THE ORIGIN AND DEMISE OF LEGAL EDUCATION IN QUEBEC (OR HERCULES BOUND)

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The argument of this essay is that legal education in Quebec enjoyed a brief golden age in the middle decades of the nineteenth century, when law first came to be taught in university and college settings. It was in 1851 that Maximilien Bibaud founded his Ecole de Droit in connection with Collège Ste. Marie in Montreal and, basically, "set the level of what could be done as full-time teacher, writer, scholar, commentator, and active reformer of the law."[1] That level has yet to be equalled, or so I shall argue in the concluding section of this essay, which analyzes some of the developments in legal education in Quebec since 1966 as attempts to recover the ground that was lost following the collapse of the Ecole de Droit in 1866.

While the primary aim of this essay is to document Bibaud's philosophy of law and legal education, I also wish to demonstrate how that philosophy can be seen as an expression of the still significantly "oral" as opposed to "written" legal culture in which he lived.[2] My purpose in concentrating on exposing the oral underpinnings of the nineteenth century legal episteme is partly to underline a point made by President Arthurs in his brilliant ethnography of the contemporary legal scene, "Prometheus Unbound." As he observes, it is remarkable how little we know about the "basic structures" and "mental map" of the society that produced so many of the texts the construction of which constitutes our daily truck and trade; texts such as the *Constitution Act, 1867*, or of particular relevance here, the *Civil Code of Lower Canada, 1866.*

We are familiar with the words of these acts (and may even know many of 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 in the case of the *Civil Code*. As I hope to show, the latter text is best read as the transcript of a dialogue and a window on the world outside Quebec's borders. Modern commentators, by contrast, see it as "un rempart élevé contre les influences

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[1]R. St.J. Macdonald, "Maximilien Bibaud, 1823-1887: The Pioneer Teacher of International Law in Canada" (1988) 11 Dalhousie L.J. 721 at 721.

[2]In other words, my intention is to depict the life of Bibaud as a social event. See S.E.D. Shortt, *Victorian lunacy: Richard M. Bucke and the practice of late nineteenth-century psychiatry* (Cambridge: Cambridge University Press, 1986).

qui, de l'extérieur, menaçaient l'intégrité du droit civil."[3] Not surprisingly, given the narrowness of this construction, contemporary civil law scholarship consists in little more than "cross-referencing codal articles."[4]

This essay, then, is also a study of the involution of Quebec law. My argument is that this involution was brought on by certain transformations in the means and relations of communication.[5] If I am correct in asserting a link between this involution and the demise of orality (or, if you prefer, rise of textuality), this may go part of the way toward explaining why it is that in Quebec universities today "law exhibits [so] few of the signs of a distinct intellectual tradition: it seems to be organized around a professional ideology, rather than an epistemology," to quote President Arthurs again. As we shall see, philosophic, historic, and political dialogue all used to be internal to law. What brought about their exteriorization was the transition from an oral to a textual noetic, or in other words, from a conception of law as rhetoric (a way of speaking) to the notion of law as logic (a kind of science).

When I say that philosophy, history and politics used to be internal to law I mean this quite literally. There was a heated debate in 1886 between William Dawson, principal of McGill University, and Siméon Pagnuelo, secretary of the Conseil Général du Barreau, over whether training in philosophy should or should not be a prerequisite to the study of law. Pagnuelo, not Dawson, was on the side of philosophy.[6] While it is not difficult for us moderns to imagine a lawyer with no grounding in philosophy, to the legal imagination of the 1880s such a creature was unthinkable; i.e. the professional ideology *included* philosophy. As for history and politics, the main reason they were internal to law is that they had not yet been departmentalized as autonomous branches of knowledge.[7] Law was political history.[8]

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[3]Office de Révision du Code Civil, *Projet du Code Civil* (Québec: Editeur officiel, 1978) at xxvi.

[4]R.A. Macdonald, "Understanding Civil Law Scholarship" (1985) 23 Osgoode Hall L.J. 576 at 579-80. Indeed, as Macdonald goes on to note, a "preoccupation with history and philosophy is [currently] thought to distort writing about legal concepts and rules."

[5]See J. Goody, *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press, 1986), as well as his *The Domestication of the Savage Mind* (Cambridge: Cambridge University Press, 1977).

[6]"The General Council of the Bar believes in the necessity of teaching philosophy to those who intend to enter the Bar, as law is essentially a science of reasoning." S. Pagnuelo, *Universities and the Bar: A Criticism of the Annual Report of McGill, from a French-Canadian Standpoint* (Montreal: Gazette Printing Co., 1887) at 2-3. It should be emphasized that Dawson was speaking as a university administrator. It is highly doubtful that his views were shared by those who taught law at McGill in the 1880s judging from Rod MacDonald's careful and deeply illuminating reconstruction of the latter's episteme. R.A. MacDonald, "The National Law Programme at McGill: Antecedents, Evolution, Prospects" (1989) Dal. L.J. (forthcoming).

[7]To take only the case of McGill, the History Department there was not created until 1895, while Political Science only came into its own (relative to Economics) in 1970.

[8]See e.g. J. Sewell, "Essay respecting the early civil and ecclesiastical juridical History of France" (1845) 1 Rev. Leg. et de Jur. 477 (a prototypical Quebec law review article, originally an address to a literary society) or E. Lareau, *Histoire du droit canadien*, 2 vols. (Montréal: A. Périard, 1889).

This essay, then, is mostly a study of law before the disciplines were formed (i.e. when you did not have to renounce history or political science to study law, because law and history and political science were one). This brings me to the final point raised by President Arthurs last evening on which I wish to comment, his point concerning the remarkable upsurge of "interdisciplinary" approaches and courses of late. "Varieties of legal theory," he says,

> are being discussed in a breadth and depth that would have been unthinkable even ten years ago. Linkages to other disciplines--sociology, linguistics, philosophy, history, economics, political theory--have been forged to such an extent that may even have overtaxed the intellectual capacity of their very creative proponents.

I could not agree more. Indeed, my fear is that if any more linkages are forged law as such will disappear. This is what makes it so urgent that we turn to Bibaud for instruction, and attempt to recover some of the *holism* of his perspective. Of course, the process of distributing the content of law in every which way, though still in its infancy, is too far advanced now for it to be stopped. Nevertheless, my hope is that this essay, by showing how history, economics, political theory and the rest can be (and in fact were) thought of as internal to law, may help to open the way for a thoroughgoing reevaluation of the undisciplined manner in which contemporary legal scholars attempt to escape the "professional nexus" (or stranglehold). Refiguring how we think about law should start here on Earth rather than Venus or Mars.

The essay unfolds as follows. Part I reviews evidence in support of the orality hypothesis with respect to the true nature of mid-nineteenth century Quebec legal culture. Part II analyzes Bibaud's philosophy of law and legal education as an expression of that orality. Parts III and IV trace the demise of dialogue across a series of editions of the *Code*, as well as in the classroom. Having shown how the rule of silence in the classroom was due to the rise of the "magisterial teaching style"--the most powerful "conversation stopper" of all time, the essay concludes with a brief look at certain recent (post-1966) initiatives in Quebec legal education, which are adjudged "promising." Nevertheless, it is maintained that until such times as History is restored to its proper place in the law school curriculum, and the professional entrance exam goes back to being entirely oral, that promise shall never be fulfilled.

