

Understanding Civil Law Scholarship in Quebec

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Citation Information

Macdonald, Roderick A.. "Understanding Civil Law Scholarship in Quebec." *Osgoode Hall Law Journal* 23.4 (1985) : 573-608.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol23/iss4/2>

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Abstract

Scholarship in law (*la doctrine*) plays a more important role in the civil law tradition than in the common law tradition given the existence of a code, the formal style of judgment writing and the pervasiveness of the view of law as legal science. Since the late eighteenth century, civil law scholarship in Quebec has gone through at least six phases, but only now does it seem to be emerging from the inward-looking didactic posture it has maintained since the turn of the twentieth century. Today, the prognosis for fundamental research in Quebec is excellent as a new generation of scholars trained in the humanities and social sciences shows renewed interest in private civil law subjects.

UNDERSTANDING CIVIL LAW SCHOLARSHIP IN QUEBEC

BY RODERICK A. MACDONALD*

Scholarship in law (la doctrine) plays a more important role in the civil law tradition than in the common law tradition given the existence of a code, the formal style of judgment writing and the pervasiveness of the view of law as legal science. Since the late eighteenth century, civil law scholarship in Quebec has gone through at least six phases, but only now does it seem to be emerging from the inward-looking didactic posture it has maintained since the turn of the twentieth century. Today, the prognosis for fundamental research in Quebec is excellent as a new generation of scholars trained in the humanities and social sciences shows renewed interest in private civil law subjects.

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I. INTRODUCTION

It is a measure of the Canadian condition that a symposium devoted to "Canadian Legal Scholarship: Its Past and Prospect" should consist

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* Dean, Faculty of Law, McGill University. I would like to thank my colleagues, Professors J.E.C. Brierley and G.B. Baker for their bibliographical insights, as well as their helpful comments on an earlier version of this essay. Research assistance for this essay was funded by the Meredith Research Fund of the Faculty of Law, McGill University. I have attempted to draft this essay in classical civil law style and would like to thank the editors of the Journal for indulging most of my efforts to achieve a coherence of form and substance.

of thirteen papers covering everything from international law to feminist law, but should have only one study devoted to 'the civil law'. Just as authors of treatises on such subjects as debtor-creditor law, trusts or mechanics liens feel justified in adding the phrase "in Canada" to the title of their works merely because they discuss in a brief final chapter 'execution of judgments in Quebec', 'the trust in Quebec' or 'construction privileges in Quebec', so too it would seem that this Symposium qualifies, by virtue of the present essay, as a 'Canadian' endeavour.

The purpose in raising this issue is not again to decry the continuing ignorance of civil law and French-language scholarship displayed in Canada's common law jurisdictions.¹ Rather, it is to illustrate the difficulties with delimiting the mandate of a Quebec civilian at this conference. Unlike most other symposium topics (which can be more or less defined *per genus et differentiam* within the conceptual structure of the law itself), the topic of this essay does not easily lend itself to discrete treatment, and in fact has the potential to overlap with most other topics. For example, my co-symposiasts justifiably might consider that I would cover all scholarship either originating in Quebec, or written in the French language, or dealing with matters proper to the *Civil Code of Lower Canada*.

Hence, those panelists addressing property, torts, contracts and family law might well feel, in principle, dispensed from considering non-common-law scholarship. But, if such a view is taken, who will be examining Quebec (and French-language) scholarship as it relates to federal aspects of family law, contract and consumer law, property and environmental law, and so on? And who will review this same scholarship in the areas of criminal law, corporation law, constitutional law or taxation law? Such are only a few of the problems of a bilingual and legally bicultural country.

Rather than leave it to others to determine the scope of this study, I have selected three criteria for defining the topic. These, no doubt, would be adopted by other Quebec civilians in similar circumstances. First, a systemic criterion has been applied. The proposition that every legal system has its proper genius and internal logic presumably is

¹ This state of affairs has been well documented in the Arthurs Report. See Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, *Law and Learning* (Chair: H.W. Arthurs) (1983) at 138, 155. See also J. Deschênes, "On Legal Separatism in Canada" (1978) 12 L.S.U.C. Gazette 1. I do not wish to find fault with the organizers of the symposium, who expended substantial energy (without great success) attempting to induce civilian and francophone professors to participate.

uncontroversial. Just as the distinction between law and equity played a significant role in pre-fusion, Anglo-Canadian legal systems, so too the distinction between public law and private law is one of the fundamental organizing tools of the modern civil law tradition.² While this distinction has little bearing (and perhaps even less meaning) in common law jurisdictions, it continues to have a significant effect on conceptions of legal scholarship in Quebec. All academic commentary not relating to private law matters (*i.e.*, on criminal law, administrative law, constitutional law, municipal law, *etc.*) has, therefore, been excluded from this survey.³

The second criterion flows from Canada's constitutionally divided legislative jurisdictions. The existence of federal statutory law, frequently grounded in common law assumptions and drafted in the manner of a common law statute, also has led many Quebec professors who teach the private law subjects to view these federal enactments as foreign to their research endeavours. The *Interest Act* is not thought to form an essential part of the law of civil obligations (contract, quasi-contract, delict); the *Bank Act* is seen as a mere appendix to the law of privileges and hypothecs (secured transactions); and the *Bankruptcy Act* is rarely analysed as part of the procedural law relating to the execution of judgments (debtor-creditor relations). Even the *Divorce Act* sometimes rates little more than a cameo appearance in civil law treatises and monographs on matrimonial property law. In consequence, the orthodox perspective that federal law is not really a part of the basic private law of Quebec has been adopted.⁴

The third criterion flows from perceptions about the nature of a Civil Code. Most private law scholars in Quebec view all non-codal legislation as a derogation from the '*droit commun*' which is (and ought to be) contained solely in the Civil Code. Even such provincial statutes such as the *Adoption Act*, the *Special Corporate Powers Act* and the *Consumer Protection Act* sometimes are not seen as *bona fide* objects

² For a brief review see J.H. Merryman, "The Public Law — Private Law Distinction in European and American Law" (1968) 17 J. Public Law 3, and R. Savatier, *Du droit civil au droit public*, 2e éd. (1950). Compare C. Harlow, "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 Mod. L. Rev. 241

³ Let me emphasize that the public/private distinction is, even in civil law countries, largely conventional. For example, in France the criminal law is seen as a subset of private law, whereas in Quebec, to my knowledge, no scholar views criminal law as a private law subject.

⁴ For a particularly forceful critique of this, and related, positions, see J.-G. Belley, "La théorie générale des contrats. Pour sortir du dogmatisme" (1985) 26 C. de D. 1045.

of private law research.⁵ Thus, a voluminous scholarship relating to Quebec private law statutory enactments has also been left aside.

This paper embraces these basic conceptual distinctions made by mainstream Quebec private lawyers, with the result that its scope is limited to the private civil law *per se* as reflected in the Civil Code.⁶ In classical civilian fashion, this study is divided into two main sections: the theory of civil law scholarship in Quebec and, the practice of civil law scholarship in Quebec.⁷ The former section considers how civil law scholars themselves view their research endeavours, and the latter reviews the product of civil law research since 1775, concluding with a prognosis for private law scholarship in Quebec over the next twenty years.

Before these topics are examined in greater detail, three points bear emphasis. First, continental civil law writers are currently debating the role of scholarship (*la doctrine*) in their legal systems. Yet, the local impact of this debate is difficult to measure, for there is no easy transposition of continental perspectives into Quebec. Here, scholars tend to adhere to a more stylized view of academic writing which reflects the particular preoccupations of civil law North America.

Second, I may not be the most apt spokesman for the private civil law scholarly community. A preoccupation with maintaining the integrity of their tradition leads some Quebec professors to consider me not to be a true civilian. Not only do I have a common law training as well as a civil law training, but I also have taught and continue to be interested in public law subjects.

Third, in Quebec there tends to be a greater divergence in scholarly traditions among various branches of the law than is found elsewhere. The observations which follow should not, therefore, be taken as representative of all French-language or Quebec-based legal research. They concern only private civil law scholarship as defined in this introduction, whether written in French or in English.

⁵ For a plea to put this 'extraneous' material back into the Civil Code, where it can then be properly studied and researched as a field of 'private law', see P.-A. Crépeau, "Civil Code Revision in Quebec" (1974) 34 La. L. Rev. 921. Surprisingly, a similar viewpoint is often expressed by common law scholars. See G. Calabresi, *A Common Law For the Age of Statutes* (1982).

⁶ The survey also covers general studies of the Civil Code, the codification movement and the judicial process.

⁷ This is not meant to be a critical allusion. Common law scholars often forget the extent to which intellectual form shapes substance. Civil law scholars in Quebec invariably attempt to write on the French two-Part 'Plan' model. For an elaboration of the features (and claimed virtues) of this mode of writing see H. Mazeaud, *Nouveau Guide des Exercices pratiques* (1961) at 78 *et seq.*

II. THE THEORY OF CIVIL LAW SCHOLARSHIP IN QUEBEC

Every legal tradition has a particular view of the role of scholarly commentary as a source of legal justification. When examined from inside the system, legal scholarship is seen to perform different functions in the civil law than in the common law. In other words, apart from law-related writing originating in disciplines other than law (philosophy, history, economics, political theory, sociology, anthropology), all legal scholarship will be shaped by systemic presuppositions. As a result, any evaluation of civil law scholarship must be preceded by a few general observations about the civil law tradition.⁸

In continental civil law jurisdictions, as well as in Quebec, most theorists regard classical legal scholarship (*la doctrine*) as a 'secondary source of law'. Even though academic commentary no longer has the exalted position of the *jus respondendi* of Roman law, in contemporary civil law theory it nevertheless has a status about equal to that of precedent (*la jurisprudence*).⁹ Scholarly opinion is not simply writing *about* law; it is, in some measure, thought to be *constitutive of* law. In this section an attempt is made to discover why this should be the case, and to assess what influence this enhanced role of *la doctrine* has had upon the legal private law scholarship to be found in civilian jurisdictions.

There are three features of the Quebec civil law tradition which contribute to the special role which legal scholarship plays, and to the form which most scholarly writing takes. These features are the existence of a Civil Code, the style of judgments and the theory of law embraced by most private law scholars. Each requires brief elaboration before a general theory of civil law scholarship may be deduced.

⁸ See J.H. Merryman, *The Civil Law Tradition*, 2d ed. (1985); A. Watson, *The Making of the Civil Law* (1981); and K.W. Ryan, *An Introduction to the Civil Law* (1962).

⁹ At least on the traditional view. See J. Carbonnier, *Droit civil*, 9e éd. (1972) t. 1 à la p. 136; H. Mazeaud, *Leçons de droit civil*, 4e éd (1967) t. 2, no. 99 à la p. 123; A. Weill & F. Terré, *Droit civil: Introduction générale*, 4e éd. (1979) no. 229 à la p. 245; R. David & J.E.C. Brierley, *Major Legal Systems in the World Today*, 2d ed. (1978) at 94-141; Y. Loussouarn, "The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law" (1958) 18 La. L. Rev. 235.

However, certain modern authors deny any such role to *la doctrine*, relegating it to a position of influence only. See J. Ghestin & G. Goubeaux, *Traité de droit civil: Introduction générale* 2e éd. (1982) t. 1, no. 227 à la p. 187-9.

For the position in Quebec see L. Baudouin, *Les aspects généraux du droit privé dans la province de Québec* (1967) à la p. 89-98; D. Turp & J. Leavy, *Sources et méthodologie du droit québécois et canadien* (1981) à la p. 483-6; P. Azard, "Le problème des sources du droit civil dans la province de Québec" (1966) 44 R. du B. Can. 417 à la p. 430; A. Popovici, "Dans quelle mesure la jurisprudence et la doctrine sont-elles source de droit au Québec?" (1973) 8 R.J.T. 189; P.-G. Jobin, "Les réactions de la doctrine à la création du droit civil québécois par les juges: les débuts d'une affaire de famille" (1980) 21 C. de D. 257; R.A. Macdonald, "La doctrine: source de droit administratif québécois?" (1984) 29 McGill L.J. 340.

