear from the reading of its *Mémoire* submitted in 1964 to the Committee for the Revision of the Act and Regulations of the Quebec Bar Association. The *Mémoire* was subsequently published as Association des Professeurs de Droit du Québec, *Mémoire de l'Association des Professeurs de Droit du Québec*, 1964 (No. 51) THÉMIS 179.

31. *See supra* note 9 and accompanying text.

C. *The Psychological Factor*

The last of the three factors, which contributed significantly to the impoverishment of civilian legal education in Quebec, is what I call the "psychological" factor, in loose reference to a psychological form of parochialism, or some kind of inferiority complex, that would strike the members of a given minority group merely by reason of their membership in that group.

Among the many denominations used to describe this apparently widespread psychological phenomenon,[32] the one encountered most frequently in the field of social psychology is that of "alienation syndrome."[33] Borrowing from earlier anthropological studies,[34] Steinberg gives the following description of the symptoms of this syndrome, as they were observed among the economically disadvantaged:

> [T]he poor, by virtue of their exclusion from the mainstream of the societies in which they live, develop a way of life all their own, one that is qualitatively different from that of the middle-class societies in which they live. Like all cultures, the culture of poverty is a "design for living" that is adapted to the existential circumstances of the poor. The pressure of coping with everyday survival leads to a present-time orientation; the lack of opportunity, to low aspirations; exclusion from the political process, to feelings of powerlessness and fatalism; disparagement of the poor on the part of the society at large, to feelings of inferiority; . . . unrelenting poverty, to passivity and a sense of resignation. Thus . . .

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32. Chestang refers to the same phenomenon in the context of African-Americans as the "black experience." L.W. Chestang, *Character Development in a Hostile Environment* (Occasional Paper No. 3, School of Social Service Administration, University of Chicago, November 1972), *reported in* W. DAHLSTROM & D. LACHAR, MMPI PATTERNS OF AMERICAN MINORITIES 201 (1986). In the context of disadvantage which is specifically socio-economic, this phenomenon has been labeled "the culture of poverty." *See, e.g.*, S. STEINBERG, THE ETHNIC MYTH—RACE, ETHNICITY, AND CLASS IN AMERICA 106-09 (1989).

33. S. Middleton, *Alienation, Race, and Education*, 28 AM. SOC. REV. 473 (1963); DAHLSTROM & LACHAR, *supra* note 32, at 200.

34. O. LEWIS, FIVE FAMILIES: MEXICAN CASE STUDIES IN THE CULTURE OF POVERTY (1959); O. LEWIS, LA VIDA: A PUERTO RICAN FAMILY IN THE CULTURE OF POVERTY--SAN JUAN AND NEW YORK (1966).

> the culture of poverty comes into existence as a reaction and adaptation to conditions of poverty.[35]

While the specificity and vehemence of this description would seem to preclude its transposition to contexts other than that of socio-economic relations, some scholars have not hesitated to do just that. Dahlstrom and Lachar, for example, contend that any minority group acting in a hostile social context is vulnerable to this syndrome of alienation,[36] and Pierre Elliott Trudeau himself has decried what he calls Quebec's "ghetto mentality."[37]

If such a sweeping prognosis is warranted, it may be that some of the puzzles about legal education in Quebec, which the discussion of the financial and Bar Association factors leaves unsolved, could be explained as the manifestations of some sort of juristic syndrome of alienation. This is the case, I propose in Part III, specifically with respect to the nature of Quebec legal scholarship.[38]

Probably due to the factual volatility and causal indeterminacy that inheres in all things psychological, this last factor is more difficult to define than the financial and Bar Association factors, and its import for legal education thus will necessarily remain somewhat unclear. Given the lack of analytical constraints, there is great potential for indulging in exaggeration and caricature, and ascribing to the psychological factor more explanatory power than it deserves. In order to guard against this possibility—and avoid falling into the trap of over-medicalizing what could be just a normal, yet undesirable, feature of the human psyche—it is here treated as residual: it is invoked only where other satisfactory explanations are unavailable.

The three factors just described have thus contributed in different ways to the impoverishment of civilian legal education in Quebec. While the financial and Bar Association factors clearly have actively participated in bringing about this state of impoverishment, the contribution of the psychological factor has been more subtle. This last factor seems to have merely reduced the chances that the disturbing

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35. STEINBERG, *supra* note 32, at 107.

36. DAHLSTROM & LACHAR, *supra* note 32.

37. P.E. TRUDEAU, FEDERALISM AND THE FRENCH CANADIANS 42 (1968). Atias referred to the same as Quebec's "*mentalité de survivance*" ["survival mentality"]. C. ATIAS, SAVOIR DES JUGES ET SAVOIR DES JURISTES 33 (1990).

38. *See infra* Part III.C.

situation be redressed through some concerted efforts on the part of Quebec law faculties.

It is this combination of financial strain, pressure from the Quebec Bar Association, and psychological parochialism which, I argue in Part III, most likely steered Quebec legal education away from its due civilian course and into an avenue that a mixed jurisdiction true to this title would have taken care to avoid.

III. THE THREE FACTORS AT PLAY

Because no social process quite resembles that of the emergence of positive law through an accumulation of human decisions, it is often said of common-law reasoning—understood in the traditional sense of instrument, product, and object of such process[39]—that it differs from any other kind of reasoning.[40] In contrast, it is questionable whether the same can be said of legal reasoning in the continental tradition, for it has often been associated with nonlegal forms of reasoning, in particular with scientific reasoning.[41]

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39. This traditional understanding of common-law reasoning has been criticized by both left and right. The normative significance of the very cornerstone of this traditional view, the doctrine of precedent, has been questioned by natural law theorists, usually described as sitting on the right of the ideological spectrum. *See, e.g.*, M. Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (1982). On the left, Critical Legal Scholars have charged that the rule of precedent is a legal fiction devoid of any actual power to constrain judicial reasoning. *See generally* THE POLITICS OF LAW (Kairys ed., 1982). See in particular D. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) and D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. (1976).

40. Among some of the most celebrated authors of such comments are B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); R. POUND, CONTEMPORARY JURISTIC THEORY (1940); and O.W. HOLMES, JR., THE COMMON LAW (1881). *See also* J.P. DAWSON, THE ORACLES OF THE LAW (1968); M.A. EISENBERG, THE NATURE OF THE COMMON LAW (1988); E.H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1950). It is accordingly common to warn entering law students about the unique character of common-law reasoning in the opening pages of law school casebooks. *See, e.g.*, S.M. WADDAMS, THE STUDY OF LAW ch. 7 (4th ed. 1992); C. BOYLE & D.R. PERCY, CONTRACTS: CASES AND COMMENTARIES at lxxix (5th ed. 1994).

41. P. Rémy, *Les civilistes français vont-ils disparaître?* 32 MCGILL L.J. 152, 154 (1986) ("[The juridical order] remains and changes of its own; it is given to me, the civilist, in the same way that nature is given to the physicist who observes it."); *see also* F. GÉNY, SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF (1914); R.P. ROUBIÈRE, THÉORIE GÉNÉRALE DU DROIT (2d ed. 1951); P. Stein, *Historical Development of Civil Codes*, *in* CAMBRIDGE LECTURES 280, 282 (1983); H.F. Jolowicz, *Utility and Elegance in Civil Law Studies*, 65 L. Q. REV. 322 (1949). From these references, it is clear that the analogy being drawn is between civilian legal reasoning and mathematical reasoning, not experimental scientific reasoning, for the latter is clearly inductive. *See* F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 254-57 (1967).

If only because the form of reasoning characteristic of a given discipline naturally will inform this discipline's educational objectives, the question of whether reasoning at civil law can properly be described as *sui generis* has important educational ramifications. Accordingly, the alleged connections between civilian legal reasoning and scientific reasoning deserve deeper scrutiny.[42]

A. *Civilian Legal Reasoning*

Like scientific reasoning, legal reasoning in the continental tradition is said to be deductive, in the sense of being a process of rational deduction from coherent first principles through which the right answers to concrete cases can be discovered.[43] The following statement of Yiannopoulos concerning legal reasoning at civil law is, in this regard, particularly revealing:

> A rational judicial process involves always determination of issues in accordance with the requirements of formal logic. The judicial decision is a conclusion reached on the basis of syllogism: rules of law furnish the major premise,

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42. For a more elaborate account of these connections, see Valcke, *supra* note 9.

43. "Codification presupposes a carefully thought-out rational framework for the law, consciously chosen, consistently followed and logically inter-related . . . in which all the concepts relating to a given area of the law are logically derived from first principles, meticulously developed and systematically ordered." R.A. Macdonald, *Comments*, LVIII CAN. BAR REV. 185, 189 (1980); J.M. Trigeaud, *Le processus législatif: éléments de philosophie du droit*, 30 ARCHIVES DE PHILOSOPHIE DU DROIT [ARCH. PHIL. DRT.] 245, 254 (1985) ("To legislate, according to Montesquieu, is to 'tie.'"). *See generally* WATSON, *supra* note 6, at 23-39. Max Weber thus summed up civilian legal reasoning by way of the following five postulates:

> [F]irst, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be 'construed' rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof, since the 'gaplessness' of the legal system must result in a gapless 'legal ordering' of all social conduct.

M. WEBER, ECONOMY AND SOCIETY 657-58 (Fischoff et al. trans., 1978).

> fact situations form the minor premise, and the conclusion follows with logical necessity.[44]

This vision of legal reasoning follows directly from the civilian's traditional vision of both the nature of law and the judicial function. In accordance with the philosophical teachings of medieval Scholasticism and eighteenth-century Rationalism,[45] civilians traditionally have viewed positive law as the materialization of some higher moral order that is inherently rational, universal, and immutable,[46] somewhat similarly to the way scientific laws reflect an immanent physical order. In the opening chapter of *De L'Esprit des lois* (1748), Montesquieu wrote indeed that "[b]efore laws were made, there were relations of justice antecedent to the positive law which establishes them."[47] The main difference between

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44. A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM 89 (1977); *see also* J. HILAIRE, HISTOIRE DU DROIT ET DES INSTITUTIONS 317 (1975).

45. G. RIPERT, LE RÉGIME DÉMOCRATIQUE ET LE DROIT CIVIL MODERNE 50 (1936). On the influence of Scholasticism and Rationalism on the development of the civil law generally, see J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY (1992); LAWSON, *supra* note 6, at 1-44; J. Maillet, *The Historical Significance of French Codification*, 44 TUL. L. REV. 681 (1970); MERRYMAN, *supra* note 6, at 6-25; WATSON, *supra* note 6, at 83-98; ZWEIGERT & KÖTZ, *supra* note 6, at 76-87.

46. J.L. Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1074 (1988) ("[Positive law is b]ased on the postulate of the school of natural law according to which there existed a legal system of permanent and universal value, founded on human reason."); Trigeaud, *supra* note 43, at 246 ("[T]he legislative process becomes the means to decipher and to interpret this [the natural] law. It is a *reading* process. The law has no other purpose than to posit the natural law; it delimits and fixes the concrete modalities of the application of the natural law."); *see also* J. DOMAT, LES LOIS CIVILES DANS LEUR ORDRE NATUREL § 1 (1689); Prévault, *Les fondements philosophiques du Code Napoléon*, 64 STUDI URBINATI DI SCIENZE GIURIDICHE ED ECONOMICHE 143 (1975-76); S. Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, U. ILL. L. REV. 597 (1984). The influence of Immanuel Kant, which pervades civil law generally, Goyard-Fabre, *Kant et l'idée pure du droit*, 26 ARCH. PHIL. DRT. 133 (1981), is here palpable. Kant wrote:

> Obligatory laws for which there can be an external lawgiving are called *external* laws (*leges externae*) in general. Those among them that can be recognized as obligatory a priori by reason even without external lawgiving are indeed external but *natural* laws, whereas those that do not bind without actual external lawgiving (and so without it would not be laws) are called *positive* laws. One can therefore conceive of external lawgiving that would contain only positive laws; but then a natural law would still have to precede it, which would establish the authority of the lawgiver.

I. KANT, *Metaphysical Principles of the Doctrine of Right*, *in* THE METAPHYSICS OF MORALS 50-51 (Mary Gregor trans., 1991) (1797).

47. C.L. DE SECONDAT, BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS: LES GRANDS THÈMES (J. P. Mayer & A. P. Kerr eds., 1970).

law and science in this respect is that, in law, this materialization is effected partly through codification, partly through doctrinal analysis and partly through adjudication: broad principles of law are embodied in the civil code, while the more detailed rules that derive from these principles are articulated by scholars and finally applied by judges.[48]

On this view, the formulation of positive law, be it by way of codification, doctrinal analysis, or adjudication, is not a creative process, but rather one of collective and gradual discovery, just as what we know as the law of gravity is no human invention, but rather an explanation of the way things are, which came about through the combined efforts of several generations of scientists. Legal reasoning is, like scientific reasoning, the deductive process by which such discovery can be operated, given the necessary coherence of the orders being discovered. As one of the French codifiers explained:

> When what is established or known offers no guidance, when at issue is a fact which is entirely new, one must go back to the principles of natural law. For if the foresight of the legislators is limited, nature in contrast is infinite; it applies to all that may interest mankind.[49]

In addition to suiting the Cartesianism of the civilian mind,[50] such a vision of positive law squares neatly with the civilian political ideal of a strict separation of powers. Since the political struggle that culminated in the Revolution of 1789, civilians have remained highly distrustful of their

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48. Cie Immobilière Viger v. Laureat Giguère Inc., [1977] 2 S.C.R. 67 (Beetz, J.) ("The Civil Code does not contain all of the civil law. It rests upon principles which it does not always explicit and whose life it is left to jurisprudential and doctrinal analysis to perpetuate."); G. Timsit, *Pour une nouvelle définition de la norme*, 1988 Recueil Dalloz-Sirey, *Chronique* 267, 268 (Fr.) ("[The code is] an open system . . . a loose, dialogic whole, whose constitutive norms even are loose, leaving to its designated readers much liberty in decoding.").

49. J. Portalis, *Discours préliminaire prononcé lors de la présentation du projet, in* 1 P. ANTOINE FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 466 (1827) ("*Quand on n'est dirigé par rien de ce qui est établi ou connu, quand il s'agit d'un fait absolument nouveau, on remonte aux principes du droit naturel. Car si la prévoyance des législateurs est limitée, la nature, elle, est infinie; elle s'applique à tout ce qui peut intéresser les hommes.*"). In a similar vein, Tronchet and Jaubert relate that the French codifiers considered the organization of the code to be "*née de la nature des choses*" ["born from the nature of things"] and "*conforme . . . à la marche naturelle des idées*" ["in conformity . . . with the natural course of ideas"]. *Id.* at lxix, cxiij.

50. Louis Baudouin described this spirit in the following, very evocative, terms: "But the need to codify comes in its deepest roots from this love of order typical of the Cartesian spirit fond of perspectives, of plans, of logic, of the aesthetic beauty of the edifice even." L. Baudouin, *Originalité du droit du Québec*, 10 R. DU B. 121, 125 (1950).

judges, and have accordingly insisted on a strict delineation of judicial powers.[51] From this perspective, the suggestion that the judicial task might be limited to the quasi-mechanical application of extant legal rules[52]—the grand lines of which would have been crystallized into a code, and analyzed by scholars—and might not extend as far as creating these rules,[53] seems particularly appealing.[54] And so did Montesquieu also insist that "[t]he judges of the nation are but the mouths that pronounce the words of the law, inanimate beings devoid of the power to temper its force or rigour."[55]

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51. Because judges had traditionally belonged to the landed aristocracy, they were prime targets of the revolutionary movement that was to seal the fate of feudalism in France. LAWSON, *supra* note 6, at 31; MERRYMAN, *supra* note 6, at 17. In addition, French judges had by then come to be known for actively protecting the interests of the aristocracy against the insurrection of the proletariat. Such overt partiality from state officials was deemed a most offensive violation of France's newly-found aspirations of equality in the eye of the law. *See generally* F. Deak & M. Rheinstein, *The Development of French and German Law*, 24 GEO. L.J. 551 (1936); R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY 152-55 (1987); P. Issalys, *La loi dans le droit: tradition, critique et transformation*, 33 CAHIERS DE DROIT [C. DE D.] 663, 675-82 (1992).