Part I

In an oral culture the standard mode of thought and expression is the dialogue or oration; in a written culture the emphasis shifts to analysis and exegesis.[9] This shift is by no means automatic. As Donald Lowe points out, the separation of knowledge from speech, which is what literacy facilitates, remains

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[9]See W.J. Ong, *Ramus, Method, and the Decay of Dialogue* (Cambridge, Mass.: Harvard University Press, 1958).

> an extraordinarily difficult accomplishment, which each literate society must struggle to achieve, over a prolonged span of time . . . The chirographic [or scribal] culture of classical antiquity introduced a new ideal, namely, an abstract, formal logic. Nevertheless, the oral tradition in the organization of knowledge, e.g. rhetoric and disputation, persisted from classical antiquity through the Middle Ages into the Renaissance.[10]

The legal culture of mid-nineteenth century Quebec can be characterized as chirographic, and therefore "residually oral," much like the culture of the Middle Ages. The evidence for this consists, first, in the virtual absence of case reporting. There were but three legal periodicals in circulation in 1850, one of which, *La Revue de Législation et de Jurisprudence*, boasted three volumes, the other two one each. As a contributor to the first volume of the *Revue* lamented: "for all practical purposes the legal profession in Lower Canada has scarcely derived more advantage from the decisions rendered in our courts of justice than might have been derived even if the pleadings, the evidence, and the judgments had been all verbal, and not a record of them kept among the archives of our courts."[11]

A second piece of evidence suggestive of the oral bias of the legal culture as a whole consists in the reaction of those who had themselves only just gained access to print to the mannerisms of those who did without. Thus, one writer expressed outrage at the daily spectacle of a judge "succeed[ing] in gaining his point by his very recklessness and tenacity," as opposed to a syllogism or a judicious analysis of sources, and lawyers "heaping up masses of great names and authorities, as if to beat down all opposition."[12] Another entertained the hope that with the publication of case reports, "avant longtemps, nous ne verrions sur le Banc, que des hommes supérieurs, par la raison tout simple, que ces rapports feraient connaître, sans déguisement, en révèlant quels sont ceux des juges qui ont droit à une réputation, par leur savoir, leur habilité, leur intégrité"--as opposed to their rhetoric.[13] These reactions on the part of those with access to the new medium (print) are readily explicable:

> Many, if not all, oral or residually oral cultures strike literates as extraordinarily agonistic in their verbal performance and indeed in their lifestyle. Writing fosters abstractions that disengage knowledge from the arena where human beings struggle with one another. It separates the knower from the known.[14]

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[10]D. Lowe, *History of Bourgeois Perception* (Chicago: University of Chicago Press, 1982) at 3. It was the introduction of print in the mid-fifteenth century that "finally standardized the communication of knowledge . . . Typographic standardization shifted the knowable entirely to the 'content' [i.e. away from the particular speaker or manuscript]. This meant a formalization of the known as content, detached from the knower"--hence the "new ideal of objective knowledge" which informed the scientific revolution of the seventeenth century. By analogy, the legal culture of Quebec underwent a scientific revolution in the 1910s and '20s.

[11]Cited in W.S. Johnson, "Legal Education in the Province of Quebec" (1905) 4 Can. L. Rev. 451 at 455.

[12]Anon., "Law Reports" (1845) 1 Rev. Lég. et de Jur. 9 at 10.

[13]M., [Untitled], 1 Rev. Lég. et de Jur. 471 at 476.

[14]W.J. Ong, *Orality and Literacy: The Technologizing of the Word* (London: Methuen, 1982) at 43-44.

Judges and lawyers, then, rather than resolving disputes, only exacerbated them. Take the case of Judge Kerr. A witness at an inquiry into the administration of justice reported that he had heard Kerr say (while on the Bench) that the *droit canadien* is "unworthy of an English judge . . . that he did not know what the Law of Lower Canada might be, as applicable to the case then under consideration, and declared at the same time what the Law of Scotland was upon the same point."[15] Lest it be thought that Kerr was prejudiced in favour of English law, it should be noted that on another occasion he was heard to remark: "I don't care for precedents."[16] Thus, for Judge Kerr there was no separation between the law and what he knew, no slavish adherence to precedents deemed binding (for no good reason), but simply a commitment to whichever law he thought was good (i.e. worth struggling for). That dull abstraction, "the rule of law" had no appeal for him, primarily because his mind had not yet been domesticated by writing, unlike the minds of those who filled the pages of the *Revue de Législation et de Jurisprudence*.

Part II

In fairness to Judge Kerr it should be said that his agnosticism with respect to the law of Lower Canada was not altogether unfounded: "To study law in French Canada in 1851 was daunting; to organize law for teaching purposes almost an impossibility."[17] To actually decide what it was and apply it . . . There really is no phrase to describe the difficulties involved in this, though "Herculean task" does come to mind.[18] The reason:

> There was no criminal code, no civil code, no code of procedure. The student, indeed the practitioner as well was obliged to consult innumerable time-honoured authorities from metropolitain France, together with commentaries [many out of print], as well as the prescriptions of Roman law, English common law, commercial law, and criminal law, the statutes and case law of Lower Canada . . . In short, the law of [Quebec] was in a chaotic state.[19]

--A veritable "Babel légale."[20] While judges like Kerr seem to have delighted in this state on account of the freedom of decision it permitted them, law professors

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[15]Quoted in E. Kolish, "Changement dans le droit privé au Québec et au Bas-Canada, entre 1760 et 1840: Attitudes et réactions des contemporains" (Thèse de Doctorat, Université de Montréal, n.d.) at 651.

[16]*Ibid.*. Of course, Scots Law is not English Law, for it is civil rather than common, and may therefore have been applicable to the case at bar for all the witness knew.

[17]R. St.J. Macdonald, *supra*, note 1 at 725.

[18]When I invoke the name of Hercules I mean the Olympian god-man, not the stunted figure who flits across the pages of R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard Univerity Press, 1978). Dworkin's Hercules looks like a mental midget next to Bibaud, and even Kerr. Whereas the former is "positively" inclined to the study of law, the latter were critically inclined. They would never have been able to take Dworkin's Hercules seriously. Hercules, incidentally, was the hero who liberated Prometheus.

[19]R. St. J. Macdonald, *supra*, note 1 at 725.

[20]See D. Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32 McGill L.J. 523 at 529-30 [hereinafter "Polyjurality"].

such as Bibaud could not afford to be quite so cavalier. If they wanted to attract students, they had to create condition under which the law could at least seem to be knowable.

Before proceeding to examine Bibaud's philosophy of law and legal education,[21] it should be noted that it was a section of the Act of 1849 which provided for the incorporation of the Bar of Quebec that created the demand for formalized legal instruction. In accordance with this section, a student who successfully completed a "course in law" needed only to undergo three years of articles or indentures, instead of five (as previously), before presenting himself for the professional entrance exam. The option of five years of articles (and no schooling) remained open but, it seems, less and less attractive, since legal studies, which were only offered on a part-time basis, could be pursued concurrently with the full-time business of articling. Hence the organization of courses in law at Collège Ste. Marie (1851), McGill College (1853) and Université Laval (1854).[22]

There are four main points about Bibaud's knowledge of law and teaching style I would like to make. The implications of some of these points can be spelled out immediately, while comment on the import of others is best reserved to part V, where I shall compare Bibaud's curriculum with that of the modern Quebec law school.