Again, certain Quebec authors contest this enhanced role of *la doctrine*. See P. Azard & A.F. Bisson, *Droit civil québécois* (1971) t. 1, no. 27 à la p. 37.

A. La loi: *The Impact of Codification*

Perhaps the best way of illustrating the problem of civil law scholarship in general, without having to review the 'to codify or not to codify' debate¹⁰ is to ask common lawyers for an assessment of the status of academic commentary in their own legal culture.¹¹ In particular, one might inquire how much analytical scholarship in the common law is required merely to reconcile various judges' rulings on disputes presented to them.¹²

For a civilian at least, much scholarly effort in common law jurisdictions seems to have been devoted, over the past century, to little more than writing integrated *précis* upon judicial decisions. The object of this scholarship has been to reduce a number of lengthy appellate court judgments to relatively canonical formulae. Of course, these formulae are not alleged to be immutable statements of legal normativity. Courts change their minds and so do legal scholars. Moreover, these formulae may be drafted at different levels of abstraction. The more abstract the formulation of a legal rule, the more permanent it is likely to be. The more permanent the rule, the more canonical it will be. However, even at its best, analytical writing in the common law tradition is unselfconsciously descriptive, in that it is focused on explaining or rationalizing judicial speculations ahistorically. Both the exemplification of, and justification for, the formulae so derived are most often found in the judgments themselves.

By contrast, the derivation and elaboration of canonical formulae is rarely the object of civil law scholarship. Instead, academic commentary focuses on arguing for the appropriateness of codal texts (justification) and, to a lesser degree, on fleshing out their implications in particular cases (exemplification). For this reason civil law analytical scholarship tends to be more systematic, rationalistic and prescriptive.

¹⁰ This, after all, is a false debate since there are both uncoded civil law jurisdictions — Scotland, South Africa, Sri Lanka — and coded common law jurisdictions — California, Montana, Israel. Besides, the issue is not the substance of private law but rather its form and presentation. See most recently, Watson, *supra*, note 8; C.M. Cook, *The American Codification Movement* (1981); G. Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (1981); and R.W. Gordon, Book Review (1983) 36 Vand. L.R. 431. For ease of expression in this essay, however, I will use the term common law to mean uncoded private law, and the term civil law to mean coded private law.

¹¹ For thorough, and sympathetic studies see G.W. Paton & D.P. Derham, *Jurisprudence*, 4th ed. (1972) at 203-69; Patterson, *Jurisprudence: Men and Ideas of the Law* (1953) at 217-23.

¹² See, for attempts to deal with this question, A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 U. Chi. L.R. 632; D. Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1946" in *Research in Law and Sociology*, vol. 3 (1980), at 3 (3 volumes); A.W.B. Simpson, "The Legal Treatise and Legal Theory" in E.W. Ives & A.H. Manchester, eds., *Law, Litigants and the Legal Profession* (1983).

One might oversimplify the point for emphasis by contrasting the epistemological basis of the common law with that of the civil law in the following manner. In systems of uncodified private law, judgments primarily provide decisions and reasons, but not norms; in systems where private law is codified the code establishes norms but, in principle, does not decide cases or give justifications. Because the code purports to announce legal norms, it has a much greater capacity to structure scholarly discourse and to set the agenda for all types of legal research, especially where commentators subscribe to a version of legal positivism. Moreover, the very existence of a code of private law promulgated by a national government (in other words, the identification of even private law with state activity) is an inducement to legal positivism.¹³

These last points can be best illustrated through an example of how codal interpretation has proceeded. Article 2022 C.C. provides: "Moveables are not susceptible of hypothecation; except as provided in the titles *Of Merchant Shipping* and *Bottomry and Respondentia*." Leaving aside the exclusion established by the second clause, the text means much more to a civil law scholar than a mere prohibition of hypothecs over moveables. In the past, it has meant no less than that, as a general rule, a creditor cannot take any type of non-possessory security in moveables.

Why should this be the case? Primarily, because the article immediately leads back to other codal texts, which seem to preclude such security devices. The most important of these other texts are articles 2092 C.C. and 2268(1) C.C., which, by implication, provide that possession amounts to ownership in the law of moveable property; articles 1980-1982 C.C., which stipulate that privileges and hypothecs are the only preferences obtainable upon a debtor's property; article 1994 C.C., which stipulates that a pledge (pawn) is the only consensual privilege which can be taken over moveables; and article 1966 C.C., which requires debtor dispossession for a valid pawn.¹⁴

¹³ See Ghestin & Goubeaux, *supra*, note 9 at 1-116, and esp. at 24-8. See also J.H. Merryman, *supra*, note 8, chapters IV, X, XIX and XX, as well as *infra*, section II, C.

¹⁴ Of course, each of these other articles demands a similar exercise in correlation. Codal articles speak to each other in the manner of common law judgments, not in the manner of ordinary statutes. See J. Vining, *Authoritative and the Authoritarian* (1986) for an elaboration of this point.

An excellent example of the research agenda implied by this feature of codes is the recent volume published by the Quebec Centre of Private and Comparative Law entitled *The Key Words in Context (KWIC) of the Civil Code of Lower Canada (At 1 April 1984)* (1985). This monograph is a comprehensive compilation of each usage of terms — ranging from the legal (e.g. revendication) to the secular (e.g. made) — in every article of the Civil Code. While few common lawyers would claim that the usage of the word "employment" in an *Employment Standard Act* necessarily shapes its meaning in the *Family Law Reform Act*, no civil lawyer would deny that the usage of that term in the chapter of the Code relating to the "lease of services" bears directly on its meaning in the chapter of the Code relating to "support obligations".

A second reason why article 2022 C.C. for so long was understood as a prohibition on non-possessory security devices in moveables is because a code gives the illusion of completeness.¹⁵ Since no codal article explicitly alludes to modern security mechanisms and techniques, commentators have held that such security devices do not and cannot exist.

Recently, however, some scholars have argued that article 2022 C.C. permits conditional sales, leases and other debtor-in-possession title-security. They assert that since the Code speaks only of preferences on a debtor's *own* property, the creditor surely can use title itself as a security device. While the jurisdiction for such a modified view might well have been grounded in economics, social theory or philosophy, it is in fact found by scholars in analogies to the right of redemption set out in articles 1545 *et seq.* C.C., and in the resurrection of the Roman law concept of *fiducia*, as a third form of security, to be deployed along with *pignus* (pledge) and *hypotheca* (hypothec). The rediscovery of *fiducia* legitimates a re-interpretation of the codal articles noted earlier and supports recourse to the right of redemption analogy.¹⁶

One sees from this example that, even though the Code sets out no justification for its norms, it ordains the mode of intelligible analysis. The Code tells scholars the language they are entitled to speak, even if within that language a variety of arguments is possible. Too often a code is permitted to assume its own legitimacy and ahistoricity. Of course, a codal structure does not necessarily mean that legal scholarship must be restricted to the reporting of, and exegesis upon, its texts, but to the extent it demands primary intellectual allegiance to its own puzzles, codified law can be viewed as an intellectual 'why-stopper'.¹⁷

In the exercise of cross-referencing legal norms it is apparent how codes shape academic writing, and how academic writing shapes legal meaning. Legal scholarship controls the justificatory structure of canonical

¹⁵ Shortly after Napoleon's codification, which was intended to suppress pre-revolutionary law, an eminent French jurist was reported to have said: "I know nothing of the civil law; I know only the Code Napoléon." Today such a view is less popular as jurists begin to acknowledge a law behind a Code. See R. David, *French Law* (1972), c.5. See also R.A. Macdonald, "Pour la reconnaissance d'une normativité juridique implicite et inferentielle" (1986) 18 *Sociologie et sociétés* 47.

¹⁶ For a detailed discussion of this evolution see R.A. Macdonald, "Privileges and Other Preferences Upon Moveable Property in Quebec: Their Impact Upon the Rights and Recourses of Execution Creditors" in M.A. Springman & E. Gertner, eds., *Debtor-Creditor Law: Practice and Doctrine* (1985), c. VII.

¹⁷ See S. Herman, "From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture" [1984] U. Ill. L. Rev. 597. The same point, for slightly different reasons, can be made about common law scholarship. The German jurist Rudolph Sohm once said: "A rule of law may be worked out either by developing the consequence that it involves, or by developing the wider principles that it presupposes." Codified law can become a 'why-stopper' in the latter sense; uncodified law a 'why-stopper' in the former sense.

texts, and stipulates the extensions to which they may be taken.¹⁸ When legal commentators exalt the canons of a code as exclusive, and do not pursue legal justification beyond those texts (to history, economics, philosophy or anthropology), their scholarship overemphasizes the exemplificatory role of civil law conceptual analysis and gives short shrift to its justificatory role. The paradox is that a legal culture of codification requires (and authorizes) fundamental conceptual analysis, while at the same time facilitating the production of inadequate legal scholarship.

B. La jurisprudence: *The Style of Judgments*

Closely related to observations about the influence of codification on scholarship is the question of how the style of judicial opinion writing shapes academic endeavours. In other words, to what extent does the form of judicial justification, independent of its subject-matter, call forth identifiable scholarly responses? No doubt, judgments laced with economic jargon will typically produce commentary from economists and jurists with a predisposition to economic analysis, just as decisions with extensive citations to philosophical works will often stimulate philosophers and philosophically minded legal scholars. For similar reasons, judgments argued solely in terms of analytical rhetoric will encourage and legitimate conceptual analysis.

Yet, a more important point here goes to the root theory of adjudication in a given legal tradition. The distinctions which Karl Llewellyn drew between the “grand style” and the “formal style” of opinion writing are not quite on point in this context.¹⁹ To an outsider, both characterizations are born of distinctively common law methodologies. Nor are differentiations between the judicial treatment of the common law (*droit commun*) of a jurisdiction and judgments relating to legislative exceptions and special cases particularly *à propos*.²⁰ A relatively uniform system-based methodology is pursued regardless of

¹⁸ For a detailed discussion of this point see Atias, “Le pouvoir des idées en droit civil” in *Connaissance politique* (1983) at 113; “La controverse doctrinale dans le mouvement du droit privé” (1983) 8 R. de la recherche juridique 427.

¹⁹ K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960). Nevertheless, the affinities between continental appellate judgments and those common law decisions Llewellyn would characterize as written in the formal style, should not be neglected.

²⁰ The term “common law (*droit commun*)” here is used to refer to the basic private law of a jurisdiction, whether this finds expression in a series of judicial decisions or in a Code.

whether the area under examination is controlled by common law principles (*principes de droit commun*) or by a statute.²¹

Instead, one must focus upon differences in the process of judicial justification in common law and civil law jurisdictions. In this connection the salient features of common law judicial methodology bear emphasis.²² First, because the common law decision reflects a *post hoc* rationality springing from an actual controversy, it displays, to use Max Weber's expression, a "lower systemic rationality" than a civil law decision; it is, therefore, less capable of being captured by a *single* syllogistic articulation as part of a larger normative system.²³ Second, a common law decision typically contains an amorphous co-mingling of the rule announced and the reasons for the rule; the rule is normally given in two or three different formulations in the same judgment, often at progressive levels of abstraction, and by reference to different criteria of justification.²⁴ Third, the explanation of the rule and the rule reflected in the decision may differ; the import of the judgment, therefore, must always be greater than as a mere exemplification of the principle it applies.²⁵ By contrast, because of theories of a division of jurisdiction between judge and legislator (as reflected in the codification phenomenon itself), and theories of legal science (as reflected in a conception of legal interpretation), the archetypal continental civil law decision evinces none of these attributes.²⁶ An example will illustrate this point. What follows is a recent, randomly selected *arrêt* — notice that the term is not *jugement* (judgment) — from the highest appellate court in France, the *Cour de cassation*.

²¹ Judicial responses to codifying statutes such as the *P.P.S.A.* more than illustrate the point as far as common law systems are concerned. See the detailed discussion in J.S. Ziegel, "Recent and Prospective Developments in the Personal Property Security Law Area" (1985) 10 *Can. Bus. L.J.* 131.

²² For further elaboration see L.L. Fuller, *Anatomy of the Law* (1968) at 84-112.