52. The typical continental judgment is accordingly a bare, dry, categorical, one-paragraph conclusion: "[Continental] judicial decisions are published, if they are published at all, in a form that appears emasculated to an American lawyer: the facts are omitted or sharply reduced and the process of judgment is made to seem abstract, mechanical, and inhuman. The civil lawyer could respond that his system of reporting judicial decisions represents greater objectivity, provide less temptation to succumb to the human aspects of the case and to endanger the purity and objectivity of the law." Merryman, *supra* note 7, at 874. An example of a continental judgment is reproduced in R.A. Macdonald, *Understanding Civil Law Scholarship in Quebec*, 23 OSGOODE HALL L.J. 573, 583 (1985).

53. Indeed, judicial decisions are not a primary source of law at civil law, and judges are accordingly free to disregard precedents. On the absence of rule of precedent at civil law, see 1 C. AUBRY & C. RAU, DROIT CIVIL FRANÇAIS 55-59 (7th ed. 1964); 1 A. COLIN & H. CAPITANT, TRAITÉ DE DROIT CIVIL 113-14 (1957); DAWSON, *supra* note 40, at 416-31; P. Esmein, *La jurisprudence et la loi*, 50 REV. TRIM. DR. CIV. 17 (1952); G. Gorla, *Civilian Judicial Decisions—An Historical Account of Italian Style*, 44 TUL. L. REV. 740 (1970); Lambert & Wasserman, *supra* note 7, at 14; P. Malaurie, *La jurisprudence combattue par la loi*, *in* MÉLANGES SAVATIER 603 (1965); 1 G. MARTY & P. RAYNAUD, DROIT CIVIL 215-19 (2d ed. 1972); 1 G. RIPERT & J. BOULANGER, TRAITÉ DE DROIT CIVIL 241-43 (1957).

54. R. DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS § 21 (8th ed. 1982). Similarly, Portalis suggested that the best that could be hoped for was that judges apply rules to facts while remaining "*pénétrés de l'esprit général des lois*" ["imbued with the general spirit of the laws"]. Portalis, *supra* note 49; *see also* Stein, *supra* note 41, at 284.

55. MONTESQUIEU, *supra* note 47, at 178 (*"Les juges de la nation ne sont que les bouches, qui prononcent les paroles de la loi, des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur.*").

It is in this sense that legal reasoning in the continental tradition is arguably analogous to scientific reasoning. If this is right, civilian legal reasoning cannot be described as *sui generis*, and as such differs significantly from common-law reasoning. For the hallmark of common-law reasoning is allegedly that unlike any other form of reasoning, it proceeds inductively to extract rules from an inordinate accumulation of concrete judicial decisions.[56] One might conjecture accordingly that while learning to "think like a lawyer" is, at civil law, presumably no different from learning to think, mastering the art of common-law reasoning, in contrast, ought to require a form of training that is specifically legal.

It seems that the history of legal education in the two traditions bears out such conjectures, as I attempt to show next. In particular, I propose to outline this difference in didactic philosophies as manifested in three major components of legal education, namely, the profile of curricula, the nature of scholarship, and the method of instruction. These were chosen because of their pivotal place in the study of law, but also, and most importantly, because these are the three educational components which, I believe, are most representative of the difference between the two legal cultures and yet are also the components which, in Quebec legal education, are most "uncivilian." This, I argue, came about as a result of the combined influence of the three factors described in Part II.

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56. ATIAS, *supra* note 37, at 45-51; J. Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 424-26 (1967); DAMASKA, *supra* note 7, at 1365-67. Many common-law scholars have suggested that, like the rules which ground the civilian deductive process, those produced by the inductive process of the common law form a coherent conceptual structure instilled with immanent rationality. Most notoriously, such was William Blackstone's endeavor in writing his COMMENTARIES ON THE LAWS OF ENGLAND (1765). More recently, see P. Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559 (1989); Brudner, *The Unity of Property Law*, IV CAN. J. L.& JUR. 3 (1991); S.R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); E.J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989). It may be that the common law rests, like the civil law, upon an internally coherent moral system. I would argue however that, while the coherence of the legal system is, at civil law, a necessary consequence of its process, similar coherence at common law, if it exists, can only be incidental. For the structure of common-law institutions gives no reason to assume that the rules which they produce will be coherent. At any rate, an adequate treatment of this argument would take me beyond the purpose of the present Article, which is devoted to legal education at civil law.

B. *The Profile of Law Curricula*

The traditional profile of law curricula in civil-law jurisdictions is described immediately below; that of Quebec law faculties is explored thereafter.

1. Traditional Law Curricula at Civil Law

Historical accounts of legal education at civil law and at common law are commonly prefaced by a restatement of the well-documented fact that "[w]hile the common law of England and America was essentially shaped by judges, the civil law of the Continent of Europe was built by university professors."[57] The difference in the educational objectives which have historically been pursued in civil-law and common-law jurisdictions follows directly from the difference between the two cultures' views of the role of legal institutions.

The fact that the common law emerged from judicial practice suggests that its teaching would similarly be best effected through practice, and so professional apprenticeship was once the only form of legal education available in common-law jurisdictions.[58] Institutional schools of law were eventually established, but their purpose remained similar to that of the apprenticeship. The traditional school of common law was not designed to dispense a general form of higher education; rather, its main purpose was to train professionals, experts at "reading the law," specialists in the technique of legal argumentation.[59] This narrow view of legal education still prevails today, at least in North American

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57. M. Rheinstein, *Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany*, 1938 WIS. L. REV. 5, 6 (1938); *see also* G. Casper, *Two Models of Legal Education*, 41 TENN. L. REV. 13 (1973); LAWSON, *supra* note 6, at 69-70; MERRYMAN, *supra* note 6, at 56-57; J.M. Perillo, *The Legal Profession in Italy*, 18 J. LEGAL EDUC. 274 (1966); SCHLESINGER, *supra* note 6, at 146.

58. STEVENS, *supra* note 8. Until recently, it was still possible in a number of U.S. states to write the qualifying bar examinations without prior formal legal schooling. *See* M. Loevy, *Become a Legal Apprentice*, 4 STUDENT LAW. 40 (January 1976).

59. *See generally* STEVENS, *supra* note 8. Milsom explains that the "art of lawyering" at common law was at one time even more strictly technical. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 40-41 (1981). It seems that the task of assisting litigants was, in medieval England, discharged by "counters"—individuals known for their ability to speak quickly and clearly—for a slip of the tongue in the pronouncement of one's statement of claim or defense was then deemed incontrovertible evidence that the speaker was lying. How it is that the litigating parties eventually came to be allowed to appoint "counters" to speak on their behalf is still unknown.

common-law jurisdictions,[60] where general university education is considered a requirement for admission to law school and thus presumably not one of its features.

The educational mission of the typical continental law faculty was defined more broadly. It was in the halls of the first European universities that, throughout the Middle Ages and beyond, the civil-law tradition grew from the Roman law that it had been into the pan-European *Jus Commune* of romanist inspiration that it became.[61] Its study was there considered a preeminent academic discipline and thus devoid of any immediate practical purpose. In the pure fashion of fifteenth-century Humanism, legal studies were indeed deemed a noble form of intellectual enlightenment, whose ultimate and only design was to form well-rounded intellectuals, disciples of arts and culture, masters of logic and rational

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60. The case of England is peculiar in this respect. As in the continental tradition, law is in England a first university degree, and it is my understanding that, largely for this reason, it has also traditionally been more general than its North American counterpart, at least at Oxford and Cambridge. This may be the result of continental influence. Unlike in the continental tradition, however, it appears that English universities have played a very limited role, if that, in the elaboration of English law. *See, e.g.*, E. JENKS, LAW AND POLITICS IN THE MIDDLE AGES (2d ed. 1913); MERRYMAN, *supra* note 6, at 53; MILSOM, *supra* note 59; SCHLESINGER, *supra* note 6, at 256-57; VON MEHREN & GORDLEY, *supra* note 6, at 11. The significance and consequences of this apparent disjunction between England's legal system and English legal education are unclear, and beyond present purposes to explore.

61. It is now widely acknowledged that the civil-law tradition developed from what one historian has called the "two lives of Roman Law," B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 1-54 (1962), the first life ending with Justinian's consolidation of Roman private law into the *Corpus Juris Civilis* in 534 A.D., and the second life beginning with the medieval rediscovery and revival of this work, after its loss and consequent fall into oblivion during the Barbarian invasions of the Dark Ages. H.J. Berman, *The Religious Foundations of Western Law*, 24 CATH. U.L. REV. 490, 492 (1975). It is indeed the *Corpus Juris Civilis* which several generations of academics proceeded to analyze, purify, revamp, and synthesize into what came to be known as "the common law of Europe," or *Jus Commune*, which in turn formed the basis of the great European civil codes enacted in the nineteenth century. H.J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 908-30 (1977); SCHLESINGER, *supra* note 6, at 263-68. For this reason, Walton wrote of the *Corpus Juris Civilis* that "[w]ith the exception of the Bible, there is no book which has so profoundly affected western civilisation." F.P. WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW (1920). Most notorious among the generations of academics who participated in the collective formulation of the *Jus Commune* were the Glossators, the post-Glossators, the Scholastics, and the School of Secular Natural Law. On the history of the civil-law tradition generally, see J.C. Coing, *The Roman Law as Ius Commune on the Continent*, 89 LAW Q. REV. 505 (1973); KELLY, *supra* note 45; LAWSON, *supra* note 6, at 10-16; MERRYMAN, *supra* note 6, at 6-33; SCHLESINGER, *supra* note 6, at 262-68. On the history of Roman law generally, see W. KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 178-80 (1973); 1 F.H. Lawson, *Selected Essays, Many Laws*, *in* 5 EUROPEAN STUDIES IN LAW 85-175 (1977); F. SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE (1946); WALTON, *supra*.

discourse.[62] Consequently, on the continent legal education has always been the exclusive province of universities,[63] designed to cater to individuals with very diverse, if at all determined, professional ambitions and constituted a first, thus general and wide-ranging, university degree.[64]

The curriculum of the typical continental law faculty was designed accordingly. While its details have varied across faculties and over time, it has found a steady core in a loose amalgam of law and nonlaw courses.[65] The nonlegal component of this curriculum has consistently included courses in philosophy, history, theology, mathematics, and the classic languages, as these were deemed to provide the basic analytical skills, judgment, mental agility, and intellectual maturity, which students would require, in the short term, to carry out the legal component of the curriculum.[66]

The profile of this latter component has become more variable over time. Before the turn of the nineteenth century, the only forms of

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62. Lambert & Wasserman, *supra* note 7, at 16 ("[T]he continental law faculties [tend to be transformed] into mixed schools of social science and of law, and to obtain . . . for the law students, a general culture appropriate to their professional tasks, more than an immediate preparation for practice, preparation which cannot be fully acquired save in the office of a practitioner."); *see also* Damaska, *supra* note 7; Geck, *supra* note 7; Merryman, *supra* note 7, at 865-66; Rheinstein, *supra* note 57; SCHLESINGER, *supra* note 6, at 146.

63. *See supra* note 8.

64. *See* Merryman, *supra* note 7, at 865. Vedel notes that in France only 20-25% of law graduates enter law careers. Half of the remaining 75-80% work in the public sector; the other half end up in the private sector, in such diverse occupations as journalism, corporate management, and politics. G. Vedel, *Le droit vit-il à l'heure de la société?*, 13 R.J.T. 234, 237 (1978).

65. Lambert & Wasserman, *supra* note 7, at 16 ("[T]he curriculum of the French faculties of law is today composed of approximately equal parts of instruction in economics, legal history, and social science and of instruction which prepares more immediately for the practice of the legal profession."); *see also* REPORT OF THE LAVAL UNIVERSITY FACULTY OF LAW, GROUPE SUR LES ORIENTATIONS DU DROIT À LAVAL 15 (1972); CONSEIL DES UNIVERSITÉS, *supra* note 13, at 6; Coing, *supra* note 61.

66. Y. Caron, *Gilt-Edged Legal Education: A Comparative Study*, 14 MCGILL L.J. 371 (1968). Poupart's following remark in this respect is typical of the continental spirit:

> Not so long ago, classic humanities, preferably Greek and Latin, could alone provide, it was thought, a formation true to its name. It is admitted today that sciences and modern humanities also contribute to form the mind.
>
> Jurists must accept that, if studying traditional positive law: private law, commercial law, administrative law, and constitutional law, remains the foundation of a legal formation, it must be complemented, in a dynamic society, with the study of disciplines which aim at grasping the legal phenomenon as it becomes concrete throughout time and space.

Poupart, *supra* note 13, at 278.

law sufficiently systematized and sophisticated to present an academic interest were those constitutive of the *Jus Commune* (Roman private law, canon law, and the *Jus Gentium*, precursor of modern "international law"[67]) and the selection of law courses which appeared in the curriculum of the typical continental faculty was restricted accordingly.[68] Courses in constitutional, administrative, and procedural law were added to this list only later, when "public law" in its institutionalized form[69] emerged along with the modern nation-state.[70] From that time onwards, Roman private law and canon law were no longer the only law courses taught in continental universities, but they nonetheless retained a position of prominence in the curriculum, as they, more than the courses of public

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67. The fathers of the School of Secular Natural Law of the seventeenth and eighteenth centuries, whose philosophical teachings have been most influential upon the civil-law tradition, were indeed internationalists. E. BODENHEIMER, JURISPRUDENCE 31-59 (1974); C.J. Zepos, *The Legacy of Civil Law*, 34 LA. L. REV. 895 (1974). In particular, Grotius's (*De jure belli ac pacis libri tres* (1625)) and Pufendorf's (*De jure naturae et gentium libri octo* (1625)) writings on the *Jus Gentium*—or "law of the peoples"—are among that school's most important works.

68. J.C. Bonenfant, *L'enseignement du droit romain*, 14 R. DU B. 71, 84 (1954); Brierley, *supra* note 12, at 18; Coing, *supra* note 61; R.W. Lee, *The Place of Roman Law in Legal Education*, 1 CAN. BAR REV. 132 (1923); SCHLESINGER, *supra* note 6, at 265.

69. Before the emergence of institutionalized public law, matters of public law were ruled by an assortment of imperial or royal decrees and local customs. MERRYMAN, *supra* note 6, at 12, 14; WIEACKER, *supra* note 41, at 83-85.

70. Merryman gives an insightful account of the ideological tensions that attended the advent of the French nation-state and subsequent enactment of the Napoleonic Code. MERRYMAN, *supra* note 6, at 14-25. On the one hand, embracing the European *Jus Commune*—a body of law billed as universal and ahistorical, applicable to all human beings equally—as the law of France meshed well with the revolutionary drive to eliminate feudalism on French territories once and for all. At the same time, however, strong nationalistic sentiments pointed in the way of supplying France with a juridical identity that would mark it off from the rest of Europe. As it happened, both the anti-feudalist and nationalistic undercurrents of the revolutionary spirit found institutional materialization at the turn of the nineteenth century. The former, in the Napoleonic Code of private law of 1804, whose larger part was drawn directly from the European *Jus Commune*; the latter, in the emergence, following 1789, of a body of public law that was distinctively French. *See* Herman, *supra* note 46; A.D. de Groot, *European Legal Education in the 21st Century*, *in* THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION 7, 15 (B. de Witte & C. Forder eds., 1992); L. MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY APPLIED TO LEGAL INSTITUTIONS 421 (1921); SCHLESINGER, *supra* note 6, at 300. A similar debate took place within the codification movement. The nationalists among the codifiers objected to the civil code being modeled exclusively upon the *Jus Commune*, and insisted that its larger part be devoted to French customary law, a position which the universalists opposed strenuously. *See* A.J. ARNAUD, LES ORIGINES DOCTRINALES DU CODE CIVIL FRANÇAIS (1969); GUTTERIDGE, *supra* note 6, at 77-79.

law, exemplified civilian legal reasoning and were thus considered the real strongholds of the civil-law tradition.[71]

2. Law Curricula in Quebec

a. Description

By continental standards, the typical law curriculum in Quebec is inadequate in at least two ways. The first concerns the absence of a solid nonlegal component to that curriculum; the second relates to the poor civilian content of its legal component.