The first point concerns how Bibaud brought order to the "chaos" of Quebec law. He did so by subjecting it to a method which he styled "à la fois historique, méthodique, philosophique et pratique."[23] Thus, in his Course, he began by lecturing on the history of Roman, Anglo-Norman and French law and legal institutions, and then proceeded to discourse on general questions of terminology, methodology, legislation, obligations and contracts. Only once his students had been thoroughly steeped in the history and language of law did he turn to consider the "lois communes du Canada," as amended by diverse royal *ordonnances* and *édits*, British imperial and provincial statutes, and compared with England's common law. The two-year Course, which was held three mornings a week, eleven months a year, concluded with a series of lectures on procedure by Bibaud's assistant, Achille Belle. Otherwise, all courses, ranging from International Law to Contracts, were taught by Bibaud himself. His was a "one-man-school," and on account of his charisma attracted far more students than the other schools.[24]

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[21] I shall dispense with reciting the myth of Bibaud's Herculean performance at his own bar exam, and the encouragement he received to found a school therefore, as this has been done by far better story-tellers than I. See A. Morel, "Maixmilien Bibaud, fondateur de l'Ecole de Droit" (1951) 1 Thémis 9 as well as his entry on "Bibaud, François Maximilien" in 11 *Dictionary of Canadian Biography, 1881-1890* 70.

[22] See M. Nantel, "L'Etude du Droit et le Barreau" (1950) 10 Rev. du Bar. 97.

[23] M. Bibaud, *Commentaires sur les Lois du Bas-Canada* (Montréal: Cérat et Bourguignon, 1859) at 4 [hereinafter "Commentaires"].

[24] See L. Lortie, "The Early Teaching of Law in French Canada" (1975) 2 Dalhousie L.J. 521.

At the demand of his students, Bibaud published his lecture notes or *Commentaires* in 1859. One of the things that most stands out about this work is that Latin and English quotations abound, all in the original, of course. Thus, Bibaud simply presumed that his students, like himself, were polyglots. Close study of the *Commentaires* also reveals how Bibaud's lectures were dialogues as much as orations. For example, at one point there is a discussion of a recent court decision on the validity of a certain marriage contract. The text is arranged in two columns headed "Considérans des juges" (which contains the text of the decision) and "Refutation" (Bibaud's point-by-point demolition of the judges' reasoning).[25]

The second point I wish to stress concerns Bibaud's attitude toward the practice of law (something he never did do). It is apparent from the way his Course was structured that he considered theory as fundamental to practice. He was called to task for this--i.e. not having "*la plus légère teinte de la pratique du droit*"--by an anonymous contributor to a local newspaper: "dans la profession d'avocat," the latter wrote, "la théorie, sans la pratique, c'est la lettre qui tue; la pratique avec la théorie, c'est l'esprit qui vivifie."[26] Bibaud had his assistant, Belle, responded to this charge. The latter pointed out that procedure as well as theory was taught at the Ecole; that it was better to have full-time professors teaching than full-time practitioners since at least in the former case classes were held (something which could not be said of McGill--Dean Badgley never let teaching interfere with his commercial law practice); and finally,

> Quant à la pratique proprement dite, ou a la *routine*, elle ne s'acquiert que par l'habitude. Les Universités Laval et McGill ne peuvent pas plus que l'Ecole de Droit enseigner cette routine.[27]

Besides, Bibaud actively encouraged students to frequent the courts, whenever their services were not needed at their patron's law office.[28] The implication I would draw from this exchange is that there is the theory and practice of law, and there is routine. What we today call practice, Bibaud regarded as routine: he sought to turn out practising theoreticians.

The third point concerns Bibaud's attitude toward Roman Law. In his estimation, Roman law was 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 Bibaud, was an enduring template of and for all law. Its legislation was almost always in complete conformity with natural 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. "Il

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[25]Commentaires, *supra*, note 23 at 396 et s.

[26]Cited in M. Bibaud, *Notice historique sur l'enseignement du droit en Canada* (Montréal: Perrault, 1862) at xliii [hereinafter "Notice"].

[27]*Ibid.* at lxiv.

[28]Commentaires, *supra*, note 23 at 14. However, the best preparation for practice, in Bibaud's view, was the *repetitorium solonnel*, as will be discussed below.

faut conclure de là, que c'est dans le droit romain qu'il faut aller puiser les principes du droit en général."[29]

Of course, in espousing this view Bibaud was no different from many of his contemporaries, and Romanism in fact remained a bias of Quebec law professors down to the 1950s.[30] But what perhaps distinguished Bibaud was his commitment to using Roman law as a standard against which to measure and criticize new initiatives, particularly those of the provincial legislature. How was one supposed to apply Seneca's maxim *non multa, sed multum* to the teaching of law given the legislature's profligacy? he asked.

> Comment n'enseigner qu'un petit nombre de choses avec un système de lois aussi compliqué et aussi hétérogène, -lorsque tous les ans, notre législature nous donne de deux à trois cents nouveaux statuts, . . . non toujours intelligibles . . . Dans les pays soi-disant libres, le législateur ne suit aucuns principes et ne s'impose aucune borne.[31]

These words are equally pertinent today: what is needed is not more legislation but less legislation more in conformity with the clarity and principles of the Roman law.

The final point I wish to stress concerns Bibaud's teaching methods. As Léon Lortie notes,

> Bibaud's originality was that he did not rely [exclusively] on lecturing and that he did not believe in [written] examinations. Following what he said was the example of German universities, every week and, later, every month, he held what he called a *repetitorium*, at which students were assigned to discuss the subjects covered during the preceeding week.[32]

Bibaud himself described these sessions as follows: "Cette Ecole est une véritable société de discussion, où les élèves font toutes les objections qu'ils veulent. Ce mode leur donne de l'assurance; aussi, sont-ils à peu près les seuls qui, à l'examen professionel, parlent d'une voix audible pour l'assistance."[33] Not only were the voices of Bibaud's students more audible than others,' they were also more often correct. For example, after one set of professional exams, the examiner in Roman law confided to Bibaud that he had "invariablement vu les élèves du Collège McGill comme muets obstinés, tandis que MM. McCoy et Colovin, de l'Ecole de Droit, ont répondu brillamment et à sa grande satisfac-

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[29] *Ibid.* at 9.

[30] See J.E.C. Brierley, "Quebec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities" (1986) 10 Dalhousie L.J. 5.

[31] *Commentaires*, *supra*, note 23 at 15. See further Bibaud's comments on the "metaphysics" of legislation.

[32] Lortie, *supra*, note 24 at 529. See R. St.J. Macdonald, *supra*, note 1 for an intriguing discussion of the German model Bibaud claims to have followed.

[33] *Notice*, *supra* note 26 at ix.

tion."[34]

There appear to have been two reasons why Bibaud's students did so much better than McGill students on the professional entrance exams which, it should be noted, were *entirely oral*. One is that the former were accustomed to using their tongues whereas the latter only knew how to push pens: the mode of instruction at McGill was the lecture (no debate), and for evaluation purposes students sat written exams (the favoured ones being slipped both questions and answers beforehand). This fraud was, of course, exposed at the bar exams, where "l'intelligence travaile et non la plume."[35] The second reason is that there was no "méthode" to the instruction given at McGill; indeed, the only McGill professor Bibaud had any respect for was Lafrenaye, "non pour ce qu'il a accompli en effet, mais pour avoir tenté d'inculquer aux élèves le goût historique de la jurisprudence."[36] As for the others, "A en juger par les programmes, leurs cours sont plutôt calqués sur Blackstone que sur les lois françaises en force en Canada."[37] Thus, on this account, McGill students were only half in the picture of Quebec law--its dual origins, English *and* French, eluded them. Bibaud's students did at least 50% better because, as will be recalled, his Course was comparative.