²³ The recent history of restitution is a classic example of this point. See S. Hedley, "Unjust Enrichment as the Basis of Restitution — An Overworked Concept" (1985) 5 *Leg. Stud.* 56, for a flavour of the characterization and systemization conundrums of the common law.

²⁴ It is this impalpability of common law rules which so delights aggressive practitioners of 'Socratic' teaching, and generates jokes about teachers who find the *ratio* of a case in "the first clause of the third sentence of the second paragraph on page 'x' of the concurring reasons of Justice Y."

²⁵ Hence, the common lawyer's preoccupation with discovering how to determine the *ratio* of a case. For a civilian, a delightful example of this obsession is A.R. Cross, *Precedent in English Law*, 3d ed. (1979).

²⁶ Max Weber constructs a table on two axes to differentiate legal systems. First, they may be either rational or irrational; second, they may be either substantive or formalistic. An irrational/substantive system is that of *cadi* justice. An irrational/formal system is that of *oracles*. A rational/substantive system is a theocracy. And a rational/formal system is that of modern western law, such as the civil law. On this typology common law systems tend to be both less rational and less formal than civil law systems, and by definition verge closer to systems of *cadi* justice. See, for a summary, A.T. Kronman, *Max Weber* (1983), c. 4.

Cie. D'assurance La Concorde et autre v. Kedvès et autres
22 fév. 1985; 2e Ch. civ.

LA COUR: Sur le moyen unique, pris en ses deux branches; — Attendu, selon l'arrêt confirmatif attaqué (Lyon, 22 oct. 1982), que M. Kedvès, circulant à bicyclette dans une agglomération, a été blessé dans sa chute provoquée par l'irruption d'un chien sur la chaussée; qu'il a assigné en réparation de son préjudice en tant que gardien de l'animal, la Soc. Sicaworms et son assureur, la compagnie La Concorde; que la caisse mutuelle régionale du Rhône et le Fonds de garantie automobile sont intervenus à l'instance; — Attendu qu'il est fait grief à l'arrêt d'avoir condamné la Soc. Sicaworms et son assureur à réparer, par l'application de l'art. 1385 c. civ., le dommage subi par M. Kedvès alors, d'une part, que s'agissant d'une personne morale, la garde de l'animal, étranger à son objet social, n'aurait pu s'exercer que par l'intermédiaire d'un préposé désigné ou autorisé à cet effet par son commettant, et que la cour d'appel n'a pas constaté l'existence d'une telle autorisation d'ailleurs déniée par la société, alors, d'autre part, que l'arrêt en déduisant qu'elle aurait toléré le geste de pitié des membres non dénommés de son personnel pour un animal sans utilité pour l'entreprise, n'aurait pas caractérisé ladite garde;

Mais attendu que l'arrêt relève que l'animal se trouvait depuis de nombreux mois à l'intérieur de l'enceinte des établissements Sicaworms où il avait été aperçu à plusieurs reprises à l'attache dans la cour; que de ces constatations la cour d'appel a pu déduire que, quelle que fût l'utilité de l'animal pour l'exercice de ses activités, la Soc. Sicaworms avait sur celui-ci, au moment de l'accident, les pouvoirs de contrôle, de direction et d'usage qui caractérisent la garde; d'où il suit que le moyen n'est pas fondé;

Par ces motifs, rejette.

It is inconceivable that the Supreme Court of Canada would decide a common law case of corporate personality and dog-owners' liability in such a summary fashion.

What does all this have to do with the style of legal writing? Quite simply, if decisions of the *Cour de cassation* are primarily exemplifications of codal texts, then academic commentary (*la doctrine*) must be the repository of analysis and critical evaluation of legal norms. Scholarly writing presumptively is the locus of reformulation, reassessment and justification of legal rules — a task which, in common law jurisdictions, is undertaken in the first instance by judges. Thus, while it is quite appropriate for common lawyers to claim that “our judges are our jurists”,²⁷ such a view completely misconceives the folkloric role of the continental civil law judge. In fact, the original characterization of the *Cour de cassation* as a governmental organ responsible to the legislature and designed to *casser* (quash) incorrect decisions by lower courts, so that legislative control over legal normativity is preserved, reflects the conception of “judicial decision as only exemplification.” The professional division of labour in continental civil law countries between the notary,

²⁷ See J.P. Dawson, *The Oracles of the Law* (1968). This is also said of Quebec judges, for reasons to be detailed in the next paragraph.

the advocate, the law teacher and the judge — a division which is imposed from the moment of law-school graduation — also contributes to a more well-defined division of literary labour as between the authors of *la jurisprudence* and *la doctrine*.

Although the Quebec Civil Code is a fair reflection of the French *Code Napoleon*,²⁸ judicial decisions in Quebec rarely resemble those of continental courts. The federal, bisystemic and bicultural character of the Quebec legal tradition contributes, even when purely private civil law cases are considered, to judgments being rendered in a form more typical of common law decisions.²⁹ Unfortunately, however, given the fixed canons of the Code, the common law judgments which these private law decisions resemble usually are not those of Llewellyn's "grand style", for exactly the reasons Llewellyn highlighted.³⁰ In other words, many private law decisions in Quebec formally look like common law judgments but substantively seem to imitate the continental *arrêt*.³¹

The impact of such a jurisprudence is not difficult to predict: some Quebec private law scholarship shows a great formal affinity to French academic commentary, but substantively resembles common law conceptual analysis.³² This writing, regrettably, reflects the worst of both worlds, since it leaves unexplored the justifications for legal norms, and is content with minor reformulation and restatements of codal rules, complemented by jejune attempts at exemplification.³³

While the style of civil law judgments ought to call forth a more sophisticated analytical tradition than that of the common law, the mixed nature of the Quebec legal system produces, in practice, legal research which frequently does not reach its potential. There are no formal or systemic limits on the types of permissible scholarship in either the continental or the Quebec civil law cultures. Indeed, sophisticated

²⁸ For a summary account of the influence of the Code Napoléon on the Quebec Civil Code see J.-G. Castel, *The Civil Law System of the Province of Québec* (1962).

²⁹ 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 Jurisdiction* (1974) 1, and bibliography cited therein. See also R. Boul, "Aspects des rapports entre le droit civil et la 'common law' dans la jurisprudence de la Cour suprême du Canada" (1975) 53 R. du B. Can. 715.

³⁰ Although phrased in different terminology, a similar conclusion about Quebec judgments is reached in the symposium "L'interprétation du droit écrit par le juge": M. Rivet & M. Ouellette-Lauzon, "L'interprétation par le juge des règles écrites en matière de droit civil" (1978) 13 R.J.T. 7 *et seq.*

³¹ For an illustration, again randomly selected, see *Robert c. Trust Général du Canada* [1984] C.A. 197 (Qué. C.A.).

³² See Jobin, *supra*, note 9.

³³ See *supra*, note 4.

analytical research looking outwards to the wider principles presupposed by individual exemplifications of canonical texts is required by the style of judicial writing in Quebec.

C. La doctrine: *Theories of Law as Legal Science*

All legal scholarship, as all scholarship, is largely determined by the intellectual climate within which its authors work.³⁴ It is, therefore, not surprising that civil law writing tends to be shaped by the three generative ideas of the modern civil law tradition — namely, philosophical rationalism, economic liberalism and legal positivism.³⁵ A pure 'legal science' is seen as an achievable goal more so than in the common law tradition.³⁶ Furthermore, in Quebec, much private law theory (and its practical reflection in legal scholarship) is moulded by two other factors — language and ethnicity. In combination, these conditioning factors are translated into a preoccupation with the survival of the local, vernacular, civilian tradition which has, in turn, dictated a specific scholarly agenda.

Private law scholarship in France is dominated by writers who subscribe to a legal philosophy of '*positivisme étatique*'; law is seen as a closed normative system emanating from the state.³⁷ For reasons probably having to do with language and perceptions about normative antecedents, most private law scholarship in Quebec (although not private law legislative and judicial activity) is responsive to French, as opposed to other continental civil law, intellectual influences. A variety of features of academic writing reflect this influence, notably the *summa divisio* between legal scholarship and scholarship about law.³⁸

No simplistic distinction between the academic writing undertaken by rationalists (formalists) as opposed to that of empiricists (realists) is

³⁴ For the implications of this view, see S.K. Langer, *Philosophy in a New Key*, 3d ed. (1957) at 1-8; C.S.S. Peirce, *Essays in the Philosophy of Science* ed. by V. Tomas (1957) at 236-46; Atias, *Epistemologie juridique* (1985).

³⁵ See Prévault, "Les fondements philosophiques du Code Napoléon" (1975-76) 64 *Studi urbinati* 143; A.-J. Arnaud, *Les origines doctrinales du Code civil français* (1973). For the position in Quebec see T. McCord & G. Nicholls, "Synopsis of the Changes in the Law" in *The Civil Code of Lower Canada* (1867) i-xxx; P.-A. Crépeau, "La renaissance du droit civil canadien", and Caron, "De la physionomie, de l'évolution et de l'avenir du Code civil" in *Livre centenaire du Code civil I* (1970).

³⁶ The most powerful expression of this view can be found in F. Gény, *Science et technique en droit privé positif* (1914-1924) (4 volumes). See also J.H. Merryman, *supra*, note 8, c. X.

³⁷ See P. Roubiere, *Théorie générale du droit* 2e. éd. (1951); H.F. Jolowicz, "Utility and Elegance in Civil Law Studies" (1949) 65 *L.Q. Rev.* 322.

³⁸ For a summary of divergent points of view in continental Europe see Ghestin & Goubeaux, *supra*, note 9 at 72-80. See also A. Hunt, *The Sociological Movement in Law* (1978).

here proposed or relied upon. Rather, the point is that Quebec private law scholarship typically has embodied only a fragment of the civilian tradition. Understandably, this fragment has its wellsprings in the period in which it was thrown off, and being removed geographically and politically from mainstream French legal thought, has retained much of its initial orientation.³⁹ What is more, because for at least eighty years private law scholarship has been primarily undertaken in French, it has been even less influenced by many of the intellectual currents which have swept both Europe (Germany and England in particular) and North America. Since other scholarship, notably in commercial law, public law and criminal law is written in both English and French and reflects these cross-currents, a cleavage has developed between civil law and non-civil law scholarship in Quebec. The authors of the former conceive of themselves as guardians of their civilization through their insistence on a particular theory of law, legal science and legal scholarship.⁴⁰

In practical terms, this custodial mission has generated a strong commitment among Quebec private law scholars to linguistic analysis of codal texts.⁴¹ Despite wide recognition of the mixed nature of Quebec's legal traditions,⁴² a prime value embraced by most French-language commentators upon one of its major components, the private civil law, is systemic integrity or purity.⁴³ It is not just language and cultural factors peculiar to Quebec which lead to a fear of corruption for the theory of legal science itself places a premium on weeding out legal transplants

³⁹ The word of Louis Hartz in, for example, *The Founding of New Societies* (1964) is instructive. For analyses focusing on legal phenomenon, see J.H. Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law" (1981) 17 *Stan. J. Int'l Law* 357; W. Twining & J. Uglow, eds., *Legal Literature in Small Jurisdictions* (1981); T.B. Smith, "Legal Imperialism and Legal Parochialism" (1965) 10 *Jur. Rev. (N.S.)* 39. An excellent overview of the intellectual climate in Quebec is presented in D. Monière, *Ideologies In Québec: The Historical Development*, trans. R. Howard (1981). See, finally, J. Palardy, *The Early Furniture of French Canada*, trans. E. MacLaren (1967), for a specific example of how ideology influences practical activity in 'fragment' cultures.

⁴⁰ For some this insularity of the civil law is a virtue. See, for example, P. Azard, "Le Droit Québécois, pièce maîtresse de la civilisation canadienne-française" (1963) 5:2 *C. de D.* 7. A similar, although less extreme view is argued by P.-A. Crépeau, *supra*, note 35 à la p. xiii.

⁴¹ See M. Tancelin, "Introduction" in M. Tancelin, ed., *Walton's Scope and Interpretation of the Civil Code of Lower Canada* (1981), a reprint of the 1907 work.