The problem concerning the nonlegal component of Quebec's law curriculum is that there is very little of it, despite the fact that law studies are a first university degree. While some form of liberal arts education, including "a regular course in philosophy," was once a requirement for admission to a Quebec law faculty,[72] this is no longer the case.[73] In fact, very few of the students currently being admitted to Quebec law schools have had the benefit of prior higher education; most

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71. *See supra* note 68. Indeed, the civil-law tradition is a tradition of private law. *See* NICHOLAS, *supra* note 61, at 2; WATSON, *supra* note 6, at 2. Public law, as the law of public institutions, was viewed as contingent and eminently practical, as a body of law that would necessarily vary from nation to nation, along with the national institutions from which it would derive. It has traditionally been considered by civilians as less interesting intellectually. For the same reason, civilians have always maintained a very tight line between public and private law. *See* WATSON, *supra* note 6, at 144-46.

72. Bar Act, S.Q., (1st Sess.) ch. 5 (1936) (Can.). The study of philosophy was at the time considered "the very basis of legal education." Ledain, *supra* note 7, at 36. Siméon Pagnuelo, then Secretary of the General Council of the Bar, wrote that this Council "believes in the necessity of teaching philosophy to those who intend to enter the Bar, as law is essentially a science." S. PAGNUELO, UNIVERSITIES AND THE BAR: A CRITICISM OF THE ANNUAL REPORT OF MCGILL, FROM A FRENCH-CANADIAN STANDPOINT 2-3 (1887), *quoted in* D. Howes, *The Origin and Demise of Legal Education in Quebec (or Hercules Bound)*, 38 U.N.B.L.J. 127, 127-28, n.6 (1989); *see also* Brierley, *supra* note 12, at 9-10. At its inception in 1848, the Bachelor of Civil Law at McGill consisted of one year in Arts and two years studying law. Macdonald, *supra* note 15, at 218.

73. The 1936 provisions of the Bar Act to that effect were repealed in 1944, S.Q., ch. 41 (1944) (Can.), and no mention is made of such requirements in the CATALOGUES, *supra* note 12. The McGill CATALOGUE is particularly informative in this respect, given that McGill offers two distinct Bachelor's programs in civil law and in common law. While some form of general university education is required for admission to the common-law degree, but not for admission to the civil-law degree, for which a DEC (*Diplôme d'études collégiales*) is deemed sufficient. The DEC is obtained in satisfaction of one of the mainstream programs offered in Quebec's CEGEPs, *supra* note 12. For criticisms of this modification in the admission requirements to the study of law in Quebec, see Boucher, *supra* note 14; Brierley, *supra* note 12, at 10; Colas, *supra* note 19, at 6.

of them come to law straight out of CEGEP.[74] Yet, the task of providing general university education to these students has not been assumed by the law faculties. Quebec's law curriculum is far from wide-ranging; if anything, resembles that offered in North American jurisdictions of common law.

To begin with, general nonlaw courses simply are not to be found in the curriculum of Quebec law faculties. Almost all of the courses that appear on the curricula of these five faculties,[75] be they mandatory or optional, are either courses *in* law (standard doctrinal law courses) or courses *about* law (interdisciplinary, usually more theoretical "perspective" or "law and"-type courses).[76] General arts, humanities, and science courses have no place in Quebec's law curriculum.

Among the courses that do appear in that curriculum, moreover, courses *about* law are very few in comparison to courses *in* law.[77] Admittedly, courses *about* law are no more ubiquitous in the Quebec curriculum than they are in the more specialized curriculum of North American schools of common law. Furthermore, some serious attempts

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74. *See supra* note 12. This is not the case for McGill students. *See supra* note 73. But McGill is exceptional in this regard.

75. *See supra* note 12. The curriculum of the diploma of Juridical Sciences offered at UQAM is exceptional in this regard. *See* R.D. Bureau & C. Jobin, *Les Sciences Juridiques à l'Université du Québec à Montréal: Fifteen Years Later*, 11 DALHOUSIE L.J. 295 (1987).

76. CATALOGUES, *supra* note 12. This situation is not new. In 1915 already, Professor Lee, then Dean and Gale Professor of Roman Law at McGill, had declared:

> The course at present prescribed for the [Bachelor of Civil Law] degree, while excellently adapted to its professed object of providing for the needs of students who intend to practise at the Bar of the Province, makes no direct appeal to students who do not intend to practise at the Bar of the Province, and even as regards those who do so intend, leaves something to be desired in respect of the more abstract and theoretical branches of legal science, which are pre-eminently fitted to form part of a course of study in a University.

Minute Submitted to the April Meeting of the University Senate, *published in* MCGILL UNIVERSITY, ANNUAL REPORT FOR 1914-15, *and quoted in* Macdonald, *supra* note 15, at 249. Concerning the law curriculum at Laval University for the years 1945-1965, Normand reports that nonlaw courses were generally rare (only three are reported: religion, political economy, and accounting), and courses in philosophy, sociology, and political science were entirely absent. S. Normand, *Tradition et modernité à la Faculté de droit de l'Université Laval de 1945 à 1965*, 33 C. DE D. 141, 150 (1992). See also his account of the resistance met by one professor when attempting to implement his "dream of a juridical formation suffused with humanism." *Id.* at 170-76.

77. A cursory look at the catalogues of Canadian schools of common law suggests, in fact, that these schools offer a greater number of more theoretical and interdisciplinary courses *about* law than do Quebec faculties of civil law. A similar comparison with common-law schools in the United States is difficult to conduct, given the high degree of diversity among these latter schools.

to promote a broader interdisciplinary and theoretical perspective on law have been made in recent years.[78] On the whole, nonetheless, the curriculum of Quebec's five law faculties has consistently, and particularly since the 1960s, been filled with doctrinal courses proper.[79]

This heavy emphasis on legal doctrine over more theoretical and interdisciplinary courses has brought Quebec's law curriculum in line with the traditional, specialized and professionally-oriented curriculum of North American schools of common law.[80] To be sure, this departure from the continental tradition of legal education would have been unproblematic if Quebec law schools had also adopted the admission and curricular policies of their common-law counterparts. But in this last respect, Quebec law faculties have remained continental: the study of law is in Quebec a first university degree, and prior university education is therefore unnecessary.

In sum, Quebec law faculties have succeeded at drawing upon two models of legal education to produce a third that is inferior to both. While the continental law curriculum is wide-ranging partly because law studies are a first university degree, and, conversely, the North American curriculum of common law is more specialized partly because entering law students have already completed some years of general university education, the law curriculum in Quebec is both specialized *and* the object of a first university degree. This policy has resulted in a majority of Quebec law graduates having had no opportunity to develop the basic analytical skills, judgment, mental agility, and intellectual maturity, which it is the purpose of general university education to afford and

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78. Some faculties have recently shown interest in the sociology of law, *see* H. Dumont, *Une science à construire: La sociologie du droit*, 12 R.J.T. 51 (1982) (sociology); CATALOGUES, *supra* note 12 (law and economics). In addition, most faculties begin their programs with a series of introductory lectures on somewhat theoretical topics in order to give students a general perspective of law and society. At McGill, this informal introduction was upgraded to a full first year course a few years ago. *See* MCGILL UNIVERSITY, CATALOGUE FOR FOUNDATIONS OF CANADIAN LAW.

79. The CATALOGUES, *supra* note 12, show that most interdisciplinary or theory courses *about* law are now optional. Although some such courses are mandatory in all five faculties ("Critical Education," "Economic Analysis of Law," "Philosophy of Law," "Legal History," "Law and Sociology," "Sources and Origins of the Law," "Introduction to the Study of Law," are a few examples), they are very few: on average, they represent 3-5% of the total number of credit-hours required for graduation. It is therefore possible to graduate from a Quebec law faculty with a transcript showing 95-97% standard doctrinal courses.

80. P.A. Crépeau, *Les lendemains de la réforme du Code civil*, 59 CAN. BAR REV. 625, 636 (1981).

which the above description of civilian legal reasoning suggests is particularly important for the civilian.[81] Instead of jurists, it is "legists" that Quebec faculties have been forming.[82]

The second problematic feature in Quebec's law curriculum is the poor civilian content of this curriculum's legal component. Within this component, the relative importance of traditional civilian private law has been declining steadily.[83] And while the eventuality of such decline had long been foreseen,[84] its steepness, particularly in the last decade, surprised everyone.[85] Once occupying almost half of the law curriculum in certain faculties,[86] traditional private law courses currently represent on average no more than a third, and sometimes as little as a fifth, of mandatory courses in the Quebec curriculum. The remaining two-thirds, or four-fifths, consist of public law courses and courses of "extra-codal" law, that is, courses such as labor law, poverty law, consumer protection law,[87] which are statutory in nature and hence not as distinctively civilian, even though they fall within the category of private law.[88]

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81. *See supra* text accompanying notes 40-56.

82. P. Henry, *Vers la fin de l'état de droit?*, 6 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER [REV. DR. PUB.] 1211, 1215 (1977) ("This specialization of education progressively generates, among other things, a dangerous incommunicability to the extent that each discipline witnesses the development of a particular and esoteric language. Such an evolution, eminently detrimental because of the divisions it introduces, produces legists, not jurists.").

83. BRIERLEY & MACDONALD, *supra* note 3, at 64.

84. Cohen had foreseen it as far back as in 1950. Cohen, *supra* note 16, at 284.

85. Brierley, *supra* note 12, at 27.

86. See the cases of Laval University and University of Montreal, as reported in Normand, *supra* note 76, at 146-49, and in A. LAJOIE & C. PARIZEAU, LA PLACE DU JURISTE DANS LA SOCIÉTÉ QUÉBÉCOISE 31-32 (1976) [hereinafter LAJOIE REPORT]. This last study was commissioned by Quebec's Ministry of Science and Higher Education.

87. *See* CATALOGUES, *supra* note 12.

88. Much debate has surrounded the question of whether the form of reasoning involved where a traditional civil code shares a given conceptual and jurisdictional space with statutory materials can properly be described as civilian. It is generally agreed that codal interpretation differs from statutory interpretation. *See, e.g.*, Bergel, *supra* note 46, at 1076, 1088-89; Bergel, *Spécificités des codes et autonomie de leur interprétation*, *in* LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION 3 (proceedings from the Journées Maximilien-Caron) (1992); E. Bodenheimer, *Is Codification an Outmoded Form of Legislation?*, 30 SUPP. AM. J. COMP. L. 15 (1982); F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF § 52 (1954); H.R. Hahlo, *Codifying the Common Law, Protracted Gestations*, 38 MOD. L. REV. 23 (1975); C. de la Vega Benayas, *Judicial Method of Interpretation of Codes*, 42 LA. L. REV. 1643, 1647 (1982); 1 A. WEILL & F. TERRÉ, DROIT CIVIL: INTRODUCTION GÉNÉRALE § 142 (4th ed. 1979). More controversial is the question of whether the conceptual centrality of a civil code as paramount

Canon law and Roman law are among the traditional civilian private law courses that have entirely disappeared from Quebec's law curriculum. This is puzzling, given the great historical and conceptual significance of canonist and romanist thought for the civil-law tradition.[89] The disappearance of Roman law from Quebec's law curriculum[90] is particularly perplexing.[91] Unlike the promulgation of the *Code Napoléon* in 1804,[92] the Civil Code of Lower Canada in 1866[93] did not effect the repeal of the law in force in the jurisdiction prior to that date, with the result that Roman law can, at least technically,[94] still be invoked in

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interpretive referent is sufficient to retain the civilian character of legal reasoning in a setting where this code coexists with statutes. For the suggestion that it may not be, see J.M. Brisson, *Le Code civil, droit commun?*, *in* LE NOUVEAU CODE CIVIL: INTERPRETATION ET APPLICATION 293 (1993); S. Normand, *Le Code et la protection du consommateur*, 29 C. DE D. 1063, 1081 (1988); Rémy, *supra* note 41, at 153; and Valcke, *supra* note 10.

89. *See supra* notes 46, 61 & 67. Maximilien Bibeau, founder of Quebec's first *École de droit* in 1851, in affiliation with Montreal's *Collège Ste-Marie*, believed Roman law to be "the *chef d'oeuvre* of human prudence, the reason for this being that the Roman jurisconsults were first and foremost philosophers." Roman law, according to Bibeau, "was an enduring template of and for all law, hence the authority it achieved among all civilized nations of Europe and America, as could be told from the extent to which their laws approximated the Roman example." Howes, *supra* note 72, at 133-34.

90. *See* CATALOGUES, *supra* note 12. Roman law was once a prominent part of Quebec's legal curriculum. Lee notes that until the 1960s, three or four hours of Roman law were taught each week throughout the first year of law studies in all Quebec faculties. *See* Lee, *supra* note 68, at 139; *see also* Howes, *supra* note 72; Normand, *supra* note 76.

91. *See* Bonenfant, *supra* note 68; S. Garson (former Justice Minister of Canada), Speech to the Inter-American Bar Association in Dallas, Texas (April 16, 1956), *published in* 17 CAN. BAR REV. 4, 6 (1957); Howes, *supra* note 72, at 134; Lee, *supra* note 68.

92. While the nationalists' insistence that the *Code Napoléon* be made of less *Jus Commune* and more local customary law was largely fruitless, *supra* note 70, they obtained the guarantee that the enactment of this *Code* would effect the official repeal of all law predating it. As such, the *Code Napoléon* served as an institutional reiteration of the French's repudiation of their prior history, which they had already expressed in 1789. On the "code system's break with the past," see M. Amos, *The Code Napoleon and the Modern World*, 10 J. COMP. LEG. & INT'L L. 222, 224 (1928) (relating one of the early commentators, Bugnet, declaring: "I know nothing of civil law; I only teach the Code Napoleon."); SCHLESINGER, *supra* note 6, at 283.

93. An Act respecting the Codification of the Laws of Lower Canada relative to Civil Matters and Procedure, S.C., ch. 41 (1865) [hereinafter CCLC].

94. *See* J.E.C. Brierley, *Quebec's Civil Law Codification: Viewed and Reviewed*, 14 MCGILL L.J. 518 (1968); H.P. Glenn, *Droit québécois et droit français: communauté, autonomie, concordance*, *in* DROIT QUÉBÉCOIS ET DROIT FRANÇAIS: COMMUNAUTÉ, AUTONOMIE, CONCORDANCE 577, 585 (H.P. Glenn ed., 1993); R. Taschereau, *Le siècle de la renaissance et son influence sur le droit civil du Québec*, 1962 (No. 41) THÉMIS 7, 16. Article 2613 of the CCLC accordingly allows reference to the "old law" to clarify the interpretation of a code provision. *See also* 1 P.B. MIGNAULT, LE DROIT CIVIL CANADIEN 52 (1895) ("*[I]l n'y a pas, à proprement parler, de droit*

Quebec courts as a suppletive source of legal materials for interpreting the code.[95] Under these circumstances, it is difficult to understand why none of Quebec's five law faculties offers Roman law as part of its curriculum.