In addition to the weekly *repetitoria*, Bibaud staged the occasional *repetitoria solonnel*. These were elaborate affairs, open to the public (including ladies), at which his students would present theses on topics such as clandestine marriage or usury, and be examined on same by a panel of local notables (judges, ecclesiastics, etc.). What follows is an account of one such "soirée littéraire," which Bibaud clipped from the *Gazette*:

> The first production was that of a report by Mr. Globensky, of the celebrated case of Simpson *et alii versus* the Bank of Montreal. . . . Then followed the debate on the important question of usury: *viz*: "whether the rate of interest for 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.[38]

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[34] *Ibid.* at vi.

[35] *Ibid.* at xl. Allowance must be made for the fact that Bibaud's tract is as propagandistic as it was historic. See further *infra*, note 43.

[36] From the *Supplément* to *Notice*, *supra*, note 26 at lxxxvi. This quotation underlines the centrality of "history" to Bibaud's own epistemology of law, or "méthode." Historical and conceptual analysis were one, as far as he was concerned. Compare *supra* note 4.

[37] *Notice*, *supra*, note 26 at vii. Compare Brierley, *supra*, note 30 at 18, note 47. Again, there is overstatement involved here. The McGill curriculum was more balanced than Bibaud suggests, as the researches of both Brierly, *supra*, note 30 at 18, and MacDonald, *supra*, note 6 attest.

[38] *Notice*, *supra*, note 26 at xxxix.

The modern analogue of these *repetitoria solonnel* is, of course, the moot court, but there really is no comparison. At best, a student's mom and dad might come and hear him (or her) speak, but more for encouragement than for any instruction they might receive; the public is largely indifferent to these mini-spectacles.

Bibaud's "soirée littéraires" *were* public spectacles--they made the newspapers. The reason for this is obvious--their subject matter transcended the narrow bounds of "the law" and was therefore of interest and importance to the community as a whole. Or perhaps a more accurate way of putting this would be that, as the usury debate illustrates, economics and political theory were still internal to law. Of particular interest is the way in which these verbal combats were judged: it was concluded that "Mr. Globensky s'était fait remarquer par la clarté, Mr. de Bellefeuille, par la logique, et Mr. Colovin, par l'éloquence."[39] Thus, the students' performances were judged by rhetorical standards, not technical legal standards; but again, this distinction is somewhat artificial, since the life of the law *was* rhetoric.

To conclude, Bibaud was a polyglot, a polymath, a potent orator and a prolific writer--in short, a "cosmopolite," i.e. "a man who moves comfortably in diversity."[40] For him, being a professor of law was a "role," not a "job."[41] His very lack (or rather, repudiation) of specialization was, however, one of the causes of his demise.

The reasons the Ecole de Droit never reopened after the 1866-67 academic year really deserve separate study. I can mention only some of them here. One is that Bibaud succeeded in alienating many of his former allies on account of his "authoritarian and adversarial" character.[42] This is not surprising, given that he was the epitome of "oral man," and therefore "agonistically programmed" by culture.[43] Nevertheless, sensibilities were changing.

What this alienation meant was that when young Gonzalve Doutre--who seems to have had nothing better to do during the two years he had to wait between completing his legal studies at McGill and attaining the age of majority (so that he could be called to the bar)--succeeded in mobilizing a certain amount of sentiment within the profession in favour of making the process of entry to the profession more "rigorous" (i.e. exclusive), and finally got his "reforms" adopted by the legislature in 1866, there was no one in a position of power on whom Bibaud could rely to question the soundness or applicability of the new "standards" to the sorts of courses he taught. He may therefore have closed the

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[39] *Ibid.* at xxxviii.

[40] See R. Sennett, *The Fall of Public Man* (New York: Knopf, 1977). For a list of Bibaud's other literary productions, which range from anthropology to biography, see Morel, *supra*, note 21.

[41] For an account of how the typographic revolution precipitated a fragmentation of "roles," and the creation of "jobs" see M. McLuhan, *The Gutenberg Galaxy* (Toronto: University of Toronto Press, 1962) at 11-18.

[42] R. St.J. Macdonald, *supra*, note 1 at 740.

[43] Ong, *supra*, note 13.

Ecole himself so that Doutre's gang of exorcists were denied the satisfaction of doing so "officially" (i.e. by order of the Governor-in-Council)--a second reason.[44]

The third reason is that the laws of Lower Canada were reduced to one writing, *a* code, in 1866. The *Civil Code of Lower Canada* is a highly formalized and highly stylized enactment similar in many respects (but mostly in appearance) to the French *Code Napoléon*, 1804. While most looked upon the *Code* with indifference,[45] others regarded it as a triumph of logic over chaos and a great boon for law teaching.[46] Bibaud saw it as an anathema,[47] and may therefore have given up law teaching in disgust.

Part III

It is important to distinguish between the formal superstructure or "style" of the *Civil Code of Lower Canada*, which was borrowed from the French, and its dialogical infrastructure or "substance," which was firmly rooted in the local culture. By "formal superstructure" I mean the way in which the *Code* divides up the law into Books, Titles, Chapters, Sections and Articles, and the abstract way it defines such concepts as "Marriage," "Property," "Successions" and the like--the "working concepts" of Quebec law. Let me leave what I mean by "dialogical infrastructure" undefined for the time being.

As John Brierley notes, "the very style of the *Civil Code* has had an impact on classroom techniques and, therefore, upon the manner in which the Quebec student is drawn into thinking about the content of the law and its processes."[48] In this part, I would like to show how the impact of which Brierley speaks remained minimal for the better part of the nineteenth century because *substance continued to dominate over style*. The gist of my argument is that the *Code* is, or was, at once the expression of a still predominantly oral (or chirographic) culture and the means whereby that culture was transformed into a written (or typographic) one.

Consider the following excerpt from one of the earliest editions of the *Code*, Edouard Beaudry's 1872 *Le Questionnaire Annoté du Code Civil du Bas Canada*:

403.D. Quel est l'effet du marriage sur la capacité du mineur?

R. Le mineur est emancipé de plein droit (A) par le marriage (B).

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[44]See R. St. J. Macdonald, *supra* note 1(where it is suggested that Doutre was Bibaud's double); Nantel, *supra*, note 22; G. Lahaise, "Centenaire de la Première Ecole de Droit établie au Canada: Collège Ste. Marie, 1851-1867" (1951) 1 Thémis 17.

[45]See A. Morel, "La codification devant l'opinion publique de l'époque" in J. Boucher and A. Morel eds., *Livre du centenaire du Code civil: Le droit dans la vie familiale*, vol. 1 (Montréal: Presses de l'Université de Montréal, 1970).

[46]See Johnson, *supra*, note 10.

[47]R. St.J. Macdonald, *supra*, note 1 at 737-39.

[48]Brierley, *supra*, note 30 at 22.

Art. 314

A) Et sans qu'il soit besoin d'aucune intervention du conseil de famille ni du juge.

B) 1. Ainsi le mineur est emancipé . . .

4. A Rome le marriage n'émancipait pas.[49]

In essence, what Beaudry has done is take the *Code* and retranscribe it in annnotated question-and-answer form. As he himself explains: "j'ai mis tout le Code en questions et réponses. Ces réponses sont généralement la reproduction du Code; j'ai préféré cette reproduction textuelle a fin de ne pas courir le risque de dénaturer le sens de la loi."[50]

What a perfectly senseless exercise!--the modern reader will think to himself: Why rewrite the Code in the form of a dialogue if all you are going to do is paraphrase (or copy) its provisions? Yet Beaudry's text-building strategy does make sense, if one allows that his audience may not have been so literately minded as ourselves. Walter Ong explains: "Early writing provides the reader with conspicuous helps for situating himself imaginatively. It presents philosophical material in dialogues, such as those of Plato's Socrates, which the reader can imagine himself overhearing."[51] Hence the dialogical form of the Beaudry edition: it is an example of "early writing." Of course, the Beaudry edition is not purely dialogical. It is also exegetical: the "(A)s" and "(B)s" serve as footnotes, referring the reader to the author's *explication du texte*. In the latter respect, the Beaudry edition anticipates later, more "literate" annotations. The latter separate dialogue from exegesis; in fact, the former completely disappears.