⁴² See L. Baudouin, *Le droit civil de la province de Québec: modèle vivant de droit comparé* (1953); "Conflicts nés de la coexistence juridique au Canada" (1956-57) 3 *McGill L.J.* 51; Tancelin, *ibid.*; Mignault, "Les rapports entre le droit civil et la 'common law' au Canada, spécialement dans la province de Québec" (1932) 11 *R. de D.* 201.

⁴³ The periodical literature on this topic is enormous, if trivial. See the sources cited in the footnotes to L. Baudouin *ibid.*, n. 19. A flavour may be gained from Mignault, "Conservons notre droit civil" (1936) 15 *R. de D.* 28; V. Morin, "L'Anglicisation de notre droit civil" (1937) 40 *R. du Notariat* 145; and J.-G. Castel, "Le juge Mignault défenseur de l'intégrité du droit civil québécois" (1975) 53 *R. du B. Can.* 544. To be fair, it is also true that xenophobia has afflicted the common law: see e.g. J.W. Cairns, "Blackstone, an English Institution: Legal Literature and the Rise of the Nation State" (1984) 4 *Ox. J. Leg. Stud.* 318; Baker, "The Constitution of Upper-Canadian Legal Thought in the late-Victorian Empire" (1985) 3 *Law and Soc. Rev.* 1.

and preventing linguistic and conceptual cross-pollination.⁴⁴ However, the pursuit of purity for its own sake is a dangerous preoccupation which, when carried to extremes, can lead to paradoxical results.⁴⁵

One example will illustrate how a quest for purity not only may deflect academic writing away from other concerns, but also may reveal an absence of self-consciousness. For centuries the civil law has understood the theory of the 'charge' as a security device (the hypothec). As noted earlier, the hypothec did not lie over moveables. Now, after several attempts, the legislatures of many common law jurisdictions have come to understand how a security device can function as a charge; that is, how 'title' and the division of legal and equitable rights are not the only way of generating a security interest. Some civil law scholars in Quebec today, however, resist the establishment of a general non-possessory security over moveables, which they see as common law heresy. Thus, a fundamental civil law idea (the hypothec), extended in the common law to moveables, is attacked as insufficiently civilian by certain Quebec private lawyers.⁴⁶

The preoccupation with survival and purity has strongly influenced both the form and the substance of Quebec private law scholarship. While French private law commentary⁴⁷ remains predominantly analytical of codal texts, certain circles are now accepting those engaged in "scholarship about law".⁴⁸ Yet such an accommodation has not yet been negotiated

⁴⁴ Compare, in *Livre centenaire de la société de législation comparé*, the essays by Marty "Les apports du droit comparé au droit civil" 91, and Rodière, "Le renouvellement du droit commercial français par le droit comparé" 109. The resistance of private civil law to bastardizing tendencies is highlighted in R. David, *Traité élémentaire de droit civil comparé* (1950).

⁴⁵ As a philosophical ideal 'purity' has long been subject to attack. For a particularly inventive demonstration of its incoherence see M. Foss, *The Idea of Perfection in the Western World* (1947).

⁴⁶ It is precisely this resistance to global reform which induced the legislature, in 1984, to create a provincial analogue to section 178 security by means of extra-codal legislation. See R.A. Macdonald, "Inventory Financing in Quebec After Bill 97" (1984) 9 Can. Bus. L.J. 153.

⁴⁷ This commentary includes that of adherent to the '*libre recherche scientifique*' school championed by François Génay at the turn of this century. See F. Génay, *Méthode d'interprétation et sources de droit privé positif* (1916); M. Villey, *Leçons d'histoire de la philosophie du droit* (1962); C. Perelman, *Droit, morale et philosophie* (1968).

⁴⁸ Even such notable representatives of the classical view as Ghestin & Goubeaux, *supra*, note 9, are prepared to consider economics, history, sociology, philosophy and comparative law as disciplines "*auxiliaires au droit*". See pages 72-80, and page 189, where the authors conclude "*la doctrine moderne de droit privé devait avoir une meilleure connaissance du phénomène juridique dans son ensemble, à travers la sociologie juridique, et qu'elle devait élargir son optique par l'étude de la philosophie du droit comparé et des faits et théories économiques.*" See also P. Durand, "La connaissance du phénomène juridique et les tâches de la doctrine moderne du droit privé" [1956] D.S. chron. à la p. 73.

Notable modern French works in this new genre are R. Savatier, *Droit et histoire*; R. David, *Les grands systèmes de droit contemporain* 8e éd. (1984); J. Carbonnier, *Sociologie juridique*, éd. rév. (1978); G. Ripert, *Le déclin du droit* (1949); and C. Perelman, *Logique juridique: nouvelle rhétorique*, 2e éd. (1979).

in Quebec private law, even though in public law fields, a peaceful and fruitful co-existence has long reigned. 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. In other words, even though French legal scholars engaged in analytical research are beginning to make use of other disciplines, in Quebec the predominant tendency is to banish these from legal discourse.

While fragment theory may partially explain this attitude of isolationism and conservatism, the desire to preserve a pure civilian legal science is a more important reason for the hostile position in Quebec private law.⁴⁹ 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. A similar point can be made about empiricism. The methodology for collecting the raw material of legal sociology — data about rates of plaintiff recovery, insurance company behaviour, marriage breakdown and the like — is believed to transcend juridical boundaries. To accept these models and methods invites the displacement of those features of law which are held to be distinctive of Quebec's vernacular, civilian tradition (its conceptual structure, its internal logic, its normative framework) from the centre of scholarly endeavour.⁵⁰ It follows that, in Quebec, a concern with purity (both systemic and intellectual) almost necessarily implies a very limited private law research agenda: an agenda not characteristic of the civil law outside of Quebec.⁵¹

D. *Legal Scholarship in Quebec Civil Law: Is la doctrine doctrinal analysis?*

The generation of theories to justify the role of legal scholarship in the civil law tradition is only a first step to understanding civil law scholarship in Quebec. It is also important to consider whether, for a civilian, the terms *la doctrine*, doctrinal analysis and legal scholarship

⁴⁹ Even some of the writing about the new Quebec Civil Code implicitly adopts this perspective. See, for example, Civil Code Revision Office, *Report on the Civil Code* (1977), foreword.

⁵⁰ I do not mean to imply that the dichotomy between that which thought to culture-specific (conceptual analysis) and that which is thought to be trans-cultural (empiricism, etc.) can be justified. Obviously empirical methods may also be jurisdiction specific; and, of course, analytical conceptualism may be trans-systemic.

⁵¹ See the analysis in J.H. Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law" (1981) 17 *Stan. J. Int'l Law* 357.

are synonymous. This requires a general assessment of the forms and functions of legal writing.

Modern civil law scholarship appears in several forms: first — books such as treaties, monographs, course manuals and published theses; second — legal periodicals containing articles, case comments and legislative notes; third — governmental sources such as law reform commission reports, ministerial studies and working papers; and fourth — research aids such as digests, abridgments and citators. Each attempts to discern, display and evaluate legal norms.⁵² Perhaps this common feature accounts for the predominant tendency in France to consider all written material about law to be *la doctrine*.⁵³ Nevertheless, evaluative judgments as to whether a particular work merits that label are possible.⁵⁴

Any literary (as opposed to conventional or customary) source of law or legal justification must have certain intellectual attributes.⁵⁵ *La doctrine*, one such literary source, performs five main functions. 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.

Judged by these criteria most modern civil law scholarship *in* law (doctrinal analysis) cannot be considered as *la doctrine* because it lacks critical perspective. Again, most civil law scholarship *about* law (historical, sociological, philosophical and economic analysis) also cannot be considered as *la doctrine* because it ignores conceptual structure and logical coherence.⁵⁶ In other words, there is an important distinction to be drawn in the civil law between *la doctrine* and doctrinal analysis. *La doctrine* is qualitative: it is used only in reference to scholarship that may be invoked as a source of legal justification within the law itself. In Rudolph

⁵² This trichotomy is taken from J. Rivero, *Droit administratif*, 9e éd. (1980) no. 68 à la p. 73-4.

⁵³ See, for example, Dalloz, *Répertoire de droit civil* 2e éd., t. 3; "Doctrines — l'ensemble des études publiées par les juristes; les opinions qu'ils émettent sur les questions qui relèvent de leur spécialité."

⁵⁴ See Weill & Terré, *Droit civil introduction générale*, 4e éd. (1979) no. 230 à la p. 245-6, who distinguish between "ouvrages scolaires", "ouvrages de pratique" and "ouvrages de doctrine proprement dits".

⁵⁵ See the discussion in *Archives de philosophie du droit: 'sources' de droit* (1982).

⁵⁶ If anything, the situation in the common law world is worse. See *Law and Learning*, *supra*, note 1.

Sohm's lexicon, *la doctrine* serves to develop the wider principles which a given rule of law may imply. Doctrinal analysis, by contrast, describes a particular focus of legal scholarship: the technique of correlating code and case, of exemplifying legal rules and of paraphrasing codal texts.⁵⁷

In the light of these distinctions, one might well think that the classical (and distinctive) civil law contribution to legal scholarship — the multi-volume comprehensive private law treatise seems most likely to merit the epithet "*la doctrine*". By and large, this is so. Yet, as one eminent French commentator has observed, these treatises, while conceptually outstanding, frequently are methodologically inadequate. "*Les traités de droit civil comportent, en introduction, quelques éléments de méthodologie. . . . Cette méthodologie me paraît le plus ordinairement se réduire à un catalogue commenté des 'sources' — ou prétendues telles.*"⁵⁸ Another critic⁵⁹ has decried the contemporary scholarly preoccupation of French civilians with rationalizing cases and commenting on recent legislative developments, to the exclusion of more philosophical inquiry: "*La tête la plus remplie des souvenirs d'arrêts divers, doit être naturellement la plus vide d'idées sur les grands principes du droit, parce qu'elle appartient à l'homme qui s'est fait une étude de ne penser que par les autres.*"⁶⁰

Thus, one returns to the point of departure. The private civil law tradition in general (and in Quebec in particular) places a higher value on scholarship *in* law of a "fundamental nature",⁶¹ (according to it alone the preferred status of *la doctrine*, or of a true source of law), than on scholarship *about* law of a 'fundamental nature'. Why, then, is the comparative absence of empirical research into law not compensated by a comparative flourishing of private law theory? This question, which can only be addressed properly once both the authors and audiences of Quebec civil law writing have been identified, will be explored in the conclusion to this essay.

⁵⁷ There is also a distinction to be drawn between both *la doctrine* and doctrinal analysis on the one hand, and scholarship about law on the other. Scholarship about law involves developing (or criticizing) a legal rule by reference to its consequences. This scholarship is both more necessary and more fruitful in common law jurisdictions, where doctrinal analysis tends to be neither *la doctrine*, nor empirically sophisticated.

⁵⁸ M. Villey, *Philosophie du droit* (1979) t. 2, no. 132. See also de la Maunière, *Éléments de Méthodologie juridique* (1976) no. 56-63 à la p. 119-29 for a pessimistic appraisal of *la doctrine* as it appears in modern treatises.

⁵⁹ Atias, "La mission de la doctrine universitaire en droit privé" (1980) 45 Sem. Jurid. 1.2999.

⁶⁰ J.B.V. Proudhon, *Traité des droits d'usufruct, d'usage personnel et d'habitation* (1836) t. 1, préface.

⁶¹ I adopt the perspective of *Law and Learning* that legal theory (philosophy, linguistics, political theory, etc.), as well as empirical research may constitute fundamental legal scholarship. See *supra*, note 1, esp. at 69-70. For further development see F. Schauer, "Does Doctrine Matter?" (1984) 82 Mich. L.R. 655.