Brierley's general conclusion that "private law has lost the pivotal place it once had in western legal systems generally and in the nature of the practice of law itself"[96] thus seems fitting with regards to Quebec's law curriculum. Given such large-scale curricular transformation over the years, today's Quebec law graduate cannot be expected to be an expert at traditional civilian legal reasoning.

b. Explanation

As expected, this phenomenon of increasing discrepancy between Quebec's law curriculum and that typical of the continental tradition is more easily observed than it is explained. Those who have ventured to attempt explanations have converged on "the increased place given to a whole range of new . . . concerns."[97] Indeed, the legislative proliferation which attended the rise of the welfare state in most, if not all, Western nations over this century has raised numerous questions concerning "the new importance of the role of the state and its agencies and, in jurisprudential terms ... a concern for the values of a system of distributive rather than corrective justice."[98]

Such fundamental political questions are bound to have significant implications for education in general, and legal education in particular. And it may well be—although I am not prepared to argue

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ancien et de droit nouveau en cette province." ["Properly speaking, there is no old and new law in this province."]).

95. The privileged status of "old law" in Quebec is readily explained by the historical context in which the CCLC was enacted: unlike some of the French codifiers, *supra* note 51, the authors of the CCLC coveted no revolutionary ambitions. While it is clearly the case that "the Quebec codification ... has represented for some an instrument of legal nationalism," this nationalism was driven by an opposition to English, not European, rule. Brierley, *supra* note 94, at 528; *see* Glenn, *supra* note 94, at 586. Indeed, the CCLC was enacted partly in reaction to the *Durham Report* of 1839, in which it had been recommended to the British government that French Canadians be "assimilated" at all levels, including that of legal institutions. G.M. CRAIG, LORD DURHAM'S REPORT 69 (1963). In the circumstances, the way for Quebec to express its own form of nationalism was precisely by affirming, rather than obscuring, its ties to the European *Jus Commune*, over and beyond English rule.

96. Brierley, *supra* note 12, at 27.

97. *Id.* at 28.

98. LAJOIE REPORT, *supra* note 86, at 585.

here[99]—that the preemption of traditional civilian courses by new courses of distributive justice in the law curriculum is just one such implication, as several Quebec scholars[100] and governmental officials[101] have argued. Another possible explanation which relates to Quebec legal education more immediately lies in the Bar Association factor. For it seems that the Quebec Bar Association has been highly, and at times deliberately, instrumental in causing the above-described curricular transformation.

It played this mediating role both directly and indirectly. As already explained, the Bar Association had been using its regulatory power directly until 1967, by imposing a given curriculum content on universities.[102] In response to persistent protest from the *Association des Professeurs de Droit du Québec*,[103] however, the Bar Association decided that year to relinquish this power. Its intervention would henceforth be limited to accrediting programs independently designed by the universities.[104] Yet, while this new policy from the Bar Association was widely acclaimed at the time as marking "a new belief in the importance of university law studies,"[105] its liberating power did not

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99. I discuss the problems involved in attempting to accommodate concerns of distributive justice through a civilian legal system elsewhere, in Valcke, *supra* note 10.

100. *See, e.g.*, F. Chevrette, *De l'enseignement clinique du droit aux "cléricatures" imaginaires*, 7 R.J.T. 315 (1972); J. Choquette, *Un rôle nouveau pour les Facultés de droit?*, 7 R.J.T. 281 (1972); M. Guy, *Facultés de droit et chambres professionnelles*, 73 REVUE DU NOTARIAT 3 (1970-71); MINISTER OF SUPPLY AND SERVICES OF CANADA, LAW AND LEARNING: REPORT TO THE SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA BY THE CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW 43, 59 (1983) [hereinafter ARTHURS REPORT]; A. Poupart, *Le rapport Arthurs et les études de premier cycle en droit*, 44 R. DU B. 619, 623 (1984).

101. *See* COMMISSION D'ENQUÊTE SUR LA FORMATION DES JEUNES AVOCATS (1973) [hereinafter GUÉRIN REPORT]; LAJOIE REPORT, *supra* note 86; CONSEIL DES UNIVERSITÉS, *supra* note 13. Interestingly, each of the first two reports "drew upon the experience of other jurisdictions, notably English and American, for its formulation of a philosophy of legal education," while the CONSEIL DES UNIVERSITÉS quotes directly from E. SCHEIN, PROFESSIONAL EDUCATION: SOME NEW DIRECTIONS 8 n.2 (1973), an American book, when suggesting that law studies in Quebec should be more professionally oriented. Brierley, *supra* note 12, at 37.

102. *See supra* note 24.

103. *See supra* note 30.

104. Bar Act, S.Q., ch. 77 (1967) (Can.).

105. Brierley, *supra* note 12, at 16. Brierley goes on to describe the intellectual atmosphere in Quebec university following the implementation of the Bar Association's new policy as follows: "[A] new self-image . . . emerged in the world of Quebec legal education. This movement in ideas is demonstrated, in the case of a number of institutions, by their own feeling of having passed from the perceived inferior status of a *law school (école de droit)* to the superior one of a *faculty of law (faculté de droit)*." *Id.*

extend to the *indirect* control that the Bar Association had been exerting upon the content of university curricula.

Unlike traditional continental-law faculties,[106] the majority of students in Quebec law faculties have had professional ambitions that are specifically legal.[107] Just like their other North American peers, Quebec law students by and large have been historically more concerned to pass the requisite professional entrance examinations than to become well-rounded intellectuals.[108] Not surprisingly, it is they who exerted the strongest pressure upon Quebec universities to set aside grand academic ambitions and focus their educational agenda upon preparing students for the writing of these examinations.[109] Given the scarcity of university funding at the time—the presence of the "financial factor"[110]—Quebec law faculties quickly yielded to this pressure in the hope that the new curricula would increase student enrollment and, more importantly, the corresponding amount of government subsidies.[111]

One way for the universities to satisfy student demands was to mold their curricula upon that of the Bar Association's own professional training program.[112] University curricula soon became packed with courses of public and statutory private law,[113] as these were the courses that formed the bulk of the Bar Association's program until 1987.[114] So much so that one author wrote of law faculties at the time that they had

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106. *See supra* note 64.

107. CONSEIL DES UNIVERSITÉS, *supra* note 13, at 9; Normand, *supra* note 76, at 154-55; P. Verge, *La valeur de l'enseignement du droit et ses valeurs*, 27 C. DE D. 891-92, 897 (1986).

108. In 1984, the following comment was made concerning all Canadian law schools: "There is little doubt that th[e] curriculum orientation is related to the anticipated occupational demands for law school graduates, namely, the practice of law based on functional rather than theoretical knowledge." ARTHURS REPORT, *supra* note 100, at 34.

109. L. Gagnon, *in Le droit vit-il à l'heure de la société?*, 13 R.J.T. 260, 262 (1978); Vedel, *supra* note 64, at 236. See in particular the striking case of Laval University. Normand, *supra* note 76, at 178-80.

110. *See supra* notes 10-16, and accompanying text.

111. *See supra* notes 13-17 and accompanying text.

112. *See supra* notes 24-27 and accompanying text.

113. *See* ARTHURS REPORT, *supra* note 100, at 33.

114. Traditional civil-law subjects covered less than one quarter of the Bar Association's course materials for the year 1989-90. QUEBEC BAR ASSOCIATION, COURSE MATERIALS (1989-90). This is to be compared with a proportion of a little less than half in 1972. *See* Poupart, *supra* note 13, at 277.

become "little more than the 'ante-chambers' of the professional corporations."[115]

Another way for the universities to cater to student preferences involved modifying the format of their law curriculum. As the Bar Association had abandoned its legislative power to monitor law studies in the province directly,[116] faculties were no longer officially required to force upon students the traditional, entirely mandatory curriculum. In the circumstances, making this curriculum partly optional seemed a sensible, even if markedly uncivilian,[117] strategy: it would enable law faculties to offer a wider variety of courses and empower students to choose their own courses, which was sure to please them highly. Elective courses hence began to appear in the curriculum of all universities, although to varying degrees.[118]

As an added benefit, it was hoped that this newly-found flexibility and diversity in the format of curricula would partly offset the indirect control which the Bar Association had been exerting upon the content of university curricula via student pressures for Bar-like courses. This hope was to subside quickly, however, for it soon became clear that curricular diversity does not guarantee a broadening of students' academic horizons. From the moment that Quebec's law curriculum became part-optional and more diverse,[119] students began systematically to select among

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115. Gagnon, *supra* note 109, at 262.

116. *See supra* note 104.

117. "[A] breaking up of the body of the law in *membra disjecta* among which the student choses [sic] a limited number of examination subjects" is one way to cope with the time constraint posed by the use of the Socratic method in common-law teaching. J. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 327 (1928). Furthermore, elective curricula allow students to concentrate their education within certain fields of the law, and obtain a form of specialized training which, as explained above is highly atypical of civilian legal education. *See supra* text accompanying notes 61-66.

118. For example, by the year 1989-90, the Bachelor's program had become 60% semi-elective at UQAM ("semi-elective" in the sense that the selection must respect certain proportions among pools of courses grouped by kind) and 50% fully elective at Laval University, while that at the University of Sherbrooke remained almost entirely mandatory (two courses in the second term of the third year curriculum were elective). Three years later, the proportions of fully- and semi-elective to mandatory courses at four of Quebec's five law faculties were as approximately follows: Laval University—50%; University of Montreal—50%; University of Sherbrooke—30%; McGill University—30% to 50% (UQAM did not disclose this information in its 1992-93 CATALOGUE). *See* CATALOGUES, *supra* note 12.

119. It seems that this tendency of students might actually have predated the said curricular transformation in Quebec law faculties. Howes reports that the demise, in 1867, of Quebec's first *École de droit* was due in part to a decline in student population caused by its founders' "very lack

university offerings courses that matched those appearing on the curriculum of the Bar Association's own professional training program.[120] In 1979, the *Conseil des universités* reviewed the situation of legal education in Quebec and concluded as follows:

> [T]he situation of law faculties in Quebec is . . . very clear: after graduation, 90% of law students go to the *École du Barreau* or the *Notariat*; a large majority of them tend, when selecting university courses, to privilege subject matters that are beneficial for the professional courses and examinations to come; which has the effect of largely eroding the goal of a general formation promoted by the faculties.[121]

In sum, the official repeal of the Bar Association's legislative power directly to monitor university curricula achieved little in the way of relieving Quebec universities from the Association's indirect influence. Largely because of the financial strain that had befallen all universities in the province, this influence continued to cause law curricula to be primarily devoted to public and statutory private law courses, to the detriment of traditional civilian private law courses and hence also of civilian educational objectives.[122]

(or rather, repudiation) of specialization." *See* Howes, *supra* note 72, at 136. Prospective students preferred to join its rival, McGill law faculty, which had succeeded at "mobilizing a certain amount of sentiment within the profession in favour of making the process of entry to the profession more 'rigorous,'" and at having these "'reforms' [be] adopted by the legislature in 1866." *Id.* It thus appears that, in the early days of legal education in Quebec, it may have been student pressure that caused the institutionalization of professional standards, rather than the other way round. *See generally* G. Lachaise, *Centenaire de la Première École de Droit établie au Canada: Collège Ste. Marie, 1851-1867*, 1 THÉMIS 17 (1951).

120. *See* Brierley, *supra* note 12, at 31; Poupart, *supra* note 13, at 620. But see the reports of student demands for an academic, as opposed to professional, university legal education at the University of Montreal and at Laval University. Gagnon, *supra* note 109, at 262 (University of Montreal); Normand, *supra* note 76, at 183-84 (Laval University). It must be noted that Gagnon was then speaking in his administrative capacity, as President of the Association of Law Students of the University of Montreal. It would be interesting to see Gagnon's own schedule of chosen courses as a student.

121. CONSEIL DES UNIVERSITÉS, *supra* note 13, at 9 (footnotes omitted).

122. The "psychological factor" may also have come into play here, although very indirectly. I argue in the next Part that this last factor has been most influential in causing Quebec legal scholarship to be both narrowly "legal" (in the sense of not interdisciplinary) in content, and only mildly critical in tone. Insofar as the profile of a faculty's curriculum is determined by the scholarly expertise of its teaching body, the psychological factor would, by influencing scholarship, also influence the profile of curricula. That such a close connection exists between faculty members'

It may be that this situation is on the way to redress with the revision of the Bar Association's professional training program, which took place in 1987.[123] The decision to reorient the Bar Association's program towards practical skill training and away from legal knowledge testing could be read as the long-demanded recognition of a clear division of tasks between the professional corporation and the universities, namely, the recognition that legal education has two distinct components—one academic, the other professional—and that, while the latter component naturally falls to the Bar Association, "evaluating legal knowledge [is] really an academic matter best left to the universities."[124]

Such clarification and deepening of the divide between academic and professional education could act as an incentive on universities to reinstate in their curricula a greater proportion of traditional civilian courses. For, with the disappearance of all forms of substantive law courses from the Bar Association's program, the students' reason for choosing certain courses over others at the university level also disappeared. As all university courses are now on the same footing with respect to preparing students for the Bar Association's professional examinations—none of them do—students will have to turn to a different standard for course selection. What this new standard will be is uncertain, but it clearly no longer will be the content of the Bar Association's program.

On the other hand, it has been argued that the 1987 revision will have the opposite effect.[125] The universities will feel pressured to offer students the kind of "professional" law courses that appeared on the pre-1987 Bar Association curriculum precisely because the Bar Association no longer teaches these courses, and students believe that law firms want

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research and teaching may be doubted, however. Indeed, the general, as opposed to field-specific, hiring policy of law faculties suggests that many professors will end up teaching at least some courses in which they have no initial expertise. In addition, it is questionable whether professors who would fail to be critical in their writing due to this psychological factor would necessarily adopt the same attitude in person, that is, in the classroom. Finally, the lack of interdisciplinarity in Quebec's law curriculum could well be remedied by requiring students to take courses in other university departments, or by hiring professors from these other departments to teach in the law program, quite apart from law professors' own fields of expertise.

123. *See supra* note 26.

124. Morissette, *supra* note 26, at 7.

125. *Id.* at 12.

them to have had those courses somewhere.[126] In a perverse way, therefore, the 1987 revision of the Bar Association's program would cause university curricula to become even more professionally-oriented then they were before 1987.

The first eight years of the Bar Association's new training program have failed to confirm either of these conjectures, because the profile of Quebec's law curriculum has remained largely unchanged through that period.[127] Its content is generally no more and no less strictly legal and doctrinal than it was prior to 1987. This suggests one of three conclusions.

Perhaps the adjustment of the university curriculum one way or the other has yet to be made. Perhaps both of the above conjectures have in fact materialized to some extent, with the effect of having largely canceled out one another. Finally, perhaps what has been described above as the Bar Association factor is not a factor after all, and university curricula are entirely unaffected by the Bar Association's involvement, or lack thereof, with regards to legal education in the province. The above discussion clearly points away from the third, and towards one of the first two of these possible conclusions; which of these, only the future can tell.

C. *The Nature of Legal Scholarship*

Since those who teach are usually also those who write in any given system of higher education, the scholarship generated by that system can be expected closely to mirror the profile of its curriculum. Quebec's system of legal education is no exception in this regard.

Quebec's legal scholarship generally has followed a course similar to that taken by its law curriculum. I propose to show in this Part that the contribution of legal scholarship to the development and furtherance of the civil-law tradition in Quebec has been of little importance in comparison to that of continental legal scholarship. Like Quebec's law curriculum, Quebec's legal scholarship by and large has

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126. Students clearly believe this. Verge, *supra* note 107, at 897. What is less clear is whether they are right in this belief. Although the practice of law has indeed expanded to a wider array of fields of the law over the years, it appears from numerous conversations with those in charge of student hiring in law firms in Quebec and elsewhere that this belief of law students is widely exaggerated.