Another early edition of the *Code* which merits scrutiny in this connection is Lorimier and Vilbon's *La Bibliothèque du Code Civil*, published in 1871. These authors imagined the *Code* as a library, rather than a dialogue. Their objective was to "réunir dans un cadre, comparativement restreint, un ensemble assez complet des principales discussions sur chaque article de notre Code, présentant successivement les données du droit Romain, du droit Français et du droit Anglais, quelquefois même du droit Américain."[52] The "discussions" in question were the sources identified in the *Reports* of the Codification Commission as embodying the existing law of Quebec. Lorimier and Vilbon claim to have spent 18 months

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[49]E. Beaudry, *Le Questionnaire Annoté du Code Civil du Bas-Canada* (Montréal: Beauchemin & Valois, 1872) at 488. It bears underlining that Beaudry was reverting to a genre already well-established in Quebec. See e.g. J.F. Perrault, *Questions et Réponses sur le droit civil du Bas-Canada* (1810).

[50]*Ibid.* at 2.

[51]Ong, *supra*, note 14 at 103.

[52]C. de Lorimier and C.Vilbon, *La Bibliothèque du Code Civil de la Province de Québec* (Montréal: Le Minerve, 1871) at 13.

hunting down these citations, all of which are reproduced in their entirety and without any attempt to eliminate the contradictions between them.[53] Subsequent editions of the *Code*, such as those of Sharp and de Bellefeuille, also list the sources of law referred to in the *Reports*, but do not reproduce them, electing to summarize reports of cases instead.[54] These editions may be said to signal a foreshortening of historical consciousness. Rather than being windows on the past, they give out on the present.

It is instructive to reflect on these transformations in the way in which the text of the *Code* was reproduced in light of the historical pattern of doctrinal production in Quebec. As Dean Rod Macdonald observes: "The private law scholarship published prior to 1900 often was historical, philosophical and largely non-professional. After the turn of the century, and at least until the mid-1960s, analytical, exegetical and professional writing predominated."[55] It will be appreciated how this observation coheres with the main thesis of the present essay, namely, that in an oral or chirographic culture the dominant mode of thought and expression is the dialogue or oration, while in a typographic culture the emphasis shifts to analysis and exegesis.

What is especially interesting about this pattern is the point at which the rupture occurs: not upon the promulgation of the *Civil Code* in 1866, but some 40 or 50 years later on. Indeed, Macdonald is insistent that the "remarkably varied and erudite" pre-codification tradition of legal scholarship continued unchecked down to the publication of F.P. Walton's *Scope and Interpretation of the Civil Code of Lower Canada* in 1907, although certain noticeable deflections from this tradition, such as Mignault's *Droit civil canadien*, began appearing in the late nineteenth century.[56] Plainly, there is a connection between orality and heterogeneity, textuality and homogeneity.

As has been shown elsewhere, what Macdonald says of *la doctrine* also holds true for *la jurisprudence*.[57] The promulgation of the *Civil Code* did not effect any significant change in the pre-codal pattern of judicial reasoning or rhetoric. Concerning rhetoric, "oral effects," such as conversational elements in literary style, approximations of informal speech patterns, and the use of dialogue, continued to turn up with some frequency.[58] Concerning reasoning, judges continued to roam

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[53]The reason for this tolerance of contradiction is that "oral man" lacks a "point of view:" "Authorship before print was in a large degree the building of a mosaic." McLuhan, *supra*, note 41 at 132 and 146-50 (on Rabelais). It bears remarking that common-law casebooks also used to be "hard on students' minds. The books consisted primarily of cases, with very little additional explanatory material." See A. D'Amato, "The Decline and Fall of Law Teaching in the Age of Student Consumerism" (1987) 37 J. Leg. Educ. 461 at 483.

[54]E. de Bellefeuille, *Le Code Civil Annoté étant le Code Civil du Bas Canada* (Montréal: Beauchemin & Valois, 1879); W.P. Sharp, *Civil Code of Lower Canada* (Montreal: Périard, 1889).

[55]R.A. Macdonald, *supra*, note 4 at 598.

[56]F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Toronto: Butterworths, 1980); P.B. Mignault, *Le droit civil canadien*, 9 vols. (Montreal: Whiteford & Théoret, 1895-1915).

[57]See Polyjurality, *supra*, note 20.

[58]W.J. Ong, *Rhetoric, Romance and Technology* (Ithaca: Cornell University Press, 1971) at 25. See D. Howes, "Dialogical Jurisprudence" in W. Pue and B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in*

over a vast number of authorities in their efforts to determine a given point of law, even when the point in question was specifically dealt with by the *Code*, and they ought, therefore, to have confined themselves to interpreting its language.[59] This practice of looking *through* the *Code* (to the other sources on which it was founded) instead of *at* it, and of invoking all manner of arcane and exotic authors, instead of cross-referencing codal articles, persisted into the twentieth century, albeit in a much attenuated form.[60]

Those who observed this practice of what could be called juridical nomadism understood it to be one of the key features distinguishing their legal culture from that of France. The *Code Napoléon* had abrogated the pre-existing law; the *Code Civil du Bas-Canada* had not (see article 2712). According to Judge Loranger, that abrogation had reduced the role of the French judge and commentator: "Le rôle de ce dernier n'est pas de chercher en dehors du texte, les lois sur lesquelles sont fondées ses explications, la matière de son commentaire. Il ne remonte pas plus haute que le Code, qui est son unique source, le premier comme le dernier mot de sa paraphrase."[61] The Quebec jurist, by contrast, had to hold "en conférence continuelle" *all* of the sources that went into the *Civil Code*; hence the notion of this text as a kind of library.

The idea of the Code as the transcript of a dialogue, or as a kind of library, is completely foreign to the modern commentator. Witness the following excerpt from J.-G. Castel's *The Civil Law System of the Province of Quebec*, published in 1962:

> To know the Quebec law of contract, it is sufficient to read the articles of the Civil Code dealing with this topic and the cases decided since its enactment. If in the common-law system it is absolutely necessary to know history to understand, for instance, the essential division between law and equity . . . this is not the case in France or in Quebec. There, the civil law is logically organized, it is not the product of a historical evolution or of a long line of decided cases.[62]

Thus, by the middle decades of this century, the civil law had come to be understood as a "system" in opposition to the "common-law system" of the other provinces of Canada (its "mixed" origins either forgotten or willfully ignored). The *Code* itself had acquired the appearance of a self-contained document, with a unique internal logic, completely impervious to history.

Legal History (Ottawa: Carleton University Press, 1988) [hereinafter "Dialogical"].

[59] At least in theory. See J.-G. Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterwoths, 1962).

[60] See D. Howes, "La domestication de la pensée juridique québécoise" (1989) 13(1) *Anthropologie et Sociétés* (forthcoming) [hereinafter "Domestication"].

[61] T.T.J. Loranger, *Commentaires sur le Code Civil du Bas Canada* (Montréal: Brassard, 1973) at 3.