III. THE PRACTICE OF CIVIL LAW SCHOLARSHIP IN QUEBEC

The history of private law scholarship in Quebec may be periodized in several ways, each reflecting a slightly different preoccupation. In view of this essay's purposes, a classification grounded primarily in observations about the authors of legal scholarship, and only secondarily in their intellectual preoccupations, has been adopted. The first period of the civilian scholarly tradition runs from its eighteenth-century beginnings until the flourishing of Quebec's law faculties in the mid-1960s. This period, labelled 'the historical pattern', is sub-divided into four stages: precodification; the late nineteenth century; the years 1900 to 1945; and the post-War years, 1945 to 1966. Scholarship from the mid-1960s until shortly after the Civil Code Revision Office completed its work in 1977 then will be reviewed as the product of an 'emergent university tradition'. The material published in Quebec especially since 1980 is identified as 'contemporary scholarship', and will be used to discern any new tendencies in private law scholarly writing.⁶²

Before commencing this survey, however, it is important to make two general disclaimers. To begin with, bibliographic comprehensiveness has not been even remotely achieved. Private civil law scholarship has, in principle, taken four main forms: treatises, monographs, theses and periodical articles. Most bibliographies tend to report only material published in these traditional forms within Quebec. Yet there has always been a significant legal literature by Quebec authors published in foreign jurisdictions, and several non-lawyers have published important studies in non-legal collections. What is more, the work appearing in these non-standard sources typically reflects preoccupations other than classical scholarship, so that it is impossible to extrapolate meaningfully solely on the basis of the material reported here. The survey which follows, therefore, must be read with the caveat that it primarily reports writing by the legally-trained for the legally-trained and published in Quebec.

⁶² In assembling the data reported in this section I have drawn on R. Boulton, *Bibliographie du droit canadien*, 2e éd. (1977); and M. Chrétien-Rioux, *Répertoire des thèses de doctorat et de maîtrise soutenues dans les facultés de droit des universités du Québec et de l'Université d'Ottawa, Section de droit civil* (1978, supp. 1979, 1980). I also profited from the essays by Jobin, *supra*, note 9, J.E.C. Brierley, "Québec's Civil Law Codification: Viewed and Reviewed" (1968) 14 McGill L.J. 521, and Normand, "Une analyse quantitative de la doctrine en droit civil québécois" (1982) 23 C. de D. 1009. The "Early Canadiana Collection" of the McGill University Law Library, the encyclopaedic knowledge of eighteenth and nineteenth century Quebec law of my predecessor, Professor J.E.C. Brierley, and the index compiled by my colleague, Professor G. Blaine Baker, as well as his general historical insights, also have been valuable bibliographical sources.

A second qualification is that the historiography of Quebec private law scholarship has yet to be written.⁶³ Indeed, it would be premature now to attempt to generate a general theory of the ideas, commitments and beliefs of those doing legal scholarship during the periods under review. Hence, not only must the conclusions and assessments drawn here be taken as tentative, but also the data itself should be viewed with some skepticism. Until one has at least a vague perception of what one is seeking (and why), one typically does not find it.

A. *The Historical Pattern (1775-1966)*

For obvious reasons, most twentieth-century assessments of the civil law in Canada focus on the post-codification era.⁶⁴ Yet this engrossment belies the considerable earlier legal scholarship.⁶⁵ Furthermore, given the general confusion as to sources of the law, given the fact that certain key texts were available either in English only or in French only and given the absence of any legislative synthesis,⁶⁶ this scholarship was remarkably erudite and varied. Most monographs and treatises were, however, primarily professional in orientation, being either legislative annotations or commentaries on the *Coutume de Paris*.⁶⁷ Nevertheless, it would be a mistake to characterize this work as 'doctrinal analysis'

⁶³ Some fieldwork in Canadian historiography which can be carried over into law has been undertaken by, among others, C. Berger, *The Writing of Canadian History* (1976). Yet to my knowledge no similar study of "clio" in Quebec has appeared. See the remarks of A. Morel, "Canadian Legal History — Retrospect and Prospect" (1983) 21 Osgoode Hall L.J. 159.

⁶⁴ See notably, *Livre centenaire du Code Civil* (1968-1970) (2 volumes), and sources cited therein; Baudouin, *supra*, note 42; and Normand, *supra*, note 61.

⁶⁵ For a detailed analysis and bibliography, see Brierley, *supra*, note 61. One might hazard a guess that most Canadian legal writing in this period originated in Quebec.

⁶⁶ See Brierley, *ibid.* at 533-40, and Castel, *supra*, note 28, Part I.

⁶⁷ See the authors mentioned in the minutes of the Civil Code Codification Commission (1866). Well-known pre-codification works include: F.J. Cugnet, *Traité abrégé des anciennes lois, coutumes et usages de la colonie de Canada aujourd'hui province de Québec* (1775); J. McCarthy, *Dictionnaire de l'ancien droit du Canada* (1809); J.F. Perrault, *Questions et réponses sur le droit civil du Bas-Canada* (1810); H. des R. Beaubien, *Traité sur les lois civiles du Bas-Canada* (1832) (3 volumes); N.B. Doucet, *Fundamental Principles of the Laws of Canada* (1841-43) (2 volumes); L.H. Lafontaine, *Analyse de l'Ordonnance du Conseil spécial sur les bureaux d'hypothèques* (1842); A. Gorrie, *A Synopsis of the Laws of Letting and Hiring* (1848); E.L. Montizambert, *A Lecture on the Mercantile Law of Lower Canada* (1848); J. Crémazie, *Manuel des notions utiles* (1852); J. Bonner, *An Essay on the Registry Laws of Lower Canada* (1852); M. Bibaud, *Commentaires sur les lois du Bas-Canada, suivi d'une notice historique* (1859-1862) (2 volumes); E.-L. de Bellefeuille, *Thèse sur les mariages clandestins* (1860); D. Girouard, *Essai sur les lettres de changes et les billets promissoires* (1860); T.K. Ramsay, *Notes sur la Coutume de Paris* (1864).

since much of it was intended precisely to *generate* legal doctrine from a variety of historical, judicial, legislative and sociological materials.⁶⁸

Codification slowly wrought changes in earlier patterns of private law scholarship. The new legislative text stimulated exegetical commentaries, and led to a series of annotational sourcebooks.⁶⁹ While some post-codification civil law analyses consisted of institutional, historical, overtly political and economic studies,⁷⁰ this broader scholarship, which in many respects continued the pre-codification tradition, began to wane in the last decades of the nineteenth century.⁷¹ The last major domestic work with this orientation was Frederick Parker Walton's *Scope and Interpretation of the Civil Code of Lower Canada*, which appeared in 1907.

Towards the turn of the nineteenth century a new focus in legal scholarship emerged, which led to practical legal studies directed to the profession.⁷² For at least the next fifty years, legal writing was primarily analytical and exegetical upon codal texts.⁷³ The model for such writing was the multi-volume treatise, of which the most famous was Pierre-Basil Mignault's *Droit civil canadien*, published in nine volumes between 1895 and 1915.⁷⁴ In this second post-codification era, the amount of monographic literature being published also dwindled. Apart from the

⁶⁸ Such a conclusion may be deduced not only from a working document drafted by one of the codification commissioners (R.E. Caron, "Quelles sont les lois du pays actuellement en force, et qui partant doivent toute entrer dans les codes à faire?" in *Mémoire: notes générales sur les lois en force* (1959), but also from post-codification histories. See *infra*, notes 68-70.

⁶⁹ See, for example, C. de Lorimier and C. Vilbon, *La bibliothèque du Code civil de la province de Québec* (1871-1890) (21 volumes); T.J.J. Loranger, *Commentaire sur le Code civil du Bas-Canada* (1873, 1879) (2 volumes); W.P. Sharp, *Civil Code of Lower Canada* (1889) (3 volumes); E.L. de Bellefeuille, *Le Code civil annoté* 3e éd. (1891); E.A. Beaudry, *Le questionnaire annoté du Code civil du Bas-Canada* (1892); J.-J. Beauchamp, *Code Civil de la province de Québec annoté* (1904-1905) (5 volumes).

⁷⁰ See, for example, T. McCord, *The Civil Code of Lower Canada* (1867); J. de Montigny & G. Doutre, *Histoire générale du droit canadien* (1869); and G. Doutre & E. Lareau, *Le droit civil canadien* (1872).

⁷¹ Normand, *supra*, note 61 calculates that some sixteen major works (treatises and monographs) appeared between 1885 and 1905, but only two, E. Lareau, *Histoire du droit Canadien* (1889) (2 volumes) and R. Lemieux, *Les origines du droit franco-canadien* (1901) were not strict analyses of codal texts.

⁷² Two precursors of this trend were T.d'E. Savigny, *Traité des substitutions fidéicommissaires*, annotated by M. Mathieu (1889), and F. Langelier, *De la preuve en matière civile et commerciale* (1894).

⁷³ The appearance of a professional legal periodical, the *Revue du Notariat*, founded by the Board of Notaries in 1898, also is evidence of this shift.

⁷⁴ Other similar treatises in this period were F. Langelier's six volume *Cours de droit civil de la province de Québec* (1905-1911); Jetté, *Cours de droit civil*, published posthumously in sections by the *Revue de Droit* between 1923 and 1939 and never completed; and J.-E. Billette, *Traité théorique et pratique de droit civil canadien* (1933), which, however, consisted of only one volume, on Donations and Wills.

above-noted efforts at producing local civil law treatises on the French model, fewer than forty monographs were written between approximately 1900 and 1945. These books tended to be of three main types: practitioner's manuals,⁷⁵ revised teaching materials⁷⁶ and graduate theses.⁷⁷ Academic monographic literature was very rare, and in most cases was neither historical nor sociological in orientation.⁷⁸

A final period in the pre-university era, the years from 1946 to 1966, saw a major transformation in both the volume and authorship (although not the focus) of legal scholarship. While the seventeen-volume *Traité du droit civil du Québec* (the Trudel collection), which appeared between 1946 and 1958, was almost entirely written by practising lawyers or court officials, a pioneering and substantial non-thesis monographic literature began to appear, largely written by full-time law professors.⁷⁹ The early model for such writing was Louis Baudouin's *Le droit civil du Québec: modèle vivante de droit comparé* which appeared in 1953.⁸⁰ But, interestingly, as law teaching became a career in the post-War decades, the orientation of academic writing changed.⁸¹ In this sense,

⁷⁵ For example, J. Sirois, *De la forme des testaments* (1907); F.L. Snow, *The Law of Landlord and Tenant in the Province of Quebec* (1917); W.S. Johnson, *The Conflict of Laws; with Special Reference to the Province of Quebec* (1933-1937) (3 volumes); A. Perrault, *Traité de droit commercial* (1936-1940); W.C.J. Merdith, *Civil Law on Automobile Accidents* (1940).

⁷⁶ Two of the best examples of such works are E. Lafleur, *The Conflict of Laws in the Province of Quebec* (1898); and W.deM. Marler, *The Law of Real Property in Quebec* (1932).

⁷⁷ A representative sample would be Demers, *Le privilège* (1916); J. Bouffard, *Traité du domaine* (1921); G.-M. Giroux, *Le privilège ouvrier* (1933); R. Brunet, *Des donations de biens futurs en contracts de mariage* (1931); M.-L. Beaulieu, *Du bornage et de l'action en bornage* (1937); J. Perrault, *Des stipulations de non-responsabilité* (1939).

⁷⁸ See Goldenberg, *Responsibility for Offences and Quasi-offences under the Civil Code of Lower Canada* (1932); M. Faribault, *Traité théorique et pratique de la fiducie ou trust du droit civil dans la province de Québec* (1936); G.V.V. Nicholls, *The Responsibility for Offences and Quasi-Offences Under the Law of Quebec* (1938); G.S. Challies, *The Doctrine of Unjustified Enrichment in the Law of the Province de Quebec* (1940). An exception was the Livre souvenir of 1936 entitled *Le droit civil français*, which, however, primarily considered French law.

⁷⁹ Nevertheless, lawyers and notaries continued to generate a substantial number of monographs. The following are representative of works written during this period: H. Roch, *Testaments et vérification* (1951); E. Rivard, *Les droits sur les successions dans la province de Québec* (1956); W.S. Johnson *The Joint and Several Liability of Architects, Engineers and Builders* (1955); H. Turgeon, *La succession légitime de la province de Québec* (1959); G. Trudel, *Lésion et contrat* (1965); M.I. Sigler, *Traffic Accidents: Cases and Comment (Quebec)* (1965).