127. This is clear from a comparison of the universities' respective catalogues for the years 1989-90 and 1992-93. *See* CATALOGUES, *supra* note 12.

been seriously lacking in critical, theoretical and interdisciplinary insight. In recent years, moreover, it has moved further away from traditional fields of civil law and favored public and extra-codal law.

But, while the courses of Quebec's law curricula and legal scholarship have paralleled one another, the reasons underlying these developments likely differed. For one, legal scholars are free from the influence which the upcoming writing of professional entrance examinations exerts on law students. Nor are they prey to the pressure which these students in turn exert upon university administrators. Indeed, one would think that the principle of academic freedom affords scholars sufficient protection from administrative and market pressures to allow them to orient their research as they like.[128] Hence, if Quebec's legal scholarship has in fact adopted the technical and narrowly professional profile described in what follows, it is more likely for reasons of individual and institutional psychology than for the kind of economic and political reasons that were argued in Part B to have underlain the similarly uncivilian course taken by Quebec's law curricula.

However, before delving into the whats and whys of civil-law scholarship in Quebec, it is essential to grasp that discussion's implications for the viability and flourishing of the civil-law tradition in Quebec. For I intimated above[129] that, while a shortcoming in quality scholarship should naturally be cause for concern in any legal system, regardless of its cultural roots, such a shortcoming is particularly alarming in civil-law systems. This is so because the place of scholarship among formal and informal sources of law traditionally has been more prominent in civil-law systems than in common-law systems.

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128. Arguably, there may be an incentive for aspiring law professors to favor, among various possible graduate research topics, those topics which are deemed most marketable on the academic scene at any given time. Insofar as student preferences determine the profile of university curricula, they would also determine which kinds of expertise universities will be demanding from teaching applicants. Hence, academic freedom only partly offsets the impact of market pressure on the profile of research interests: its protection does not extend to pre-hiring research. This incentive is unlikely to be very compelling however, given the protracted period of the supplier's investment (the number of years required for any kind of academic specialization), the high volatility of the demand (the rapidly changing needs of universities in terms of fields of expertise), and, most importantly, the fact that, in Quebec as elsewhere, expertise is not nearly as important a hiring factor as in other academic disciplines, where hiring is usually field-bound.

129. *See supra* text accompanying notes 1-10.

1. The Importance of Scholarship at Civil Law

Historically, legal scholarship has played a crucial role at all stages of the development of the civil-law tradition. It largely is to legal academics that the civil law owes its formulation, interpretation, and transmission across ages, peoples, and territories.

The great Western civil codes all were compiled by small groups of academics drawing on the writings of their peers.[130] Justinian's declared ambition in compiling the *Corpus Juris Civilis* (534 a.d.), acknowledged to be the first civil code upon which all subsequent ones were modeled,[131] was "to select and preserve the best of classical literature."[132] The "commission" appointed for that purpose was composed of seventeen jurists and headed by the most eminent among them at the time, Tribonian.[133] Justinian claimed that nearly two thousand "books" were read and synthesized in the compilation process.[134] Similarly, the codifiers of the French *Code Napoléon* of 1804 were neither judges nor legislators.[135] They were four of France's most prominent jurists charged by Napoleon with the task of reducing existing

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130. *See* 1 R.B. SCHLESINGER, FORMATION OF CONTRACTS—A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 251-59 (1968).

131. *See* Bergel, *supra* note 46, at 1075; VON MEHREN & GORDLEY, *supra* note 6, at 7; WALTON, *supra* note 61, at 1.

132. NICHOLAS, *supra* note 61, at 34. What came to be known as the "classical literature of Roman law" consists of the writings of the "Roman jurists," of whom Nicholas wrote that they

> were men from the leading families who undertook the interpretation of the law as part of their contribution to public life. . . . They were men of affairs, interested in practical rather than theoretical questions, and yet not immersed like the modern professional lawyers in the details of daily practice. To English eyes they have some of the characteristics of both the academic and the practising lawyer. For on the one hand they built up a great legal literature and also undertook what legal teaching there was, and on the other hand they influenced the practice of the law at every point.

Id. at 28-29.

133. *Id.* at 40.

134. *Id.* Excerpts from the writings of thirty-nine authors appear in the final version of the Digest, the principal of the *Corpus Juris Civilis*' three parts. Among these, the contributions of Paul, Gaius, Ulpian, and Papinian were most important. *Id.* at 40-41. On the compilation of the *Corpus Juris Civilis*, see generally J. CROOK, LAW AND LIFE OF ROME 14 (1967); KUNKEL, *supra* note 61; SHULZ, *supra* note 61; WALTON, *supra* note 61.

135. On the process of the French codification, see generally ARNAUD, *supra* note 70; Bodenheimer, *supra* note 87, at 23-24; G. Burdeau, *Essai sur l'évolution de la notion de loi en droit français*, ARCH. PHIL. DRT. 7, 14-15 (1939).

legal materials[136] to a single code, one that would be accessible to all French citizens.[137] Indeed, legal scholars and scholarship have been of such importance to the codification process that one author concluded that "codification is . . ., in large measure, *la doctrine*'s daughter."[138]

La doctrine's contribution to the development of the civil-law tradition was not to end with the codes' publication. As one famous French author exclaimed, a new code is an "inconvenient tool,"[139] a tool whose convenience can only be revealed through intelligent and industrious interpreters. Indeed, the very nature of a civil code as a compilation of broad statements of principle entails that, following codification, much remains to be done by way of analysis, interpretation and explanation of codal provisions if these provisions are to find concrete application through adjudication.[140]

The mission of bridging the gap between codal theory and judicial practice fell to the legal scholars. The justice officials of ancient Rome[141] were usually not themselves jurists, and it is thus in accordance with the jurisconsults' commentaries on the *Corpus Juris Civilis*, the *Jus Respondendi*, that they discharged their functions.[142] Some historians concluded therefrom that the *Jus Respondendi* in fact amounted to a primary source of law, on an equal footing with the *Corpus Juris*

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136. *See* DAVID & BRIERLEY, *supra* note 1, § 110.

137. It is said that Napoleon used to sit in during the codifiers' sessions, with a view to pointing out to them the passages he, a nonjurist, could not understand and would insist that these passages be rephrased. In a similar spirit, the "common people" had been invited to comment on the first project of 719 articles presented by Cambacérès. And the reason it was finally decided to defer to a commission of philosophers was that the first project "smelled too much like the Palace man." 2 THIBAUDEAU, MÉMOIRES 148 (1824).

138. M. Gaudet, *La doctrine et le Code civil du Québec*, *in* LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION 224, 225 (proceedings from the Journées Maximilien-Caron) (1992).

139. E. GAUDEMET, L'INTERPRÉTATION DU CODE CIVIL EN FRANCE DEPUIS 1804, at 10 (1935) (quoting Marcel Planiol).

140. BRIERLEY & MACDONALD, *supra* note 3, at 125 ("[Codification represents] an attempt . . . to give the law a systematic structure that, combined with its presentation in a relatively small compendium, invite[s] a commentary upon its texts that was grounded in the search for their immanent rationality."); *see also* Gaudet, *supra* note 138, at 226.

141. Among these officials, the *Praetor* was charged with devising and publishing policies concerning legal remedies, which would be granted in individual cases adjudicated by the official arbitrator, or *Iudex*. *See* NICHOLAS, *supra* note 61, at 19-28.

142. R.W. LEE, THE ELEMENTS OF ROMAN LAW § 29 (1956); NICHOLAS, *supra* note 61, at 28-32.

Civilis.[143] And on the continent, more than a millennium later, it was similarly to the writings of renowned legal scholars that judges, themselves high-level bureaucrats,[144] were turning for guidance when interpreting codal provisions.[145] It was accordingly affirmed that "[t]he great commentaries on the Civil Code are scarcely less authoritative than the Code itself."[146]

In sum, "it is not too much to say that there are large and important fields of law which were created by continental jurists just as the English common law was the judges' handiwork."[147] In other words, civilian scholars have traditionally discharged a function that by common-law standards is quasi-judicial. Inadequate scholarship would thus be to a civilian jurisdiction what inadequate caselaw would be to a common-law jurisdiction.

To be sure, a lack of scholarship is unlikely to bring about a lack of law, for other agents would probably take over the scholars' duties. As described below, in Quebec, the void that resulted from the scholars' idleness was filled by the judges. Still, there is cause to fear that the law's civilian character will be lost as a result of such reallocation of duties among law-making agents. For much of what distinguishes civil-law from common-law systems lies in the different ways in which legal duties are allocated among institutional agents in these systems.[148]

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143. MERRYMAN, *supra* note 6, at 8; WATSON, *supra* note 6, at 171. Nicholas indeed refers to the *Jus Respondendi* as "juristic law." *See* NICHOLAS, *supra* note 61, at 39.

144. Unlike in Anglo-Saxon jurisdictions, where judicial appointments are conferred upon professional jurists on the basis of experience, prestige, and competence, in civil-law jurisdictions judicial appointments are obtained automatically upon graduation from a recognized *École de la magistrature* and are therefore in no way honorific. Gaudet, *supra* note 138, at 245. Indeed, if civil-law judges in fact do no more than mechanically apply rules to facts, then no particular wisdom or expertise with respect to policy matters is necessary in order to discharge judicial duties competently.

145. *See id.* at 152; Y. Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 LA. L. REV. 235, 250-54 (1958); H. DE VRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 300-03 (1976); WATSON, *supra* note 6, at 171.

146. C.K. ALLEN, LAW IN THE MAKING 117-19 (1927); *see also* 1 J. CARBONNIER, DROIT CIVIL (9th ed. 1972); 2 H. MAZEAUD, LEÇONS DE DROIT CIVIL § 99, at 123 (4th ed. 1967). *But see* J. GHESTIN & G. GOUBEAUX, TRAITÉ DE DROIT CIVIL: INTRODUCTION GÉNÉRALE § 227, at 193-96 (3d ed. 1990); P. AZARD, 1 DROIT CIVIL QUÉBÉCOIS § 27, at 37 (1971).

147. VAN CAENEGEM, *supra* note 51, at 53-65. Similarly, Rheinstein wrote that "[w]hile the common law of England and America was essentially shaped by judges, the civil law of the Continent of Europe was built by university professors." Rheinstein, *supra* note 57, at 6.

148. While the strong formalism of common-law systems is clear from these systems' endorsement of the doctrine of precedent and consequent high regard for judges, the privileged

Therefore the civilian character of Quebec law would be jeopardized if Quebec scholars proved unable to discharge the task traditionally assigned to scholars in civil-law jurisdictions. The condition of Quebec legal scholarship is best assessed by identifying the difference between the kinds and content of traditional scholarship at civil law and at common law and then looking to Quebec scholarship to determine the extent to which, if at all, this difference has there been preserved. The remainder of this Part is structured accordingly.

2. Traditional Scholarship at Civil Law

For purpose of better underscoring the difference in the kinds and content of legal scholarship between the civil law and the common law, it seems appropriate to examine each legal culture's scholarship in relation to some common scale. I propose a strictly acultural perspective, where legal scholarship is divided into categories arranged on a spectrum in order of abstraction. At one end of the spectrum stands scholarship that is "strictly legal"; at the other end, scholarship that is "meta-legal."

"Strictly legal" scholarship is the kind of scholarship whose only object is the study of a given legal system's inner mechanics. As such, strictly legal scholarship aims to outline the internal relations, logical

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standing of legal scholars in civilian jurisdictions is consistent with the rationalism of the civilian mind. For, if reason is taken to prevail over experience in legal reasoning, it only makes sense to rely more heavily upon the opinions of professional scholars, whose time and intellectual energies are entirely devoted to intellectual activities, than upon the opinions of judges, whose ability to engage in pure rational thinking is constrained by the daily pressures and contingencies of legal practice and administration. *See* DE VRIES, *supra* note 145, at 301 ("[O]nly men admittedly aloof from political affiliation and skilled in the processes of textual interpretation could serve the need for impartial statement of allegedly immutable universal principles."); WATSON, *supra* note 6, at 171 ("Juristic opinion was [in Roman times] treated as valuable in itself as an interpretation of the law and was timeless, whereas judicial decision was strictly tied to time and place. Whereas judges did not ignore jurists, jurists in their writings ignored the judges.") Thus, while the question of whether some given statement qualifies as a "source of law" is, at common law, determined through an extrinsic inquiry into the statement's source (only those statements which originate from a source formally endowed with legal authority qualify as "law"), the same question is, at civil law, determined through an inquiry into the statement's intrinsic soundness as a legally relevant expression of rational reasoning. *See* Burdeau, *supra* note 135, at 10 ("When one talks about [civil] law it is consequently its source in human reason that one has in mind, rather than the role and the sense of the intervention of state organs in its formation."); A. Tunc, *The Grand Outlines of the Code*, *in* THE CODE NAPOLEON AND THE COMMON LAW WORLD 20, 25 (1950) (quoting J. Portalis) ("Laws are not pure acts of will; they are acts of wisdom, of justice, and of reason."). Hence the common saying that that which is deemed "law" is so by reason of authority at common law, but by the authority of reason at civil law.

ramifications, and practical implications of a discrete body of positive rules. It is alternatively labeled "doctrinal," "analytical," "positive," "descriptive," or scholarship "*in* law." "Meta-legal" scholarship refers in contrast to the kind of scholarship that focuses upon a body of law's relation to other bodies of law and/or disciplines. Accordingly, "meta-legal" scholarship may also be designated as "jurisprudential," "theoretical," "critical," "normative," or scholarship "*about* law."

As this representation is a heuristic device designed to highlight certain key features of traditional civilian and common law, and contemporary Quebec scholarship, it is inevitably defective from a strict descriptive perspective. For one, the categories represented are greatly oversimplified. Indeed, while descriptive and normative forms of analysis can be distinguished conceptually, they often blend into one another in practice, with the result that little scholarship, from whichever legal system, is *strictly* legal or strictly *meta*-legal.

In an attempt to alleviate this problem, I have thus positioned these categories on a spectrum ranging from the *most* strictly legal to the *most* meta-legal. I believe this analytical framework is superior to one where the scholarship categories are taken alone, since different pieces of writing combine descriptive and normative forms of analysis in different proportions and hence necessitate some kind of middle-ground positioning. Moreover, this representation on a spectrum offers the advantage of being jurisdictionally neutral, as common-law and civil-law systems alike have generated both kinds of scholarship, albeit in different forms.

If typical common-law scholarship is to be ordered by degree of abstraction, it seems best divided into three categories. The first, "most strictly legal," category contains work such as "codes," "restatements,"[149] traditional doctrinal treatises, and law reviews, which have for their primary object to "reduce a number of lengthy appellate court judgments to relatively canonical formulae."[150]

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149. Editors' notes or commentaries, which are often appended to the main text of these codes and restatements, are here excluded as these reach beyond the purely descriptive into the domain of personal critique and opinion and thus belong closer to the normative end of the spectrum, perhaps even in the second category described next.

150. Macdonald, *supra* note 52, at 578. Macdonald does not endorse the above general classification, however, for he seems to be of the view that this doctrinal category captures all of common-law scholarship.

The second category harbors work which, while doctrinal in that its focus does not reach beyond positive law, is also somewhat critical, in that it challenges positive law on its own terms. As any form of criticism entails a certain distance from the object being criticized, the scholarship of this second category is necessarily more abstract than that contained in the first and is hence closer to the "meta-legal" end of the spectrum. The contemporary law review article, which might criticize the judicial interpretation of some precedents or question the constitutionality of some statute, epitomizes the work contained in this second category. For it is by reference to the system's own rules (the rule of precedent, the rule that unconstitutional statutes are invalid) that this system's products (cases, statutes) are being assessed.