[62] Castel, *supra*, note 59 at 34.

Part IV

What brought about this astonishing involution in the civil law of Quebec, and in particular, the conception of the *Code*? I have suggested three possible explanations elsewhere. One is that it was a result of Quebec jurists finally (circa. 1910-20) coming to recognize that the respect with which they treated "foreign" authorities (particularly common-law ones) was not being reciprocated by common lawyers, and that on account of this un-civil behaviour, inter-relations between the two "systems" were terminated.[63] Another was the new fashion for the "argumente du texte," or "linguistic method" of codal interpretation, which sprang up in the 1910s and '20s. This style of reasoning was completely at odds with traditional canons of text construction, but it did have two advantages: the Privy Council could understand you, and it provided quick answers.[64] The third is that there was an implosion of French Canadian nationalism in the 1920s and 30s, and the heightened consciousness of the boundaries of the nation brought on by this implosion provoked a heightened awareness of the boundaries of the *Code*.[65]

Here, I would like to advance two more. The first concerns the style in which the *Code* is reproduced nowadays and the second what has been called the "magisterial teaching style" of the civil law professor. Actually, it is somewhat artificial to discuss the style of the *Code* and the magisterial teaching style separately, since they are one and the same. In any event, my point is that there is nothing in them which in any way contradicts Castel's remarks.

Consider *The Civil Codes: A Critical Edition*, the work of Paul-André Crépeau. What is meant by the word "critical" in this title is that this edition was prepared

> in full respect for the legislative texts 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.[66]

There are other senses to the word "critical," but let us simply say they are not germane.

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[63]See Polyjurality, *supra*, note 20.

[64]See Dialogical, *supra*, note 58. That is, no longer was it necessary to reflect on what was just; law, henceforth, was whatever the legislator said it was.

[65]See Domestication, *supra*, note 60.

[66]P.-A. Crépeau, *The Civil Codes: A Critical Edition* (Montréal: Chambre des Notaires, 1985) at xiii. It is instructive to compare Crépeau's attitude towards legislative texts with Beaudry's. Beaudry experienced a certain amount of textual anxiety at the thought that he might "dénaturer le sens de la loi," but this did not prevent him from tampering with it. In Crépeau's case, the impulse to improve upon a legislative text is completely repressed. See further Lowe, *supra*, note 10 at 2-5 on the contrast between chirographic and typographic norms of textual reproduction, particularly what he says about the elimination of corruption.

Comparing the Crépeau edition with those of Sharp and de Bellefeuille, two very significant substitutions (or displacements) emerge. First, in place of a listing of the sources referred to in the *Reports* of the Codification Commission, there is a 108 page ALPHABETICAL INDEX, beginning with *Abandonment* and ending (significantly) with *Writing*. Second, in place of summaries of cases decided since codification, Professor Crépeau has taken great pains to identify every modification to the text of the *Code* made by the legislature from 1866 down to July of last year; each of these is duly noted. Crépeau's *The Civil Codes* is thus a very "positive" contribution to our legal knowledge.

What is the effect on the mind of the student, who is drawn into "thinking about the law" by this text, as I was, of the fact that there are no abstracts of cases? It prepares him (or it did me) for the suggestion that "In the traditional civilian approach, legislation [the *Code*] is considered the one and only authoritative source of law to which all others, including case-law, are subordinated."[67] In other words, the deletion of case reports reinforces the idea that there is a "hierarchy of sources," with the *Code* at the apex. In the nineteenth century, the *Code* was merely one source among others; i.e. its stature was not very "positive."

What is the effect of the ALPHABETICAL INDEX? It, more than anything, creates the illusion of there being a "system" to the civil law, by first corralling the student's mind, and then shuttling it around within the text, occluding any suggestion that there might be a *hors-texte*. One's skill at "cross-referencing codal articles" is obviously enhanced by internalizing this device. But where it comes in most handy is in the context of bar exams which, of course, are now *entirely written*.

How does the Crépeau edition differ from the first editions of the *Code?* As we saw in Part III, the latter encouraged the student to enter into conversation or dialogue, either with the text of the *Code* (e.g. the Beaudry edition) or the authorities on which it was founded (e.g. the Lorimier and Vilbon edition). It was impossible for the *Code* to acquire the appearance of autonomy under these circumstances: the Beaudry edition responded to the student's questions, while the Lorimier and Vilbon edition transported the student to the four corners of the legal universe--Rome, France, England, America. The Crépeau edition, by contrast, does give the impression of being autonomous. It refers only to itself, and thus cuts out conversation.

Law teaching has traditionally, and perhaps always will, involve an oral dimension. But just as the *Code*, in its more recent incarnations, has become something of a "conversation stopper," so too has the teaching style derived from, and ostensibly justified by reference to, it. John Brierley explains:

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[67] J.-L. Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec" in J. Dainow, ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Baton Rouge, La.: Louisiana State University Press, 1974) 1 at 7. Rather than "traditional," let us say post-1920.

> Civil law teachers have been traditionally inclined to adopt an expository and didactic method in which the texts of the *Code*, rather than particular fact situations, are the primary raw materials subjected to analysis. . . . [Such] an *ex cathedra* lecture style, of course, remains above all a performance: it is a show, more than anything else, in which a student audience has little or no participation, or indeed any activity other than the taking of notes . . . [This] formal teaching style was said to be justified by the very form, expresssion and style of the *Civil Code* itself. Taken together, both the *Code* and the manner of its teaching emphasized the logical and coherent character of the law and were seen as a way to inculcate an analytical ability and to expose the humanistic values for which the *Civil Code* itself was seen to stand.[68]

The reader may wish to recur to Part II to refresh his or her memory of the other "traditional" way in which the civil law was taught in Quebec--i.e. Bibaud's way. I leave the reader to draw his or her own conclusions as to which way--the didactic or the dialectic--is most likely to inculcate an analytical/ critical ability, or to promote "humanistic values" in the student.[69]

Is there any justification for the "magisterial teaching style" itself? This is the same as asking whether there is any justification for the "linguistic method" of interpretation as elaborated by Mignault and the Privy Council back in the 1910s and '20s to be found in the *Code*.[70] My answer is that justification is not entirely lacking, but it can only be gained by focussing on its formal superstructure and ignoring its dialogical infrastructure.

What I mean by "dialogical infrastructure" is the fact that the French and English texts of the *Code* were evolved together (neither one is a simple translation of the other), and the *Code* itself recognizes this by constituting them both as equally law (see article 2714). In the event of inconsistency between the French and English versions, the interpreter is referred back to the sources on which they are founded--that is, the authorities (Roman, French, British, American) identified by the Codification Commission in their *Reports*. But even this recourse is not exclusive, since the *Code* did not purport to abrogate the existing law, save in the event of inconsistency or duplication (see article 2712). The *Code* is (or was) therefore a window, not a fortress; and it not only is the record of a bilingual dialogue, but *prescribes the dialogue form*--not "conceptual analysis"--as the means of its own exegesis.

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[68]Brierley, *supra*, note 30 at 22-23.

[69]One thing I must say is that I have always found it far easier to prepare and deliver a lecture than to take the time to craft the sorts of questions that will draw the brighter students out of their passive note-taking role and force them to articulate themselves. You can always count on the talkative ones to fill up class-time with questions, but babble is not the same as dialectic.

[70]See Dialogical, *supra*, note 58 at 74-76. In the account of what is meant by "dialogical infrastructure" that follows, I am drawing very heavily on John Brierley's path-breaking article, "Quebec's Civil Law Codification: Viewed and Reviewed" (1968) 14 McGill L.J. 520, the best guide to the inner meaning, or substance, of the *Code* I know.