⁸⁰ See also, F.M.C. Cancino, *La nullité des actes juridiques* (1950).

⁸¹ When Walton published his monograph in 1907 he was the only full-time law teacher in Quebec. Throughout the 1920s and 1930s McGill had the largest full-time complement in Canada — three. The pioneers of Quebec private-law teaching were F.P. Walton, F.W. Lee, H.A. Smith, F.R. Scott and S. Lemesurier. For a listing of early law teachers at other faculties commencing in the post-War period, see Jobin, *supra*, note 9 at 264-5; and for a general assessment of law teaching at this time see M. Cohen, "The Condition of Legal Education in Canada" (1950) 28 *Can. B. Rev.* 267.

Baudouin's work was at once the last major non-doctrinal work and the first of the newer analytical studies written by full-time law teachers.⁸²

The history of legal periodicals in Quebec, and an assessment of their content confirms the basic themes which emerge from a review of the monographic literature. The oldest continuing law journal is the *Revue de notariat* which was founded in 1898. Legal periodicals did, however, appear earlier, and at least three, *La revue de législation et de jurisprudence* (1845-1848), *The Law Reporter* (1854) and *The Examiner — L'Observateur* (1861) antedated, but did not survive, codification. All contained an amalgam of articles, speeches, notes, lectures, foreign judgments and local judicial decisions,⁸³ as did *La Revue légale: recueil de jurisprudence et d'arrêts* which first appeared immediately following codification, in 1869. However, by 1895, after a three-year hiatus, its second series began under the title *La Revue légale: publication mensuelle de droit, de législation, de critique et de jurisprudence*, and case reporting had become prominent. In fact, one is hardpressed to find any scholarship other than annotations in the journal after 1909 when it changed its name to *La Revue légale: publications mensuelle des arrêts de principe et de jurisprudence annotée*. Between 1940 and 1942 the journal underwent a further metamorphosis, becoming simply *La Revue légale*, and thereafter it published only cases.

Four other legal periodicals appeared prior to 1900, but apart from the *Legal News* (1878-1897), each lasted fewer than five years.⁸⁴ A fifth now defunct publication, the *Revue de droit*, was published between 1922

⁸² The studies by A. Morel, *L'évolution de la doctrine de l'enrichissement sans cause* (1955), and *Les limites de la liberté testamentaire dans le droit civil de la province de Québec* (1960); by J.-G. Cardinal, *Le droit de superficie* (1957); by P.A. Crépeau, *La responsabilité civile de médecin et de l'établissement hospitalier* (1956); and by M.-L. Beaulieu, *Le bornage, l'instance et l'expertise, la possession, les actions possessoires* (1961) all of which arose from theses, are representative. See also R. Comtois, *Traité théorique et pratique de la communauté des biens* (1964).

I have not attempted to analyse the monographic material published during this period in non-standard sources, or to tabulate legal scholarship by Quebec authors published in France, the U.K. and the U.S. I have also not undertaken a thorough study of historical and sociological works published by non-lawyers.

⁸³ For example, the inaugural lecture of F.W. Torrance of the McGill Law Faculty on Roman Law, delivered in January, 1854 immediately following a note about a U.S. judgment and immediately preceding the full-text report of a Superior Court case, was reprinted in "Roman Law" [1854] *The Law Reporter* 52.

⁸⁴ The other three were *The Lower Canada Law Journal* (1865-1868), *La revue critique de législation et de jurisprudence du Canada* (1871-1875), and *La Thémis* (1879-1883). Each of these journals, it should be noted, began as the *Revue légale* and expired primarily as a case reporter. The third is noteworthy for its editors, de Montigny, Loranger, de Bellefeuille, de Lorimier, Beaudry and Desrosiers, each of whom contributed a major monograph or treatise during the late nineteenth century. Moreover, two of these editors became the guiding hands of the *Revue légale* after 1895.

and 1939,⁸⁵ and a sixth post-codification journal, but only the second legal periodical which remains extant, was founded in 1941 as the *Revue du Barreau*. This journal has, in large measure, been the heir of legal scholarship published in both the *Revue légale* and the *Revue de droit*. From 1940 through 1960 the only regularly-appearing periodicals in which commentary on the civil law could be found were the notaries' professional journal, the Bar's professional journal and the professional journal of the Canadian Bar Association, the *Canadian Bar Review*.⁸⁶ This last review, founded in 1923 as a result of the amalgamation of the Ontario-based *Canadian Law Times* (1881-1922) and the *Canada Law Journal* (1865-1922), contained the occasional excellent civil law study during this period. Not surprisingly, in view of their audience and their early editors,⁸⁷ much of the material published in these journals before 1966 was either of the after-dinner-speech variety or the brief practical point analysis. Unlike earlier journals, which regularly published foreign judgments and non-topical essays, scholarly historical, philosophical or institutional studies on civil law topics were infrequent throughout most of the 1940s and 1950s.

Shortly after the War, university-based legal periodicals began to appear. In 1951 the students of the University of Montreal founded a journal, *Thémis*, but it was not until the review fell under faculty control in 1966, and was renamed *La revue juridique Thémis*, that it became a major forum for legal scholarship. The first number of the *McGill Law Journal* was published in 1952, but this student-run review did not appear annually until 1965. The law journal at Laval, *Les cahiers de droit*, was founded in 1954, but did not establish a record of regular publication until the mid 1960s. The University of Ottawa inaugurated a law review, *Justinien*, in 1966, but again, it was not until the 1970s, when it was renamed the *Revue générale de droit*, that the journal became

⁸⁵ This review is probably Canada's most remarkable law journal. A private undertaking, it published a wide range of material, including the *Cours Jetté*, throughout its history and never succumbed to the temptation to reproduce cases.

⁸⁶ It is worth noting, however, that Quebec scholarship appeared not infrequently in off-shore publications such as the *Law Quarterly Review*, the *Journal of the Society of Public Teachers of Law*, the *Judicial Review*, the *Yale Law Journal*, the *Michigan Law Review*, the *Harvard Law Review*, the *University of Toronto Law Journal* and the *Revue Trimestrielle de droit civil*. In such periodicals, as well as in non-legal sources such as the proceedings of the *Institut canadien*, and those of the *Literary and Historical Society of Quebec*, the material tended to be both less parochial and less professional.

⁸⁷ In early 1957, the *Canadian Bar Review* broke with tradition and appointed a law professor, J.-G. Castel, as Editor, to succeed Mr. G.V.V. Nicholls, who resigned, ironically, to take up a full-time teaching position. The *Revue du Notariat* followed and later that same year with the nomination of Professor Roger Comtois as Director. The *Revue du Barreau* remains under the editorial direction of a Committee of the Bar, although in 1983 the Chair of the Committee was, for the first time, a full-time legal academic.

more than an in-house magazine. The last of Quebec's regularly appearing legal periodicals, the *Revue de droit de l'Université de Sherbrooke*, began publication in 1970.⁸⁸ Nevertheless, even in these university reviews, throughout the period between 1946 and 1965 most civil law contributions could not be classified as historical, sociological or institutional scholarship.

A major influence upon legal scholarship for much of this 'historical' period has been the existence of university law faculties. This tradition dates, at McGill, from 1844, and from the 1870s at both Laval and Montreal. Of course, until the 1960s the programmes of these institutions were not under the control of full-time faculty, so professional interests largely shaped legal scholarship.⁸⁹ This university tradition, such as it was, meant that there has always been a number of legal theses written each year in Quebec. Forty-six theses on private law were written between 1866 and 1965, and twenty-six of these were published in monographic form. This accounts for almost one-half of the monographic production of the period, and over one-quarter of the works published.⁹⁰ Not surprisingly, given their origins in Quebec law faculties that were preoccupied with professional training, almost all of these theses are analytical and exegetical.⁹¹

A second contribution of university law faculties to civil law scholarship during this period was the publication of professors' "Notes de cours". Until recently, civil law teaching (whether undertaken by lawyers, judges or full-time professors) has tended to be reflected, in parallel fashion to common law teaching, by a particular form of pedagogical instrument. In the common law, from the time Christopher Columbus Langdell published his first casebook in 1872, the *Cases and Materials* assemblage has been predominant. In the civil law, also from

⁸⁸ According to Normand, *supra*, note 61, from 1866-1966 some 956 periodical articles on the civil law was published. Of these, 576 appeared between 1946 and 1955 and 252 others between 1926 and 1945. My own sampling indicates that prior to 1946 almost all periodical literature was written by lawyers and judges. During the 1950s this predominance continued in the professional journals, but in the university law reviews a more equal participation by each of professors, students and practitioners could be observed.

⁸⁹ When McGill began teaching common law in the early 1920s, the Montreal Bar forced abandonment of the programme after only a few years, on the pretext that law was a 'practical' subject. See S. Frost and D.L. Johnston, "Law at McGill: Past, Present and Future" (1981) 27 McGill L.J. 33.

⁹⁰ Normand, *supra*, note 61, at 1022-3. I have not been able to tabulate theses published in history, philosophy and sociology departments which bear on legal topics.

⁹¹ This tendency should be contrasted with that revealed in post-War theses written by Quebec students in fulfilment of graduate requirements in France. See, for example, the studies by Morel, Cardinal and Crépeau, *supra*, note 81.

the late nineteenth century, it has been the *Manuel de cours*. Mr. Justice Langelier's early treatise *Cours de droit civil de la province de Québec*, for example, first saw light as his teaching notes over a period of thirty years (1872-1905) at Laval. Again, the work by Louis-A. Jetté which appeared in the *Revue de droit* between 1922 and 1939 was a posthumous publication of his notes for the lectures he delivered during three decades at the University of Laval at Montreal. Finally, even Mignault's *Droit civil canadien* was not based on leading continental civil law treatises, but on Frédéric Mourlon's *Repetitions écrites sur le Code civil*, the most popular student manual then available in France; as such it was intended primarily for his students at McGill.⁹²

From 1910 through 1960, fewer such course notes were published. The major examples, dating from the 1930s, were William deM. Marler, *The Law of Real Property* (1932) and Antonio Perrault, *Traité de droit commercial* (1936-40). Nevertheless, during the 1940s and 1950s, practising lawyers and notaries teaching at law faculties frequently reworked their course notes, even if these were rarely published as such. A major reason for non-publication was the commitment to exegetical, codal article-by-codal article teaching, a form of presentation adopted by the authors of the *Traité de droit civil de Québec*, who themselves frequently lectured at the law faculties. This state of affairs, as much as any other factor, explains the persistence of Mignault's *Droit civil canadien* as the leading civil law reference work for over sixty years.

The historical pattern may be summed up as follows. 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. The small number of full-time university teachers of private law helps explain the professional orientation of most twentieth-century civil law writing prior to 1945. But, even with the advent of a full-time professoriate, and the inauguration of university law journals in the 1950s, only the authorship of legal scholarship changed: professors rather than lawyers took on a greater responsibility for writing professional monographs and articles. The demands of pedagogy also conspired to stimulate research in aid of elementary exegetical expositions of legal rules.

Such classical forms of university scholarship as historical, philosophical, political and institutional writing, as well as more modern university preoccupations such as social-science research, did not figure

⁹² The antecedents of these works are explained in F. Langelier, *Cours de droit civil canadien* (1905) t. 1, préface; "Editor's Note respecting the Cours Jetté" (1923) 1 R. de D. 193; P.-B. Mignault, *Le droit civil canadien* (1895) t. 1, préface.

prominently in the scholarly agenda of either lawyers or professors prior to 1966. Yet, the quantity of Quebec legal commentary in private law fields exceeded that produced in the rest of Canada, and nothing comparable in scope or analysis to Mignault's treatise has ever appeared in common law provinces.