The third and "most meta-legal" category gathers all work that represents an *a priori* refusal to play by the rules. The relatively recent trend of interdisciplinary work that proposes to evaluate legal rules by standards borrowed from philosophy,[151] sociology,[152] economics,[153] even sociobiology,[154] among other typically nonlaw disciplines, is the most obvious example of legal scholarship found in this last category. Comparative law that is not purely descriptive may be another.[155]

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151. *See, e.g.*, P. BENSON, A SUMMARY OF GROTIUS' CONTRIBUTION TO THE NATURAL LAW OF CONTRACT (1984); G.P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS (1993); E.J. WEINRIB, THE IDEA OF PRIVATE LAW (1994).

152. The best examples of legal writings from the perspective of sociology can be found among those of the Critical Legal Scholars. *See, e.g., supra* note 39; R.L. Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695, 718 (1982); A. Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFF. L. REV. 383, 384 (1979); K.E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 162 (1982); R.H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 120 U. PA L. REV. 1429 (1982).

153. *See, e.g.*, G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983).

154. *See, e.g.*, J.H. BECKSTROM, SOCIOBIOLOGY AND THE LAW—THE BIOLOGY OF ALTRUISM IN THE COURTROOM OF THE FUTURE (1985); J.H. BECKSTROM, EVOLUTIONARY JURISPRUDENCE—PROSPECTS AND LIMITATIONS ON THE USE OF MODERN DARWINISM THROUGHOUT THE LEGAL PROCESS (1989); R. DAWKINS, THE SELFISH GENE (1976); R. DAWKINS, THE BLIND WATCHMAKER (1985).

155. Comparative law could hardly be purely descriptive, for the very fact of inquiring into other legal systems suggests at least minimal normative purposes, be they to find some basis upon which to improve our own system, or else to consolidate our faith in our system in view of the cultural difference observed elsewhere. Yet, much, if not most, of comparative law scholarship betrays some attempt on the author's part to stay away from normative commentary. Such an attempt is implicit in scholarship that takes a "topical" approach to comparative law. *See, e.g.*,

Turning then to civil-law scholarship with a view to conducting a similar exercise in classification, one is immediately reminded of the difference that divides the civil law and the common law concerning the issue of institutional allocation of legal duties.[156] Largely due to the fact that the active role that judges have played in the formation of legal rules at common law has, in civilian jurisdictions, been traditionally discharged instead by legal scholars, the categories used above in classifying common-law scholarship are inadequate for classifying civil-law scholarship.

A first difficulty arises which concerns the proper definition of "legal scholarship." If we define legal scholarship in accordance with its usual common-law understanding, as any form of legal writing produced by legal scholars that is not itself a primary source of law, then the first and the third of the above three categories, the "most strictly legal" and "most meta-legal" categories, are almost empty.

Except for three caveats noted below, the first category of scholarship is almost empty because the kind of writing classified above as "most strictly legal" is, at civil law, a primary, not secondary, source of law. Indeed, descriptive accounts of legal rules that, at common law, are provided in "restatements" or "codes" devoid of formal legal authority are, at civil law, found mostly in the ultimate primary source of law, the civil code.

A first caveat to this observation is that the civil code has itself historically been the work of scholars,[157] and it would accordingly be misleading to suggest that no piece of scholarly writing is "strictly legal" at civil law. Yet, as the civil code is a primary source of law, it does not qualify as "scholarship" under the above definition, no more, at any rate, than do pieces of legislation drafted with scholars' assistance in common-law jurisdictions. Moreover, even if the code did qualify as scholarship and were consequently included in the first category, this category would still remain largely empty, for, while the code would unquestionably be highly significant scholarship, the process of its drafting has typically involved no more than a handful of civilian scholars.

GLENDON ET AL., *supra* note 6; ZWEIGERT & KÖTZ, *supra* note 6. See also E. McWhinney's description of a Canadian program of comparative law studies in *Comparative Law and Jurisprudence at the University of Toronto*, 9 J. LEGAL EDUC. 99 (1956).

156. This difference was explored *supra* text accompanying notes 43-56 & 130-148.

157. *See supra* text accompanying notes 130-138. On the codification process in Quebec specifically, see Brierley, *supra* note 12, at 14.

Secondly, as judicial decisions of civilian courts are, at least ideally, "strictly descriptive" accounts of the law[158] and are not themselves a primary source of law,[159] they too would fall in the first scholarship category, if they qualified as "scholarship" at all. However, civilian judges have not traditionally been "legal scholars,"[160] and their writings can hardly be described as scholarship for that reason.

Thirdly, some descriptive accounts of the civil law are admittedly found in the classic collections of textbooks authored by eminent civilian academics, the *traités*.[161] One might accordingly want to place these *traités* within the most doctrinal category of legal writings, at least insofar as these *traités* are denied the kind of formal authority historically accorded the *Jus Respondendi* of Roman law,[162] which authority would promote them to primary sources of law on a par with the civil code and would thereby take them outside our definition of legal scholarship altogether. Still, the *traités* are hardly "strictly" descriptive: as they embody their author's personal attempt at reconstructing, from the starting-point of the code's principles, what legal rules there *should* be, they are necessarily heavily laden with normative content.[163] Hence, the *traité* of civil law differs significantly from the doctrinal treatise of common law in that the former goes beyond merely reconstituting rules

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158. *See supra* text accompanying notes 50-56.

159. *See supra* note 53.

160. *See supra* note 144.

161. *See, e.g.*, J. CARBONNIER, DROIT CIVIL (16th ed. 1992); R. DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL (1923) (unfinished); J. FLOUR & J.L. AUBERT, LES OBLIGATIONS (5th ed. 1991); E. GAUDEMET, THÉORIE GÉNÉRALE DES OBLIGATIONS (2d ed. 1965); GHESTIN & GOUBEAUX, *supra* note 146; J.L. JOSSERAND, COURS DE DROIT CIVIL POSITIF FRANÇAIS (3d ed. 1939); LALOU, TRAITÉ PRATIQUE DE LA RESPONSABILITÉ CIVILE; F. LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS (3d ed. 1878); H. MAZEAUD & A. TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSIBILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE; HENRI MAZEAUD ET AL., OBLIGATIONS—THÉORIE GÉNÉRALE (8th ed. 1991); M. PLANIOL & G. RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS (2d ed. 1954); RODIÈRE, LA RESPONSABILITÉ CIVILE; SAVATIER, TRAITÉ DE LA RESPONSABILITÉ CIVILE; A. SÉRIAUX, DROIT DES OBLIGATIONS (1992); B. STARCK ET AL., OBLIGATIONS (4th ed. 1993); F. TERRÉ & P. SIMLER, DROIT CIVIL—LES BIENS (4th ed. 1992). *See also* the *traités* mentioned at *supra* note 53.

162. *See supra* note 143 and accompanying text.

163. A brief survey of the *traités* listed should make this clear. *See supra* note 161. Most of these were put together from the author's teaching notes. *See, e.g.*, FLOUR & AUBERT, *supra* note 161, at i; G. MARTY & P. RAYNAUD, DROIT CIVIL at preface (1st ed. 1961). In some of these, the authors are explicit about their intention to "go beyond the positive law," GHESTIN & GOUBEAUX, *supra* note 146, at vii, or to "enlarge [students'] horizon beyond the pure juridical technique," MARTY & RAYNAUD, *supra*. That these *traités* would present a high normative content is to be expected in a system where the law's authoritativeness is derived from its rational character, as explained, *supra* note 148.

of law from judicial decisions. If anything, it can best be compared to the contemporary law review article and thus would best be classified in the second, "internally critical," category of legal scholarship.

The third, "most meta-legal" category of scholarship is also almost empty at civil law—or at least has been, up to recently—if scholarship is defined, as above, so as to exclude writings about law produced from outside the legal academy.[164] For, while continental law professors have authored much literature that is critical of the law, the critical vantage point taken in these writings has typically been internal to the law; only rarely would legal rules be evaluated against nonlegal standards.[165] Certainly, common-law professors have been much more productive in this regard.[166]

This may appear surprising given the historical prominence of interdisciplinary subjects in the continental curriculum.[167] Yet it would be mistaken to assume that simply because law and nonlaw subjects have cohabitated in the same curriculum for so long, they have become intertwined. Unquestionably, continental law professors considered the study of nonlaw disciplines an indispensable educational complement to the study of law. But they also thought it imperative, as a precondition, that disciplinary boundaries be clearly delineated and respected. Class materials for law courses were selected among the writings of jurists; philosophy materials, among the writings of philosophers. That these boundaries might one day become blurred was then thought inconceivable, and any attempt at doing so would have been deeply resented.[168]

This resistance to interdisciplinarity on the part of civilian jurists might be explained by reference to the continental vision of private law as a conceptually unified system, one that is internally coherent and comprehensive by reason of it being derived from one and the same set of

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164. There may be much literature about law produced by academics outside law faculties that, given the outsider's perspective from which it is written, would fall into this third category. The review of such writings would take me beyond the purposes of the present Article, however.

165. C. Atias, *La controverse doctrinale dans le mouvement de droit privé*, 8 REV. RECH. JUR. 427 (1983); R. DAVID, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ (1950).

166. *See supra* notes 151-153. This is clear from the fact that all "law and-" movements were born in schools of common law.

167. *See supra* notes 65-66 and accompanying text.

168. *See, e.g.*, GÉNY, *supra* note 88.

premises through logical reasoning.[169] Given that conceptual unity captures the essence of civil law, civilians have traditionally been unwavering in their determination to preserve this unity in the private law of their respective jurisdictions. Moreover, I would venture to suggest that the risks which cross-pollination between law and nonlaw sciences pose for the former's unity are greater where the two share a common methodology, as is the case for the civil law. For such commonality entails that the line between the two exchanging parties might be difficult to maintain and that one might as a result come to infiltrate the other. Thus, if reasoning at civil law is indeed indistinguishable from scientific reasoning in general,[170] the prospects of implementing exchanges between law and nonlaw sciences without impinging upon the integrity of either seem limited.[171] This may explain why civilians have viewed attempts at so doing with much suspicion.

Some evidence suggests that continental attitudes have been changing in this regard. More and more continental legal scholars seem indeed to be turning to nonlegal disciplines in search of novel critical insights into the law.[172] And while this is a relatively new phenomenon, it seems appropriate to conclude that, insofar as only law professors' writings are concerned, the third, "most meta-legal" category of legal scholarship is no longer the empty one that it has long been at civil law. It is now sparsely populated and gaining.

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169. On the conceptual unity of the civil law, see *supra* note 10.

170. *See supra* text accompanying notes 43-44.

171. This is perhaps what Howes has in mind when he expresses his own fear that "['law and-' type courses] reduce law to other things (politics, economics, gender, etc.). By thus distributing law in every which way, they decrease rather than increase law's intelligibility, as well as drain it of its own internal, nontechnical (albeit vestigial) powers of self-critique." Howes, *supra* note 72, at 148. His proposed solution, though, differs greatly from that of traditional civil-law faculties described above. Indeed, while he suggests that "[r]ather than sacrificing law for the sake of expanding these other disciplines, what we ought to be studying is how these other domains or disciplines can be contained in and by law," *id.*, the solution traditionally favored among civil-law faculties was to teach, say, both "law" and "philosophy," but not "law and philosophy."

172. *See, e.g.*, C. ATIAS, ÉPISTÉMOLOGIE JURIDIQUE (1985); ATIAS, THÉORIE CONTRE ARBITRAIRE (1987); J. CARBONNIER, SOCIOLOGIE JURIDIQUE (1978); DAVID, *supra* note 54; P. Durand, *La connaissance du phénomène juridique et les tâches de la doctrine moderne du droit privé*, 1956 Recueil Dalloz-Sirey, *Chronique* 73 (Fr.); GHESTIN & GOUBEAUX, *supra* note 146, §§ 101-11, at 75-83, 189; C. PERELMAN, DROIT, MORALE ET PHILOSOPHIE (1968); C. PERELMAN, LOGIQUE JURIDIQUE: NOUVELLE RHÉTORIQUE (2d ed. 1978); R. SAVATIER, LES MÉTAMORPHOSES ÉCONOMIQUES ET SOCIALES DU DROIT PRIVÉ D'AUJOURD'HUI (1964); M. VILLEY, LEÇONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT (1962).

The first and third categories of legal scholarship being thus largely empty, it is in the second that the bulk of civilian writings lies. Most of these writings were composed throughout the nineteenth century by a contingent of legal scholars known on the continent as the *École de l'exégèse*, whose overall scholarly production has since remained unrivaled in quantity and, some would say, in quality.[173]

The contribution of the *exégètes* to the civil-law tradition has been monumental. It is they who, through decades of collective textual analysis, interpretation, extrapolation, reconstruction, and synthesis, discharged the onerous task of erecting an entire conceptual edifice of rules on the foundation of principles exposed in the civil code,[174] much like the Roman jurisconsults had done with the *Corpus Juris Civilis*.[175] At their hand, one scholar exclaimed, "from the Civil Code, a century of efforts and controversy has gradually caused the Civil Law to arise."[176] And it is this civil law that generations of civilian judges have consulted and applied in legal practice.[177] In sum, the ultimate accomplishment of the *exégètes* has been to fill the gap between codal theory and judicial practice and thereby also fill the second category of legal scholarship at civil law.

This second, middle-category of legal scholarship is therefore undoubtedly more voluminous at civil law than at common law. This is to be expected, given the pivotal role played by the code at civil law. Indeed, the reason that civilian scholarship has tended to cluster towards the middle of the spectrum, rather than follow common-law scholarship in spreading somewhat evenly along it, lies principally in the fact that the territories of scholarly discourse are inevitably constrained by the code.

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173. *See generally* J.M. Augustin, *Les premières années d'interprétation du Code civil français (1804-1837), in* LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION 27 (1992); J. BONNECASE, L'ÉCOLE DE L'EXÉGÈSE EN DROIT CIVIL (2d ed. 1924); GAUDEMET, *supra* note 139.

174. *See supra* text accompanying notes 135-146. The *exégètes* have often been described as adherents of narrow and unduly formalistic literalism. *See* BONNECASE, *supra* note 173, § 8, at 25; GAUDEMET, *supra* note 139, at 10. However, as has been noted, this description is misleading, for the large majority of them refused to restrict their analysis to the letter of the law and favored a broader interpretive approach that accounts for the words' context. Gaudet, *supra* note 138, at 233-341; Husson, *Analyse critique de la méthode de l'exégèse*, 17 ARCH. PHIL. DRT. 115 (1972); H. MAZEAUD ET AL., LEÇONS DE DROIT CIVIL—INTRODUCTION À L'ÉTUDE DU DROIT § 103, at 140 (8th ed. 1986).

175. *See supra* note 143.

176. P. Rémy, *Éloge de l'exégèse*, REVUE DE LA RECHERCHE JURIDIQUE 254, 259 (1982).

177. *See* Gaudet, *supra* note 138, at 152; Loussouarn, *supra* note 145, at 250-54; DE VRIES, *supra* note 145, at 300-03; WATSON, *supra* note 6, at 171.

As explained above, in its capacity as a primary source of law, the code provides most of the purely descriptive legal materials necessary to trigger the civilian legal system into operation and thereby forecloses this system's scholarship from reaching the "strictly legal" end of the spectrum. At the same time, the code's presence naturally serves to focus the scholarly agenda within the range of topics covered by its provisions[178] and thus distracts scholars' attentions away from the "meta-legal" end of the spectrum. Given the code's constraining effect in this regard, it is not surprising that the bulk of civilian scholarship lies somewhere between these two extremes.