I regret how "positive" the preceding discussion of how to approach the *Code* must sound. No text controls its own interpretation, least of all the *Code*.[71] Rather than speak in terms of rules, let me therefore close this part with an example of the "dialogical method" of interpretation in practice--the decision of Judge Robert MacKay in *Doolan* v. *Corporation of Montreal*.

Plaintiff, a carter, brought an action in civil responsibility against the city for the damage caused to his carriage and his reputation, following his unlawful arrest and illegal assault by two of the corporation's policemen. Article 365 is very clear about cases of this nature: corporations "cannot sue or be sued for assaults, battery, or other violence to the person." MacKay noted that an identical rule, coined in fact by Blackstone, formed part of the English common law, and went on:

> Many of the old technical rules affecting corporations are being condemned and discarded," said Chancellor Kent. . . . He asked, why? and he answered, because inconvenient and impolitic, leading sometimes to mischief and injustice. Blackstone, and art. 365 of our code merely give definitions. As in England, actions may be brought against corporations for assaults by their servants, notwithstanding Blackstone and the common law doctrine, so the same may be instituted here, notwithstanding the Code. Surely, under the generality of our Code corporations are not free to assault by deputation, and to trespass at pleasure![72]

It will be observed that MacKay's decision abounds with "oral effects." He takes up Kent's dialogue and continues it; his style is very conversational, one might even say informal--in short, he goes on speaking while he's writing. This style was intimately bound up with the substance of what he wrote, as emerges from a comparison of his method of interpretation with the modern one.

The modern Quebec legal mind would start with the definition given in the *Code*, and only if it were unclear, go on to consider other texts for the light they could shed *on* the definition in question. MacKay skips the definition and goes straight to the justice of the matter. This is what it means to treat the *Code* as a window, rather than a fortress. Even when a definition is perfectly clear, that does not mean one should not seek out the most enlightened discussion on the matter in question--in this case, Chancellor Kent's. Kent's discussion, which is in fact beyond the *Code*, thus comes to shine *through* the codal definition, completely altering its meaning.[73]

One point I would like to emphasize is that MacKay reveals himself to be perfectly capable of reasoning in the "traditional" (as we moderns say) civilian mode on other occasions. My explanation for this is that he, like his con-

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[71] See Walton, *supra*, note 56 for some indication of how the practice of interpretation exceeded what the *Code* laid down.

[72] *Doolan* v. *Corporation of Montreal* (1868) 13 L. C. Jurist 71 at 73.

[73] See the discussion of "light through" versus "light on" in McLuhan, *supra*, note 41 at 105 et s.

temporaries, felt it appropriate to reason this way when the civil law was in agreement with what Bibaud called "les principes du droit en général." In such cases, their dialogism is submerged. Today it has (practically) disappeared.

Part V

The major theme of most "histories" of legal education in America (including Quebec) is "the slow progression of advancing standards."[74] The major theme or meta-narrative of the present essay has been decline (rather than progress).[75] In this concluding section I would like, however, to break with the linearity of the preceding discussion and explore certain respects in which the history of legal education in Quebec may also be described as a cycle. We shall be concerned with four major "developments" all of which date from the mid- to late-1960s: a change in teaching style, the invention of Bar School, the establishment of a "National Programme" at McGill, and the "de-standardization" of the curriculum. These innovations are widely regarded as "advances" or "improvements." I too regard these developments as for the better. But they are not better because they are novel. They are better because they re-introduce the way things were back in the 1860s. Indeed, with the exception of the National Programme, all of these improvements stand in need of further improvement, for they have yet to measure up to the standard set by Bibaud, or so I shall argue.

The magisterial teaching style was in full flourish when the full-time university degree in law became a universal requirement for entry to the profession in the late 1940s. But according to John Brierley, it has been in retreat since the mid-1960s: "Conscious efforts have been made in all faculties and in all subjects over the last twenty years or so to develop a wide variety of teaching materials [i.e. other documents than the *Code*], to adopt *les méthodes actives* [i.e. seminars] and to orient exams and other exercises (*les travaux pratiques*) towards concrete problem solving and policy issues."[76] This is all very well and does seem to represent a significant restoration of Bibaud's way of teaching (law school as debating society). But it cannot be too heavily emphasized that promoting the acquisition of "problem-solving" techniques in relation to particular fact situations is no substitute for obliging students, as Bibaud did, to develop an articulate position on an intractable moral-legal issue, such as usury (or as we moderns say, "the regulation of interest rates"). Indeed, what the modern law school tends to pro-

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[74]A.S Konefsky and J.H. Schlegel, "Mirror, Mirror on the Wall: Histories of American Law Schools" (1982) 95 Harv. L. Rev. 833 at 845. Representative histories of Quebec law schools include S. Frost and D.L. Johnson, "Law at McGill: Past, Present and Future" (1981) 27 McGill L.J. 1; L. Thisdale, "Le centenaire de la Faculté de Droit de l'Université de Montréal" (1980) 6 Dal. L.J. 374; Y. Pratte, "The Faculty of Law at Laval University" (1965) 16 U. of T. L.J. 175. Exceptions (i.e. exceptional histories) include Brierley, *supra*, note 30, and MacDonald, *supra*, note 6. It bears underlining that MacDonald sees a number of cycles where I only see one. Nevertheless, I think he would agree that the cycles he describes are contained within this larger one (1866-1966).

[75]This theme has also been sounded by others. See G.B. Baker, "The Juvenile Advocate Society, 1821-1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class" *Historical Papers 1985*, Canadian Historical Association 74; and for other departments of North American education: G. Grant, *Technology and Justice* (Toronto: Anansi, 1986); A. Bloom, *The Closing of the American Mind* (New York: Simon & Schuster, 1987).

[76]Brierley, *supra*, note 30 at 23. While in retreat, it remains very much in evidence.

duce is theoretical practitioners (i.e. students who know the answer to the question: What would a theoretical practitioner do in *x* situation?), but as for practising theoreticians (Bibaud's model graduate), this remains a problem.

A theoretical practitioner is about as suited to the practice of law as he or she is to thinking about law--namely, little, if at all. This is why a period of "practical" or "professional training," as distinct from "academic training," has had to be instituted. The Bar assumed responsibility for teaching legal novices what lawyers really do following the revolt of Quebec law teachers in 1964. The latter, "collectively in their newly formed association (APDQ), called for a new vision in legal education and an enfranchisement of the university programmes from professional control"; the Bar, graciously, concurred, contenting itself with "accrediting degree programmes rather than prescribing their detailed contents" (as previously), and setting up its own School, or "fourth year programme," in 1968.[77]

The invention of Bar School is a singularly interesting phenomenon. As will be recalled, nineteenth century legal education was characterized by a union of practice (apprenticeship) and theory (university training): the two went on concurrently. For us moderns, the gap between the two is so great that we have had to create a whole new institution (Bar School) in an attempt to re-unite them. The irony in this is that, at least at first, the Bar Course did not differ markedly from what was meted out at university, the reason for this being that "a disparity in the requirements and expectations of the different faculties . . . [newly but already] well launched in establishing optional courses, forced the Bar (so it argued) to teach in 'fundamental' subjects and to provide a theoretical framework (*rappel théorique*) for its practical component."[78] Thus, the Bar merely perpetuated the formation of theoretical practitioners, its supposedly "'practical' but in fact highly *livresque* programme" being inimical to actual "skills training."[79] This situation is finally being corrected. Role-playing, simulated models, and perhaps most exciting, "Bar videos," are now an integral part of the professional training programme. The videos are the things to watch since, as we have seen, transformations in the means and relations of legal communication can have a significant impact on law's content.