B. *The Emergent University Tradition (1966-1977)*

Nominally, one might take the end of the Second World War as the point of departure for examining university tradition in legal scholarship. However, it was really not until the mid-1960s that university law teaching became well established.⁹³ Along with the growth of university law faculties, three events signaled a new direction for legal scholarship. In 1965, Professor Paul-André Crépeau was the first academic appointed to chair the Civil Code Revision Office; 1966 saw the centenary of the Civil Code; and in 1968, the Bar took over responsibility for professional training. Of course, these events also coincided with the secularization of education and the *renouveau* of the 'Quiet Revolution'. As law faculties became more secure as academic institutions, university law reviews flourished,⁹⁴ new professorial positions were created⁹⁵ and the professions began to publish bar admission and continuing education materials in addition to their in-house periodicals.⁹⁶

The centenary of the Code provoked a brief outpouring of historical and institutional scholarship.⁹⁷ Also, at this time (and even slightly earlier) several younger professors, notably Jacques Boucher, Jean Goulet, Perry

⁹³ Normand, *supra*, note 61, takes 1946 as a watershed date in scholarship, while Jobin, *supra*, note 9, seems to opt for the mid-1960s as the point of departure for modern scholarship in the civil law. This difference is explained by their criteria. Normand undertakes a quantitative analysis; Jobin considers qualitative factors as well.

⁹⁴ During a five-year period (1965-1970), *La Thémis* and *Cahiers de droit* fell under professorial control, and the *Revue générale de droit* and *Revue de droit de l'Université de Sherbrooke* were founded.

⁹⁵ See Jobin, *supra*, note 9 at 164-265. At McGill this development occurred slightly earlier, with the hiring of Gerald LeDain, Jean-Gabriel Castel, Paul-André Crépeau and John W. Durnford. J.-G. Castel's *The Civil Law System of the Province of Quebec* (1962) was the first of the new-style teaching materials to focus on historical and institutional subjects.

⁹⁶ See for example, the *Cours de perfectionnement* of the Board of Notaries and the *Cours de la Formation Professionnelle* of the bar, for multi-volume student-oriented doctrinal studies.

⁹⁷ See in particular, J.L. Baudouin, "Le Code Civil Québécois: Crise de croissance ou crise de vieillesse" (1966) 44 R. du B. Can. 391, in the special number of the *Revue* devoted to the Civil Law; A. Morel, "L'apparition de la succession testamentaire" (1966) 26 R. du B. 499 in the special number of the *Revue* devoted to the Civil code Centenary; Brierley, *supra*, note 64; the two volume *Livre centenaire du Code civil* (1970); and Baudouin, *supra*, note 9. See also A. Popovici, ed., *Mélanges Baudouin: Problèmes de droit contemporain* (1974), and J.S. Ziegel & W.F. Foster, eds., *Aspects of Comparative Commercial Law* (1969).

Meyer and André Morel, were writing on such subjects as jurimetrics, legal theory, sociology of law and legal history.⁹⁸ Nevertheless, academic writing soon reverted to more topical subjects, as two new civil law treatise projects were announced: the first to appear, the *Traité élémentaire de droit civil*, began in 1970 at the University of Montreal, and by 1977 had five volumes;⁹⁹ the second, *Droit civil québécois*, originated in the late 1950s at the University of Ottawa but was not published until 1971.¹⁰⁰ Neither of these projects was conceived of nor written in the grand style of any one of the major continental *Traité théorique et pratique du droit civil*. In effect, both followed the student précis model. Both were written exclusively by professors, and both now seem to have run out of momentum.¹⁰¹

The vast bulk of the monographic literature published since 1966 has had a distinctly pedagogical orientation. Indeed, much of it has been in the modified "Notes de cours" format. At the University of Montreal, a student collection, *Les cours de thémis*, appeared during the 1970s and was frequently revised.¹⁰² A similar series, *La collection bleue*, was published a few years later by professors at the University of Ottawa.¹⁰³ Complementing these series were a variety of individual civil law monographs published by professors at other faculties, and intended primarily as student

⁹⁸ See for example, J. Boucher, "La Coutume de Vexin" (1964) 14 *Thémis* 57; "L'histoire de la condition juridique et sociale de la femme au Canada français" in *Livre centenaire du Code civil: I* (1970) 155; J. Goulet, "Revalorisation du droit et jurimétrie" (1967) 9 *C. de D.* 9; J. Goulet & E. Caparros, "A propos d'«un tour d'horizon complet» sur la recherche dans les sciences juridiques" (1969) 10 *C. de D.* 476; P. Meyer, "Jurimetrics: the Scientific Method in Legal Research" (1966) 44 *Can. B. Rev.* 1; "The contribution of Natural Law to Positive Law in Quebec" (1966) *R. de D. Comp.* 5; A. Morel, "La codification devant l'opinion publique de l'époque" in *Livre centenaire du Code civil: I* (1970) 27; "L'imposition et le contrôle des peines au baillage de Montréal (1666-1693)" in *Etudes Bissonnet* (1968) 411.

⁹⁹ The volumes have been J.-L. Baudouin, *Les obligations* (1970); A. Mayrand, *Les successions ab intestat* (1971); J. Pineau, *La Famille* (1972); J.-L. Baudouin, *La responsabilité civile délictuelle* (1973); and P. Martineau, *La prescription* (1977).

¹⁰⁰ The only volume to appear has been P. Azard & A.-F. Bisson, *Droit civil québécois: Notions fondamentales; famille; incapacités* (1971).

¹⁰¹ No volume in either series has been published since 1977. The revised versions of the J. Pineau and J.-L. Baudouin studies have now appeared as separate monographs. See J. Pineau, *Mariage, séparation, divorce* (1978); J.-L. Baudouin, *Les obligations* 2e éd. (1983); *La responsabilité civile délictuelle*, 2e éd. (1985).

¹⁰² The volumes which have appeared in this series are: G. Brière, *Les libéralités* (1972); G. Brière, *Les successions ab intestat* (1972); J. Pineau, *Les régimes matrimoniaux* (1972); P. Martineau, *Les Biens* (1973); R. Joyal-Poupard, *La famille* (1973); M. Pourcelet, *La vente* (1974); M. Ouellette-Lauzon, *Droit des personnes et de la famille* (1976); J. Pineau & M. Ouellette-Lauzon, *Théorie de la responsabilité civile* (1978); J. Pineau, *Théorie des obligations* (1979). Several are now in subsequent editions.

¹⁰³ The volumes in this series are C. Perret, *Précis de responsabilité civile* (1979); C. Ducharme, *Précis de la preuve*, 2e éd. (1982); G. Brière, *Les Libéralités* (1982), the eighth edition of the former *Cours de thémis*; G. Brière, *Les successions ab intestat* (1983), the ninth edition of the former *Cours de thémis*, and A. Larouche, *Précis des obligations* (1983).

précis.¹⁰⁴ One pedagogical instrument that deserves special mention is Maurice Tancelin's *Jurisprudence sur les obligations* (1973), which was the first commercially-produced casebook on a private civil law subject.¹⁰⁵

After 1966 two other types of monographic literature were occasionally produced by law teachers. These were practitioner-oriented works on areas of current importance in the civil law,¹⁰⁶ and a small number of genuinely scholarly monographs.¹⁰⁷ Complementing these single volume studies were various series of topical studies written by law professors and published within law faculties.¹⁰⁸ Coincidentally, the scholarly productivity of lawyers and notaries declined markedly. Of course, the professional corporations continued to produce annual Bar Admission materials, notably the *Cours de formation professionnelle du Barreau du Québec* and the *Cours de perfectionnement du Notariat*, but the privately published civil law studies characteristic of earlier periods all but disappeared.¹⁰⁹

The picture in the law reviews is similar, although a more varied scholarship does appear. In the period following 1966, some 800 articles, notes and comments about private civil law were published in Quebec legal periodicals. More than one-half of this material dealt with family law and the law of obligations (including sale and lease), and more than two-thirds of it was written by full-time law teachers.¹¹⁰ What is more,

¹⁰⁴ See, for example, M.A. Tancelin, *Théorie du droit des obligations* (1975); T. Rousseau-Houle, *Précis du droit de la vente et du louage* (1978); E. Caparros, *Les régimes matrimoniaux du Québec* (1979); E. Groffier, *Précis de droit international privé québécois* (1980). Most of these are now in a second or third edition.

¹⁰⁵ Nevertheless, case-method and problem-method teaching is not widespread, and published materials have tended to reflect a pedagogical orientation. Thus, prior to 1970 most teaching was magisterial; the seventies were the years of the *polycopiés*; now, it seems, the demands of pedagogy (and perhaps the CEGEPisation of law faculties) have further devalued scholarly coinage. A new series, *Les Mémentos Thémis* has appeared at the University of Montreal. This series, which is even typeset in the format of class notes, comprises, in civil law, Lauzon, *Exécution des jugements* (1983) and P. Ciotola, *Les sûretés* (1984).

¹⁰⁶ For example, R. Comtois, *Essai sur les donations par contrat de mariage* (1968); J. Pineau, *Mariage, séparation, divorce* (1978); E. Caparros, *Les lignes de force dans l'évolution du droit des régimes matrimoniaux* (1978); P.Y. Marquis, *La responsabilité civile du notaire officier public* (1977); J. Pineau & D. Burman, *Effets du mariage et régimes matrimoniaux* (1984).

¹⁰⁷ A. Mayrand, *L'inviolabilité de la personne humaine* (1975); M.C. Cumyn, *Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie* (1979); F. Frenette, *L'emphytéose* (1983); H. Battifol, *Les contrats en droit international privé comparé* (1981); J. Ghestin, *Le contrat* (1982); C. Larroumet, *Réflexions sur la responsabilité civile* (1983).

¹⁰⁸ See, for example, *Lois nouvelles* (1964, 1965) of the University of Montreal; the *Meredith Memorial Lectures* (1950-1984) at McGill; and *Les Colloques de l'Université de Sherbrooke* (1980-1984).

¹⁰⁹ The Bar and the Board of Notaries also produced a significant volume of continuing education material. In addition, the Board of Notaries has assembled a multi-volume *Répertoire de droit*, complete with full-text reproductions of cases, as well as forms and precedents.

¹¹⁰ See Normand, *supra*, note 61 and Jobin, *supra*, note 9. This is to be contrasted with the 1950s when professional periodicals were dominated by articles from legal practitioners.

of the thirty to forty non-topical articles on private law matters, more than twenty dealt with specific aspects of Civil Code Revision. Fewer than fifty articles, notes or comments published during the period of an emergent university tradition in Quebec focused on historical, philosophical, economic or sociological approaches to the private civil law.¹¹¹

Much of the explanation for the predominantly analytical focus of 1970s private law scholarship can be found in the third major event of the mid-1960s, the appointment of a law professor to chair the Civil Code Revision Office.¹¹² The impact of this project, which absorbed almost the entire energies of private civil law scholars from about 1966 to 1977, was enormous. Some two hundred lawyers, judges and law teachers participated in the Office's various committees. Moreover, law reform necessarily has a positivistic, instrumental and analytical focus. Some valuable empirical and comparative research was also undertaken for the Revision Office, although not all areas of private law were examined, and frequently the studies lacked a viable methodology. Finally, this enormous research lies, for the most part, unpublished, unindexed and, consequently, inaccessible to most younger scholars.¹¹³

The force and impact of the Revision Project is far from spent. As the legislature proceeds to enactment, Book by Book (often with significant amendment) of the Draft Civil Code, participants in the Revision Project are called upon to defend, reargue, modify and rethink their proposals. Furthermore, significant law reform generates a need for doctrinal exposition and synthesis. Much effort is, therefore, now being devoted, in articles and monographs, to analytical commentaries upon proposals now enacted.¹¹⁴

A second major reason for the analytical orientation of private law scholarship during the 1960s and 1970s can be best understood as a side-effect of the Quiet Revolution. For twenty years, private law has been distinctly out of favour among young law teachers in Quebec. Constitutional, administrative and labour law are preferred graduate pursuits. There has been, as a consequence, much excellent empirical, historical and institutional work in public law generated by the Laval

¹¹¹ I have attempted to reproduce the methodology of A. Janisch, *Profile of Published Legal Research* (1982), who, in sampling for the *Law and Learning* Report, came to a similar conclusion.

¹¹² See R.A. Macdonald, Comment (1980) 58 Can. B. Rev. 185 for an outline and assessment of the methodology of the Revision Project.