But it is not merely in volume that the second category of civilian scholarship differs from that of common-law scholarship. Another difference concerns their respective positions on the spectrum. At civil law, the second category of scholarship lies closer to the "meta-legal" end of the spectrum. For the second-category scholarship of civil law is more abstract than the second-category scholarship of common law. As Merryman explained:

> In the civil law tradition, legal scholarship is pure and abstract, relatively unconcerned with the solution of concrete social problems or with the operation of legal institutions. The principal object of such scholarship is to build a theory or science of law. In its most extreme form such scholarship displays a detachment from society, people, and their problems that astonishes a common lawyer. On the common law side, we tend to think of the work of legal scholarship as another aspect of social engineering; it is our business as scholars to monitor the operating legal order, to criticize it, and to make recommendations for its improvement. Improvement, to us, means coping more adequately with concrete social problems. Our outlook is professional.[179]

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178. S. Normand, *Une analyse quantitative de la doctrine et droit civil québécois*, 23 C. DE D. 1009, 1013 (1982) ("*La présentation de l'oeuvre est fortement imprégnée par l'attachement aux textes. Ainsi, les traités reproduisent-ils généralement chacun des articles du Code et les font suivre d'un commentaire didactique.*" ["The presentation of the work is strongly impregnated by attachment to the texts. Hence do the *traités* generally reproduce each of the Code's articles and provide thereafter a didactic commentary."]); *see also id.* at 1015.

179. Merryman, *supra* note 7, at 867. Merryman's portrayal of common-law scholarship and social engineering is doubly apposite in the present context, for it also explains why the second

As scholarship that is more abstract will necessarily generate critiques that are more expansive, the continental *doctrine* is, on the whole and at a theoretical level, more critical than standard doctrinal analysis at common law.[180] One scholar described as follows the functions discharged by *la doctrine* at civil law:

> It has a puzzle-solving or explicative function. It also provides a critical perspective on legal postulates in order to discern their fundamental premises. Further, *la doctrine* examines the evolution of both legal norms and their social functions, suggesting new formulations and unprecedented applications of existing rules. Again, it elaborates the logical and ideological structure of a given area of the law. Finally, it integrates various sources of legal justification into their political and social context.[181]

From this passage, it seems clear that civilian scholars' critiques, however abstract and profound they may be, remain internal to the law. The object of this critique is to disclose, not to challenge, the law's "fundamental premises" and "ideological structure." Consequently, the second category of civil-law scholarship reaches further towards the abstract end of the spectrum than that of common-law scholarship, but it does not reach so far as to merge into the third, "most meta-legal" category.

In sum, our spectral representation of the form and content of legal scholarship reveals that there are two main differences between civil-law and common-law scholarship. At civil law, unlike at common law, the first ("most strictly legal") and third ("most meta-legal") categories of scholarship are almost empty, and the second ("internally critical") is more voluminous and critical.

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category of scholarship is, at common law, complemented by considerable third-category scholarship, which in turn is almost nonexistent at civil law: fact-based legal analysis must naturally be combined with an interdisciplinary outlook—say, from economics or sociology—in order to produce sound recommendations of social engineering.

180. 3 V. DALLOZ, RÉPERTOIRE DE DROIT CIVIL (2d ed.); WEILL & TERRÉ, *supra* note 88, at 245-46.

181. Macdonald, *supra* note 52, at 589.

3. Legal Scholarship in Quebec

a. Description

It is immediately clear to anyone moving from the two traditional models of common-law and civil-law scholarship to the specific situation of Quebec as a mixed jurisdiction that "mixed" it is indeed. Like Quebec's law curricula, Quebec's legal scholarship partakes of both legal traditions. Moreover, the common-law component ends up overshadowing the civil-law one.

Quebec legal scholarship clearly is not lacking in volume. For, while "the volume of scholarly production in Quebec has not been as great as in many other Civil law jurisdictions,"[182] it has been substantial.[183] In fact, the average scholarly production of Quebec law faculties has, consistently with their active involvement in graduate education,[184] far exceeded that of common-law schools in the other Canadian provinces.[185]

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182. BRIERLEY & MACDONALD, *supra* note 3, at 127.

183. *Id.*

184. Quebec faculties have the largest graduate student population in Canada according to the Committee of Canadian Law Deans' 1984-85 statistics. *See supra* note 16; ARTHURS REPORT, *supra* note 100, at 36 ("At present 13 Canadian law faculties have graduate programs. Among the 260 full-time master's or doctoral students, 170 are enrolled at three civil law faculties (Montreal, McGill and Laval), leaving only about 80 distributed among nine common law faculties."). This standard alone is not necessarily representative of Quebec's relative student involvement in graduate work, however. An officer of the fellowship division of the Social Science and Humanities Research Council of Canada [hereinafter SSHRC] confirmed that, although an accurate head count is difficult, most common-law graduates who decide to pursue their studies beyond the LL.B. (the Bachelor's degree of Legal Letters) go to graduate schools outside Canada (usually in England or in the United States) and that the proportion of civilians doing the same is comparatively lower. This could be partly due to the fact that, consistently with the professional orientation of legal education in common-law systems, Canadian common-law schools have historically expressed little interest in hosting programs of graduate studies. The same is true of the majority of English and U.S. schools; only a few of these schools have more to offer in this respect, at least in comparison with other disciplines. *See* AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1989: LAW SCHOOL AND BAR ADMISSION REQUIREMENTS 65 (1989). Yet, the few existing programs are apparently both attractive and numerous enough to include Canadian graduate students. Given that, according to SSHRC statistics, more than 80% of these students return to Canada upon completing their foreign degrees, it could well be that, on the whole, the larger part of Canadian-produced graduate work comes from common lawyers, in spite of Quebec's initial comparative advantage in terms of overall graduate involvement by law faculties.

185. *See* ARTHURS REPORT, *supra* note 100, at 89; Normand, *supra* note 178.

But, as should be clear from the discussion at the beginning of this Part, it is *la doctrine*'s power of influence upon the shape of legal rules and the outcome of judicial cases, rather than its quantitative importance, that has traditionally distinguished it from scholarship at common law. It thus is the content of Quebec scholarship, more than its volume, that matters if Quebec cares to preserve its civilian heritage.

The content of Quebec scholarship is worrisome. To begin with, much of it is not civilian at all: private law simply is no longer the prime area of research and publication that it once was for Quebec scholars.[186] Currently, the larger part of Quebec scholarship takes place in fields of public law, particularly constitutional and administrative law,[187] and is thus common-law scholarship. As this scholarly focus merely mirrors the general trend of the increased importance of public law over private law in recent years,[188] which general trend I discuss elsewhere,[189] the present discussion will be confined to that (albeit relatively smaller) part of Quebec scholarship which does concern private law.

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186. Normand reports that a larger proportion of Quebec scholarship was in traditional fields of civil law during the years 1765 to 1839. S. Normand, *L'histoire de l'imprimé juridique: un champ de recherche inexploré*, 38 MCGILL L.J. 130, 141 (1993). It could be argued that this standard for comparison is misleading since, unlike today, public law was then in a state of infancy. Yet, the immaturity of public law at the time may be viewed as a factor that, if anything, further underscores the relative importance of private law over that period. Given that legal scholars are largely responsible for shaping the law in civilian jurisdictions, indeed, the fact that public law was awaiting development in Quebec from 1765 to 1839 could have given Quebec scholars all the more reason to focus upon this last task, and thus neglect private law.

187. According to the 1983 statistics published in the ARTHURS REPORT, *supra* note 100, at 78, civil-law subjects then stood among the top twenty research areas for less than a third of Quebec law professors. *See also* P.G. Jobin, *Les réactions de la doctrine à la création du droit par les juges: les débuts d'une affaire de famille*, *in* ASSOCIATION HENRI CAPITANT, LES RÉACTIONS DE LA DOCTRINE À LA CRÉATION DU DROIT PAR LES JUGES 65 (1980); R.A. Macdonald, *Civil Law—Quebec—New Draft Code in Perspective*, 58 CAN. BAR REV. 185, 202 (1980); R.A. Macdonald, *Comptes rendus*, 26 MCGILL L.J. 126 (1980); P. Slayton, *Law Reform in Quebec: A Cautionary Note*, 2 DALHOUSIE L.J. 473, 481 (1975).

188. *See supra* text accompanying notes 96-105. Brierley offers another possible explanation for the relative scarcity of private law scholarship in Quebec. He points to the fact that many private law scholars have been "heavily engaged, through the Civil Code Revision Office, in re-thinking the basic institutions of private law, a process that continued for over a decade," and one during which they had little time left for publication. Brierley, *supra* note 12, at 14. Yet, it could be retorted that only a small proportion of Quebec's jurists were actively involved in the recodification process, and those who were must have derived tangible research benefits from the experience, at least in the later years of the process.

189. *See* Valcke, *supra* note 10.

Like their continental colleagues, Quebec scholars have left the third category of legal scholarship virtually empty: very little of Quebec scholarship is "meta-legal" in nature.[190] Contemporary Quebec scholars have published little in the field of comparative civil/common law,[191]

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190. Legrand reports that legal history, for example, is considered the exclusive province of historians. P. Legrand, Jr., *Regards sur cent quinze ans de Code civil: éléments d'une réflexion sur un nécessaire reviviscence du droit civil au Québec*, 28 McGILL L.J. 142, 143 (1982). *See also* Macdonald, *supra* note 52, at 607:

> While sociologists, political scientists, economists and social theorists in Quebec, in greater proportion than their analogues in common law Canada, seem to be interested in legal phenomena, they apply their own research tools to the law. Legal scholars thus have an imposing threshold to traverse: the creation of an indigenous empirical methodology.

See also Howes, *supra* note 72, at 127:

> It is remarkable how little we know about the 'basic structures' and 'mental map' of the society that produced so many texts the construction of which constitutes our daily truck and trade ... We are familiar with the words of these acts [such as the 1866 CCLC] (and we may even know them by heart), but as for what they referred to—the reality they framed—to discover anything about that we must enter into conversations with 'aliens' from other disciplines (historians, political scientists, etc.). This is especially true of the Civil Code.

Apparently, Quebec legal scholars once were more open to interdisciplinarity. *See* Macdonald, *supra* note 52, at 598. The founder of Quebec's first school of law, Maximilien Bibaud, has been described as "a man who moves comfortably in diversity," given the wide, interdisciplinary range of the topics, from anthropology to biography, on which he wrote. Howes, *supra* note 72, at 136, n.40. This is confirmed by the following account, Bibaud's own, of one of the weekly public debates which he organized for his students:

> The first production was that of a report by Mr. Globensky, of the celebrated case of Simpson *et al. versus* the Bank of Montreal.... Then followed the debate on the important question of usury: *viz*: "whether the rate of interest of the use of money lent should be restricted by law." Mr. de Bellefeuille opened in the affirmative and in an able discourse replete with logic and learning, undertook to prove that it would be beneficial to Society in general to restrict the rate of interest to a certain fixed sum: Mr. Colovin, on the negative, maintained with his usual force and eloquence that money being but a representative medium, and as such, an article of commerce, should not be restricted in the value of the use of it any more than any other commodity.

M. BIBAUD, NOTICE HISTORIQUE SUR L'ENSEIGNEMENT DU DROIT EN CANADA xxxix (1862), *quoted in* Howes, *supra* note 72, at 135.

191. Brierley, *supra* note 12, at 29. Macdonald concludes that "it seems that the common law and the civil law, like Law and Equity, are destined to flow side by side in the same river bed." Macdonald, *supra* note 52, at 606. One notable exception in this regard is the scholarly production of the Center for Research in Private and Comparative Law and of the Institute of Comparative Law established at McGill University in 1975. *See, e.g.*, DROIT QUÉBÉCOIS ET DROIT FRANÇAIS: COMMUNAUTÉ, AUTONOMIE, CONCORDANCE (H.P. Glenn ed., 1993). Supporters of Canadian biculturalism will find it disconcerting that, however little comparative scholarship is being

and, up to recently,[192] one would have been hard pressed to find any work at all in purely academic subjects such as legal theory, legal philosophy, and legal history.[193] Quebec law professors on the whole have been markedly less inclined towards interdisciplinary matters than their common-law colleagues from the other Canadian provinces.[194]

As with continental scholarship, therefore, that from Quebec has been *in* law, rather than *about* law. But here ends the similarity with continental scholarship, for a large part of Quebec scholarship *in* law has been of the first ("most strictly legal"), not second ("internally critical"), category. And that which does fall within the second category bears greater resemblance to the second-category scholarship of common law than to that typical of continental jurisdictions.

Indeed, although the *traités* of Quebec civil law[195] are not "purely descriptive," most of them are at least as descriptive as the traditional

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produced in Quebec, the sum of it still makes up the larger proportion of Canada's total production. *See* A. JANISCH, PROFILE OF PUBLISHED LEGAL RESEARCH: A REPORT TO THE CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW (1982).

192. Some Quebec legal scholars have recently ventured into interdisciplinarity. *See, e.g.*, J.G. Belley, *La théorie générale des contrats: Pour sortir du dogmatisme*, 26 C. DE D. 1045 (1985); Brierley, *supra* notes 12 and 94; LE DROIT DANS TOUS SES ÉTATS (R. Bureau & P. Mackay eds., 1987); S. Gaudet, *Le rôle de l'État et les modifications apportées aux principes généraux du droit*, 34 C. DE D. 817 (1993); M. Jutras, *Civil Law and Pure Economic Loss: What Are We Missing?*, 12 CAN. BUS. L.J. 295 (1987); N. Kasirer, *Dire ou définir le droit?*, 28 R.J.T. 141 (1994); L. Langevin, *Entre les mesures sociales et la propriété privée, une cohérence à établir*, 18 REVUE DE DROIT (UNIVERSITÉ DE SHERBROOKE) [R.D.U.S.] 357 (1988); Macdonald, *supra* notes 15 and 52; Y.M. Morissette, *Une épistémologie du droit: L'État providence de François Ewald*, 28 C. DE D. 407 (1987); Normand, *supra* notes 76, 88 & 178; M. Tancelin, *Les bases philosophiques de l'avant-projet de réforme de 1987 en matière de droit des obligations*, 19 R.D.U.S. 1 (1988). However, these scholars remain, if not entirely marginal, at least insufficient to conclude as to the emergence of a definite "movement" of scholarship towards interdisciplinarity comparable to that which occurred in France in recent years. *See* Macdonald, *supra* note 52, at 588.

193. BRIERLEY & MACDONALD, *supra* note 3, at 70. The UQAM's explicit policy to promote interdisciplinary studies in law is therefore exceptional in Quebec's juridical context. *See* CATALOGUE, *supra* note 12. This last law faculty is dominated by public law scholars, however.

194. ARTHURS REPORT, *supra* note 100, at 89.

195. *See, e.g.*, J.L. BAUDOUIN, LA RESPONSABILITÉ CIVILE DÉLICTUELLE (1973); J.L. BAUDOUIN, LES OBLIGATIONS (1983); L. BAUDOUIN, LE DROIT CIVIL DE LA PROVINCE DE QUÉBEC (1953); P. MARTINEAU, LA PRESCRIPTION (1977); A. MAYRAND, LES SUCCESSIONS AB INTESTAT (1971); MIGNAULT, *supra* note 94; J. PINEAU, LA FAMILLE (1972); J. PINEAU & D. BURMAN, THÉORIE DES OBLIGATIONS (1988); M. POURCELET, LA VENTE (1987); M. TANCELIN, DES OBLIGATIONS (1988).

common-law treatise,[196] and certainly much more so than the French *traités*.[197] The same is true of most articles published in Quebec law reviews. Moreover, one scholar recently concluded that, generally speaking, Quebec legal scholars do "little more than 'cross-referenc[e] codal articles.'"[198]

Nonetheless, there is Quebec scholarship *in* law that is somewhat "internally critical" and that accordingly belongs in the second category. Still, this second-category scholarship on the whole remains less abstract and critical than its continental counterpart. Like the second-category scholarship of common law, it largely is informed by immediate professional concerns and consequently is more narrowly focused than traditional civilian second-category scholarship.[199] In sum, "[Quebec civil law scholarship], regrettably, reflects the worst of [two] worlds, since it leaves unexplored the justifications for legal norms, and is content

196. For some particularly striking examples, see BAUDOUIN, *supra* note 195; POURCELET, *supra* note 195, MARTINEAU, *supra* note 195. *But see* TANCELIN, *supra* note 195; PINEAU & BURMAN, *supra* note 195.