Perhaps the most significant development in legal education in Quebec in the last twenty years is the establishment of a National Programme at McGill. This programme, which also dates from 1968, presents "an integrated curriculum in civil law and common law studies."[80] While the idea of such a bi-systemic curriculum is normally traced to certain Englishmen--R.W. Lee and H.A. Smith (both former Deans at McGill),[81] it could equally well be attributed to Bibaud. In-

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[77] *Ibid.* at 16. It will be appreciated how this stance represented a reversal of the position taken by the Bar in 1866, the position which resulted in the closure of the Ecole de Droit. See *supra*, note 44.

[78] *Ibid.* at 37.

[79] *Ibid.* at 40.

[80] J.E.C. Brierley, "Developments in Legal Education at McGill" (1982) 7 Dal. L.J. 364 at 364.

[81] See Frost and Johnson, *supra*, note 74.

deed, it would be easy to mistake the following description of the *Foundations of Canadian Law* course, which is the centrepiece of the National Programme, for a description of Bibaud's Course at the Ecole de Droit:

> all students are exposed to the historical, institutional and philosophical underpinnings, and the methodological techniques, of both the civil law and common law systems, as transplanted from their European origins to their Canadian context. This course, the fundamental vehicle for sensitizing students immediately to the dual origins of Canadian law, is recognized to be among the most challenging in the curriculum to teach.[82]

McGill students are thus significantly more in the picture of Quebec law now than they were in Bibaud's day, or at least they ought to be, and probably would be, had not that picture changed (i.e. been cut in half).

It is ironic that McGill's National Programme is seen by most as an anomaly when what it is in fact is an anachronism. This misperception is at once a further index of the closing of the Quebec legal mind and a sign of what has been called the "advancing presentism" of the Canadian legal profession generally.[83] It remains to be seen whether the McGill project will succeed in enlarging the truncated picture we now have of "the civil law of Quebec." In any event, the point to be stressed is that by virtue of the very anachronicity of its project, McGill figures as the ideal locus for the resumption of the bilingual dialogue which informed the *Civil Code*, and so for the elaboration of a distinctly Canadian *jurisprudence*.

The word *jurisprudence* sounds in both English and French, both common and civil law. As I have suggested elsewhere, it is the exploration and elaboration of connections of this nature that judges (and law professors) ought to be concentrating on since that is "what we are fitted for" as Canadians, in the words of the late George Grant.[84] Of course, if such a change is to come, if we are to recover our lost legal heritage, it will have to stem from the top of the judicial hierarchy (i.e. the Supreme Court of Canada), since it was from the top (the Privy Council, to be precise) that the idea of ignoring the wisdom of the "other" legal system was first introduced into the practice of Canadian law.[85]

In this regard, it is heartening to consider La Forest J.A.'s (as he then was) discussion of *Lauréat Giguère Inc v. Cie Immobilière Viger*,[86] in the New Brunswick case of *White, Fluhman and Eddy v. Central Trust Co.*[87] After setting forth Beetz J.'s enunciation of the conditions precedent for an action in unjust enrichment

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[82]Brierly, *supra*, note 80 at 367.

[83]See G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law and Hist. Rev. 219.

[84]See G. Grant, *Lament for a Nation* (Toronto: McClelland and Stewart, 1965); Howes, *supra* note 58 at 85.

[85]See *supra*, note 64.

[86][1977] 2 S.C.R. 67.

[87](1984) 54 N.B.R. (2d) 293. I am indebted to Dean Karl Dore for this reference.

(*l'enrichissement sans cause*) in *Viger*, La Forest J.A. went on: "This, as I mentioned, was a civil law case but a universal principle such as we are dealing with here affords an excellent opportunity for cross-fertilization between Canada's two legal systems."[88] La Forest J.A.'s decision exemplifies dialogical *jurisprudence* at its best. It is also exemplary of the sorts of links law professors could (and should) be forging, were they not so dazzled by the trendiness of going "interdisciplinary" or, at the opposite extreme, *positivisme étatique*.

The final development to be discussed here is the one just alluded to--namely, the "'de-standardization' of university legal education through the implementation, in all faculties, of varying ranges of optional courses" in *doit public* and *droit social*, "as well as in inter-disciplinary studies (sociology of law, law and economics, legal history)."[89] All of these courses represent incursions on the terrain once occupied by the civil law. That is, while the "geography of the Code," to use Brierley's apt phrase, used to define the scope and substance of law school courses ("Successions," "Property," "Security on Immoveables," etc.), its divisions no longer exercise the same controlling power.

With regard to the offerings in *droit public* and *social*, I can only say, with Brierley,

> the Civil law is itself on the point of a major renewal and will soon acknowledge aspects of distributive justice within traditional private law relationships (family, property, contract). In the light of these imminent developments, the real challenge in future curriculum planning is *to avoid the creation of a multitude of little parcellings of courses in the face of the vast statutory law now in place*. The real need is to promote that kind of synthesis in these new subjects for which the systematized method of the *Civil Code* itself still provides a model.[90]

With regard to the offerings in "sociology of law" and (that abomination) "law and economics," I think the same point should be made.[91] What these courses do is 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, non-technical (albeit vestigial) powers of self-critique.[92] Rather 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.[93]

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[88] *Ibid.* at 307-8. See further Polyjurality, *supra*, note 20 at 527, note 14.

[89] Brierley, *supra*, note 30 at 25 and 29.

[90] *Ibid.* at 29 (emphasis mine). See further *supra*, note 31 and accompanying text.

[91] See D. Howes, "Property, God and Nature in the Thought of Sir John Beverley Robison" (1985) 30 McGill L.J. 365 at 399-400.

[92] See E. Weinrib, "Towards a Moral Theory of Negligence Law"

[93] I attempted as much in "Popular Song as Consitutional Discourse: An Essay on 'We Are The World' and Its Counterparts" (1990) 3(3) International Journal of , Politics, Culture and Society (Forthcoming).

Bibaud well understood how politics and economics were contained in and by law. This was because his episteme was informed by history, and because the Roman law provided him with an archimedean point from which to survey and criticize the vicissitudes of legislation. But the study of Roman law has disappeared from the law school curriculum. What is worse, legal history, which used to be *the* legal methodology (if not the essence of law itself), is now at best an optional course.[94] Plainly, we moderns have got our priorities backwards. It is only by reversing them--that is, by restoring History and Roman Law to their rightful place at the centre of the law school curriculum--that the demise of legal education in Quebec can itself be turned around.

However, even this reform--making Legal History and Roman Law core courses again--is unlikely to have much effect as long as it remains the case that at university as at the bar *la plume travaile et non l'intelligence*, for examination purposes. Of course, the solution to this pedagogical conundrum is as simple as it is obvious: law exams should go back to being entirely oral.

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[94]See J. Beauchamp, "De l'étude et de la pratique du droit" (1895) 1 Rev. Lég. 8 at 8-12 on this point. Because of what Brierley *supra*, note 30 at 31 calls the "precocious professional orientation" of most law students, Legal History is often cancelled for want of warm bodies. It thus seems that Quebec's law teachers got themselves out from under the control of the professional corporation only to deliver themselves into the hands of their students. It is the latter who "by consistently opting for courses that relate to [their] preconceived ideas about the nature and practice of law" now dictate the curriculum.