197. *See supra* notes 161 and 53.

198. Howes, *supra* note 72, at 128, *quoting* Macdonald, *supra* note 52, at 579-80; *see also* Jobin, *supra* note 187, at 264; Normand, *supra* note 178, at 1016-17, 1021, 1026.

199. Jobin points to the *traités* of Baudouin, Mayrand, Pineau, Baudouin, and Martineau cited above, *supra* note 197, as examples of writings by Quebec law professors that, albeit "more 'learned' than those of [practitioners] . . ., are nonetheless underlain by concerns that remain largely didactic and professional." P.J. Jobin, *L'influence de la doctrine francaise sur le droit québécois: Le rapprochement de deux continents*, *in* DROIT QUÉBÉCOIS ET DROIT FRANÇAIS: COMMUNAUTÉ, AUTONOMIE, CONCORDANCE 110 (H. Patrick Glenn ed., 1993). The very short life of one of Quebec's first legal periodical, *La Revue Critique*, offers a case in point. The declared purpose of this periodical was "to fight without hesitation errors and false principles, which are found in legislation and in jurisprudence, and attempt to always give the last word to Law, to logic, and to reason." S. Normand, *Profil des périodiques juridiques québécois au XIXe siècle*, 34 C. DE D. 153, 165 (1993). The periodical vanished quickly, apparently because "professional men have here little taste, feel very little disposition for venturing into abstract studies." Normand, *supra*, at 165 (quoting J.J. Beauchamp, *Avis aux abonnés*, 13 REVUE LÉGALE (NOUVELLE SÉRIE) 1, 2 (1907). Finally, Crépeau's understanding of the term "critical" is particularly revealing in this regard. In the preface to his "Critical Edition" of the Civil Code, Crépeau explains indeed that this edition was prepared "with great care, in full respect for the legislative text as they have been enacted. Indeed, no one, except the Legislator himself . . . has the right to tamper with a text of law, even, as has often been the case, with the very commendable aim of improving it. At best, in a critical edition, one may draw the reader's attention by appropriate observations and symbols to typographical or other errors which it may contain." P.A. CRÉPEAU, THE CIVIL CODES AND RELATED CIVIL LAW STATUTES: A CRITICAL EDITION xiv (1991) (footnotes omitted).

with minor reformulation and restatements of codal rules, complemented by jejune attempts at exemplification."[200]

b. Explanation

As a possible explanation for the emptiness of the third, "meta-legal" category of scholarship, it often has been claimed that Quebec scholars, like their continental analogues, have resisted interdisciplinary exchanges out of some concern to preserve the purity of their law.[201] While this is surely a genuine concern for some Quebec scholars, and hence part of the explanation, it is indeed only *part* of that explanation. The complexity of Quebec's situation as a mixed jurisdiction suggests that more than just one factor is at play here.[202]

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200. Macdonald, *supra* note 52, at 584.

201. *Id.* at 579-80; *see* Brierley, *supra* note 12, at 27. ("[There is] a fear that the 'purity' of the Civil law would be compromised if a broader view of its horizons were adopted (the theme is omni-present in the literature)."). See, e.g., the preface to the 1978 *Projet de Code civil* in which the *Office de révision du Code civil* describes the civil code as "a fortress erected to protect the integrity of the civil law from outside influences." *See also* P. Azard, *Le Droit Québécois, pièce maîtresse de la civilization canadienne française*, [5] 2 C. DE D. 7 (1963); P.A. Crépeau, *La renaissance du droit civil canadien*, *in* LIVRE DU CENTENNAIRE DU CODE CIVIL (I) (1970); M. Tancelin, *Introduction* to WALTON'S SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA (Maurice Tancelin ed., 1981).

202. Howes argues that "the transition from an oral to a textual noetic" has been one such factor. Howes, *supra* note 72, at 128. Clearly, a rejection of interdisciplinarity naturally would follow from a switch in the locus of law's authority from rational necessity—as was the case in the continental tradition of civil law, where the moral authority of positive law was deemed to lie in its conformity to reason—to the fact of requisite institutional sanction—as is the case in the common-law tradition, where law's authority is contingent upon its canonical form as duly formulated legislative or judicial statement. An emphasis on canonical form naturally channels inquiries concerning legal validity very narrowly, that is, such emphasis precludes inquiries into things other than the physical, institutional process and actual method of canonical formulation of any given legal enactment. If, therefore, the "transition from oral to textual noetic" is to be understood as the transition from the conceptual and rational to the physical, institutional, and canonical, then Howes' explanation seems right. But Howes apparently means something else by this expression, for he further describes the said transition as that "from a conception of law as rhetoric (a way of speaking) to the notion of law as logic (a kind of science)." *Id.* (footnotes omitted). In the conception of law as rhetoric, he writes, "the main reason [history and politics] were internal to law is that they had not yet been departmentalized as autonomous branches of knowledge. Law was political history." *Id.* So understood, his explanation for the scarcity of interdisciplinarity in Quebec legal scholarship is one that I would reject, as the above discussion should make clear. In the continental tradition, interdisciplinarity is important for purpose of legal education, but this is not to say that interdisciplinarity partakes of law itself. On the contrary, as a form of science, law is an autonomous discipline in that it rationally derives from first premises in a way that excludes tapping into other disciplines. Yet, since legal reasoning thus is no different from scientific

For instance, part of the reason that Quebec law faculties have produced little or no interdisciplinary scholarship lies with the fact that most of their members are themselves graduates of these faculties and have thus, in all likelihood, rarely been exposed to nonlaw disciplines.[203] In some indirect way, therefore, the financial and Bar Association factors discussed above with respect to Quebec's law curricula[204] have also affected the profile of Quebec's legal scholarship.

Another factor has, it seems, been psychological. I would argue that the "survival"[205] or "ghetto"[206] mentality exhibited by many Quebeckers as a result of their cultural, linguistic, and juridical marginality in the larger North American context has reached to, and perversely impacted upon, Quebec's legal academic community. More specifically, Quebec's marginality has induced among its legal scholars a form of academic parochialism akin to the "alienation syndrome" introduced above.[207]

In his description of this syndrome, Steinberg mentions "low aspirations," "feelings of powerlessness and fatalism," as well as "passivity and resignation."[208] Others similarly list a "tendency to avoid intellectual engagement and competition"[209] among the symptoms of this syndrome. So described, the alienation syndrome seems an appropriate diagnosis for the pervasive parochialism of Quebec's legal scholarship, which Macdonald outlines as follows:

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reasoning, the main task of legal education ought to be to develop basic intellectual skills—analysis, logic, judgment, and a certain form of maturity—which are necessary for proper thinking taken in its most general sense. Interdisciplinarity is important for this purpose, not because law is a hodge-podge of diverse disciplines. Hence, although I agree with Howes that interdisciplinarity is important to civilian legal education, I disagree with him on the reason that this is so and thus also reject his argument that "the transition from an oral to a textual noetic" was ever a factor in Quebec legal scholars' neglect of interdisciplinarity.

203. Indeed, it is no coincidence, and somewhat ironic, that most of the few Quebec scholars who have ventured beyond the legal into the meta-legal, *see, e.g.*, *supra* note 192, are among the minority of Quebec law graduates who obtained graduate degrees at a foreign school of common law, where they gained some exposure to nonlaw disciplines.

204. *See supra* text accompanying notes 101-124.

205. *See* ATIAS, *supra* note 37.

206. *See* TRUDEAU, *supra* note 37.

207. *See supra* text accompanying notes 32-38.

208. STEINBERG, *supra* note 32.

209. J. Howard & R. Hammond, *Rumors of Inferiority*, NEW REPUBLIC, Sept. 9, 1985, at 17-18.

> It is as if everyone implicitly accepted that empirical research and the Civil Code were incompatible. Thus, one finds that instead of empirical analyses of landlord/tenant law, there are studies of the incidence of compliance with the orders of the *Régie du logement* [Quebec's administrative agency for housing]; rather than economic studies of consumer sales contracts, there are bureaucratic studies of the *Consumer Protection Bureau* [Quebec's administrative agency for consumer protection]; instead of studies of the lease of work (master/servant law), there are studies of decision making within the *Labour Standards Commission* [Quebec's administrative agency for labor relations].[210]

The models and methodology of economics, sociology, and most other nonlegal sciences have been denied entry into legal academe in Quebec, because they are not culture- or Quebec-specific.[211] As explained above,[212] civilians in general have traditionally viewed interdisciplinary exchanges with suspicion, for they feared that the absence of a clear dividing line between legal and nonlegal reasoning would leave open the possibility that the latter undermine the conceptual unity of the former. Among Quebec civilians, this fear has been compounded by their being constantly reminded of their vulnerability in this regard, given their minority status in North America.[213] In this sense, it may be argued that Quebec's legal academic community is prey to an "alienation syndrome."

Quebec's minority position in North America is more than just an explanation for the absence of third-category scholarship; it also is the reason that Quebec needs such scholarship most imperatively. The

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210. Macdonald, *supra* note 52, at 605.

211. *Id.* at 588 ("Economic analysis of property, contract and delict is not a new way of looking at the rules of the Civil Code; it is often seen as an American corruption. Empirical research and legal sociology are, whatever else, not legal scholarship. A preoccupation with history and philosophy is thought to distort writing about legal concepts and rules . . . Economics is held to be not culture specific: there are Marxists in France, in the United States, in the United Kingdom and in Quebec; the same is true of Chicago or welfare economists.").

212. *See supra* text accompanying notes 169-172.

213. ATIAS, *supra* note 37, at 33; J.H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357 (1981); T.B. Smith, *Legal Imperialism and Legal Parochialism*, 10 JUR. REV. 39 (1965); W. TWINNING & J. UGLOW, LEGAL LITERATURE IN SMALL JURISDICTIONS (1981).

absence of third-category scholarship is not nearly as problematic on the continent as it is in Quebec. Continental legal systems are structured so as to preserve the civilian character of their private law and, in the absence of risks of infiltration by foreign legal cultures, the lack of local literature questioning, reinforcing, and defending the intellectual foundations of these systems' common private law tradition is unlikely to have catastrophic consequences, at least not for a few decades to come. In contrast, Quebec is one of only three small civilian legal systems in North America[214] and is under constant threat of being swept under the tide of Anglo-Saxon legal culture. Inertia is most likely fatal under such circumstances.

For the sake of its livelihood as a marginal legal culture, therefore, Quebec ought to take proactive measures and bolster its legal system's intellectual premises vis-à-vis those of the dominant system. And there is no reason to believe that the civil-law tradition would not stand up to philosophical, sociological, economic, and any other interdisciplinary scrutiny in Quebec.

With respect to Quebec's scholarship *in* law, the main reason[215] that it is largely descriptive and less abstract and critical than this scholarship is on the continent appears to be that in Quebec, unlike on the continent, there is a pressing need for such writings. Indeed, while

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214. The other two are Louisiana and Puerto Rico. *See supra* note 1.

215. One fact that would explain this having been the case earlier in Quebec's legal history is that, in that province as in the Canadian common-law provinces, the first legal scholars were full-time practitioners, whose occasional writings aimed to achieve no more than resolve concrete legal questions which they or their peers would encounter in their practice. Normand, *supra* note 178, at 1016; Normand, *supra* note 76, at 154-55, 161. Quebec's academic scene has since been substantially overhauled, however, and the majority of its current scholars are full-time university professors. (This overhaul was part of the educational reform that took place in Quebec in the 1960s. *See supra* text accompanying notes 11-12.) Yet, contemporary Quebec scholarship is not much more critical and abstract for that matter. One could then suggest that, as with Quebec legal scholars' resistance to interdisciplinarity, their uncritical attitude towards scholarship *in* law is due to the fact that these scholars' own legal education was obtained in an uncritical, largely professionally-oriented environment, namely, Quebec law faculties. *See supra* text accompanying notes 81-96. If this argument is sound, it would seem that, here again, the financial and Bar Association factors are rearing their ugly heads. This argument is much less convincing here than it was with regards to these scholars' resistance to interdisciplinarity, however: clearly, a lack of exposure to nonlegal disciplines will likely have the effect of limiting the scope of one's future research agenda as a scholar, but it seems unlikely that one similarly requires exposure to critical or abstract thinking by others in order to be able to engage in such thinking oneself. After all, one would expect that those Quebec law graduates who undertake to pursue an academic career would, from the outset, be inclined towards critical and abstract thought.

Quebec judicial decisions are no more a *formal* source of law than continental decisions,[216] their persuasive power *de facto* is almost as great as if they were formally binding.[217] Realistically, therefore, anyone looking to predict how a given issue of private law will be treated by Quebec courts must go beyond the texts of the Code: he or she must also consult past judicial decisions on the issue. Hence the need, in Quebec, for legal scholarship whose immediate purpose is to recount, summarize, and organize the various rules of law "made" by the courts, that is, for scholarship of the first, "most strictly legal" category.[218]

In sum, the traditional civilian roles of judge and scholar have come to be reversed in Quebec:[219] whereas on the continent the scholar is the critical legal thinker who shapes the law through abstract reasoning and reduces it to a set of formulae that will then be applied somewhat mechanically by the judge,[220] in Quebec the law effectively is shaped by judges[221] and thereafter mechanically compiled by scholars.[222] This has

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216. *See, e.g.*, P. Azard, *Le problème des sources du droit civil dans la province de Québec*, 44 CAN. BAR REV. 417 (1966); E. Belleau, *La Revue du Droit*, 1 REVUE DU DROIT 1 (1923); A. Mayrand, *L'autorité du précédent judiciaire en droit québecois*, [1959-60] 34 THÉMIS 69; P.B. Mignault, *Le Code civil de la province de Québec et son interprétation*, 1 U. TORONTO L.J. 104 (1935-36).

217. A. Popovici, *Dans quelle mesure la jurisprudence et la doctrine sont-elles source de droit au Québec?*, 8 R.J.T. 189 (1973); E. Deleury & C. Tourigny, *L'organization judiciaire, le statut des juges et la modèle des jugements dans la Province de Québec*, *in* DROIT QUÉBÉCOIS ET DROIT FRANÇAIS: COMMUNAUTÉ, AUTONOMIE, CONCORDANCE 215 (H. Patrick Glenn ed., 1993).

218. Normand reports accordingly that, from 1945 and until as late as 1965, most doctrinal writings by Laval academics were in the form of short case commentaries. Normand, *supra* note 76, at 161.

219. *See generally* Gaudet, *supra* note 138, at 245.

220. *See supra* text accompanying notes 131-149.

221. As a corollary, the standard civil-law decision from Quebec is, in true common-law fashion, usually published together with the judge's own elaborate, fully documented, and opinionated account of the reasons for decision. See, for example, the opinions of the civilian judges in Houle v. Canadian National Bank, [1990] 3 S.C.R. 122 (concerning abuse of right); Laferrière v. Lawson, [1991] 1 S.C.R. 541 (loss of chance); Laurentide Motels Ltd. v. City of Beauport, [1989] 1 S.C.R. 705 (civil liability of municipalities). This contrasts starkly with the standard continental judgment described above, *supra* note 52. Jean-Gabriel Castel once accordingly exclaimed: "Judges in Quebec are to a great extent the province's jurists." CASTEL, *supra* note 3, at 231. For a more elaborate discussion of the style and form of Quebec judgments, see Valcke, *Quebec Civil Law and Canadian Federalism*, *supra* note 9.

222. Admittedly, doctrinal writings are sometimes cited in support of Quebec judges' decisions. Such citations are few, however: Atias found that 26.52% of all the references made by the judges in 108 Quebec Court of Appeal decisions in 1985 were to doctrinal sources. ATIAS, *supra* note 37, at 131. Moreover, it is unclear whether these writings have any real power of influence upon these judges' reasoning. Gaudet notes that, in France, because judges do not have