¹¹³ The Archives of the Civil Code Revision Office are on deposit with the McGill Law Library through the Quebec Centre of Private and Comparative Law, but are as yet neither properly indexed nor cross-referenced.

¹¹⁴ It is a fair conclusion that the reason for extensive writing in family law, leasing and consumer law during the 1970s was the important legislative reforms undertaken in these areas.

Laboratoire de recherche sur la justice administrative and the *Centre de recherche en droit public* at the University of Montreal.¹¹⁵

One can see in private law scholarship of the 1970s something akin to a lost generation phenomenon. Most civil law teaching and research during the 1970s was undertaken by professors hired before 1970. Necessarily, given the underdeveloped university context in which they studied, the Civil Code Revision Project and the need to generate teaching materials, most of their work was analytical and expository. Law teachers who joined faculties during the 1970s took up the political and social challenge of the Quiet Revolution primarily in public law. The civil law professoriate aged and was not renewed with more modern preoccupations; the public law professoriate increasingly moved away from traditional research. Civil law teaching thereby attracted only that small number of self-selecting young professors who wished to undertake analytical research. It was as if deeply implanted in the psyche of civil law scholars were a controlling and limiting conception of legal scholarship as only formal, conceptual analysis. Young scholars interested in empirical approaches, historical studies, economic analysis and legal culture invariably were researching and writing in public law topics. Consequently, a generation gap appeared in the civil law professoriate, and this gap was reflected in scholarly orientation.¹¹⁶

In retrospect, the period of emergent law faculties was a partial disappointment with respect to civil law scholarship. The period began with a flourish of creativity and a cadre of young professors capable of carrying the scholarly tradition beyond professional and purely analytical research. The need to create a 'modern' civil law doctrine which was by then fifty years out of date in some areas, as well as the deflection of interest to the Civil Code Revision Project, to public law subjects and to the 'national question' in Quebec slowed considerably the pace of these developments.

As one surveys the scholarly scene at the turn of the 1980s, however, two major developments since 1966 are apparent. First, the vast bulk of civil law scholarship is now being undertaken by full-time professors. Second, there are only a few areas of private law, notably theoretical aspects of the law of property, secured transactions and registration of rights,¹¹⁷ which have not had a modern coverage in monographic form

¹¹⁵ See, for example, the bibliographical survey undertaken in J.G. Belley, "Du juridique et du politique en sociologie du droit: à propos de la recherche *Droit et société urbaine au Québec*" (1983) 17 R.J.T. 445.

¹¹⁶ I wish to thank my colleague Professor J.E.C. Brierley for helping me to formulate this idea.

¹¹⁷ See CLIC, *Ecrits juridique canadiens contemporains, Enoncé des besoins* (1980).

and detailed treatment in the periodicals. Once again, while one might have wished for a greater outpouring of historical and sociological work, and an even more sophisticated level of analytical writing, the product of these first years of the university tradition is remarkable, and far superior to any comparable writing in common law jurisdictions.¹¹⁸ It remains to assess whether or not contemporary civil law scholars based in the law faculties are now on the threshold of also undertaking more fundamental research.

C. *Contemporary Scholarship (1977-)*

Because history does not divide itself into convenient time periods, one is always slightly embarrassed by the choice of date from which to compute that which is contemporary. For present purposes, the end of the 1970s has (more or less) been chosen as a cut-off point. Two related reasons sustain this choice: first, the Civil Code Revision Office submitted its report and wound up its various study committees in 1977; second, a major private law research group, the Quebec Research Centre for Private and Comparative Law was established at the same time.¹¹⁹ Just as the Civil Code Revision Office dominated the private law research agenda of the emergent university period, so too it would seem, the Centre for Private and Comparative Law will play a major role in contemporary scholarship. Designed to promote fundamental civil law research and to generate the doctrinal infrastructure for the new Civil Code, the Centre has become the focal point for non-pedagogical private law scholarship. Any evaluation of contemporary scholarship must, therefore, begin with a review of its work.

To date the Centre has been predominantly pursuing projects in the mode of analytical scholarship. Some of its initiatives, such as the publication of an annual edition of the Civil Code hardly qualify as research scholarship at all. On the other hand, at least four of its efforts, *The Historical and Critical Edition of the Civil Code of 1866*,¹²⁰ the bilingual compilation of Civil Code terms,¹²¹ the English/French legal lexicon and the project to compile a definitive dictionary of civil law terms reasonably

¹¹⁸ See Janisch, *supra*, note 110.

¹¹⁹ There is a third reason for the choice of the late 1970s. I myself joined the McGill Faculty in 1979, and so, from that date onward can speak with first hand knowledge of the Quebec scene.

¹²⁰ This work, edited by Professors J.E.C. Brierley and P.A. Crépeau, for which a supplement has been recently prepared, contains a definitive text (complete with legislative history) of all amendments to the *Civil Code of Lower Canada* since 1866.

¹²¹ This two volume set, formally titled in English *The Key Words in Context of the Civil Code of Lower Canada (at 1 April 1984)* is a bilingual repertory of all uses of legal (and certain non-legal) terms in the 1966 Civil Code as of April 1, 1984.

can be characterized as the fruits of fundamental legal research. Each of these projects involves the investigation and verification of the linguistic and legislative data of Quebec private law. While none can be labelled as empirical legal research, all of these publications will be essential research tools for generations of civil law scholars, and all are the product of extensive investigation of primary sources.

These tools have also facilitated the Centre's major analytical project, the sponsorship of a new Civil Law Treatise. No volumes of this work have yet appeared, but research is underway by seven authors. This comprehensive treatise deals with the historical, economic, sociological and philosophical subtext of the Code and will constitute the first indigenous work of fundamental analytical and conceptual orientation (that is, will constitute *la doctrine*) not only in Quebec, but probably in Canada and will reflect the best to which scholarship in the civil law can aspire.

The Centre has also undertaken a major empirical inquiry into medical law, involving the study of medical malpractice in Quebec, its treatment by the courts and the effects of judicial decisions on medical procedures. Yet, this latter effort betrays the real irony of much contemporary civil law scholarship. In order to be attractive to researchers and especially to funding agencies, non-analytical, empirical projects seem to require an extra-codal dimension. 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*; rather than economic studies of consumer sales contracts, there are bureaucratic studies of the *Consumer Protection Bureau*; instead of studies of the lease of work (master/servant law), there are studies of decision making within the *Labour Standards Commission*. Funding and prestige rarely accrue to traditional legal analysis, even that of a fundamental nature, unless some broader dimension, like the possibility of a treatise, is present.¹²²

When one examines contemporary civil law scholarship not sponsored by the Centre, a familiar picture emerges. Private law scholarship by established law professors, whether it appears in monographic form

¹²² Of course, the judgment about whether prestige accrues to those engaged in traditional research is subjective. Yet my assessment of the reaction of the university community at large (as opposed to the Bar) to analytical studies is negative. Such a conclusion may also be deduced from the Annual Reports of the Directors of Quebec's various F.C.A.C.-sponsored Research Centres. The record of legal scholars before peer review committees of the F.C.A.C. and S.S.H.R.C. is proof enough of the proposition respecting outside funding, subject to the caveat that both the Bar and Board of Notaries have contributed substantially to the Civil Law Treatise project.

or in the law reviews, is still overwhelmingly analytical and expository.¹²³ Nevertheless, in the law reviews especially, some valuable sociological, historical, comparative and economic studies are appearing.¹²⁴ Moreover, historians, sociologists and economists are examining more often the legal regimes of New France and nineteenth-century Quebec. Even now the Quiet Revolution is seen as an historical artifact and has generated academic treatment. While most of these other scholars seem preoccupied with constitutional law, criminal law, labour law and so on, rather than with the civil law as reflected in the Civil Code, already they are having an impact on academic writing within the law faculties.¹²⁵

Yet, here lies a paradox. It bears notice that the one Quebec law faculty devoted to interdisciplinary and empirical work, the Université du Québec à Montréal, is dominated by public law scholars and little in the private law field has emerged. Moreover, the one Quebec law faculty with a commitment to comparative private law, McGill, has had difficulty in encouraging truly comparative research; 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.¹²⁶ In other words, there still remain significant barriers to the establishment of fundamental private law research (of either analytical, comparative or empirical orientations) even within institutions with a particular interest in and commitment to fundamental research.

Despite this observation, an in-progress summary of patterns in contemporary private law scholarship in Quebec would certainly not yield

¹²³ In the period 1980-1984 my sampling indicates a general ratio of six analytical studies to one non-analytical study.

¹²⁴ See, for example, J.G. Belley, "Vers une sociologie historique de la justice québécoise" (1983) 24 C. de D. 409; A. Morel, "Canadian Legal History — Retrospect and Prospect" (1983) 21 Osgoode Hall L.J. 159; Normand, *supra*, note 61; Jobin, *supra*, note 9; P. Carignan, "La place faite à la religion dans les écoles publiques par la loi scolaire de 1841" (1982-83) 17 R.J.T. 9; Gagnon, "Le transfert de la propriété comme garantie des obligations en droit anglais et en droit civil" (1982) 13 R.D.U.S. 3; D. LeMay, "Vers un contrôle bibliographique pour les lois du Québec" (1983) 24 C. de D. 305; S. Normand, "Justice civile et communauté rurale au Québec, 1880-1920" (1984) 25 C. de D. 579; and E. Mackaay, "Le droit relatif aux accidents: une interprétation économique" (1980-81) 15 R.J.T. 383; Boucher, Migué & Viens, "Consumer Protection Legislation: an Exercise in Property Rights Economics" (1983) 13 R.D.U.S. 391.

¹²⁵ See, notably, the studies by Belley, *supra*, notes 4 and 114 as concerns sociological work; the historical studies by A. Morel, *ibid.*, and Normand, *ibid.*; and the economic analysis by Mackaay, *ibid.* See also P. Desjardins "La Coutume de Paris et la transmission des Terres — le rang de la Beauce à Calixa — Lavalée de 1730 à 1975" (1980) 34 Revue d'histoire de l'Amérique française 331; J. Dickinson, *Justice et Justiciables: la procédure civile à la prévôté de Québec, 1667-1759* (1982).

¹²⁶ The efforts of the University of Ottawa to generate comparative legal scholarship also should not go unmentioned. From 1963-1975 the Faculty organized Annual Symposia on Comparative Law, but this project now seems in abeyance. Similarly, the attempt to produce a comparative study of private law has been aborted after one volume. See J.A. Clarence-Smith & J. Kerby, *Private Law in Canada — Comparative Studies — General Introduction* (1975).

a pessimistic prognosis. First, it is worth recalling that empirical legal studies require the coincidence of money, methodology and market. In recent years the F.C.A.C., aprovincial Social Sciences and Humanities Research Council, has sponsored several legal research centres, the McGill Centre for Private and Comparative Law being the most high-profile member of this group in civil law matters. Yet, to date, no private sources seem prepared to fund empirical research, even though the Bar and the Chamber of Notaries have made significant contributions to the Civil Law Treatise Project.

Moreover, legal researchers have not developed an adequate methodology either for the design or the execution of empirical studies. 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.

Finally, the effect of an absence of market should not be underestimated. The profession itself is rarely interested in non-analytical work, and academic lawyers have not yet succeeded in carving out their niche as a learned discipline. Neither economic reward, nor personal recognition accrues to those who pursue empirical or historical work. For this reason, the gestation period for such scholarship (as a major academic preoccupation) is likely to be another ten to fifteen years. The university tradition is still in its adolescence in most Quebec law faculties.

The prospects for fundamental analytical research are much better. The rate of production of such scholarship in monographic form is extraordinary. The basic bibliographical work has been undertaken and research tools for exploiting it are now being developed. For example, there is a project to catalogue and index the Archives of the Civil Code Revision Office; the Historical Code and the Key Words in Context Index are already in place; and the Civil Law Dictionary, along with the bilingual lexicon are well on the way to completion. Finally, the Treatise project is receiving significant financial support and is progressing on several fronts. Should this latter project realize the ambitions of its proponents, it will represent the epitome of *la doctrine* across the entire range of private civil law.

The most important development which augurs for the future of civil law scholarship, however, is a renewed interest in private law among younger scholars. Many of this new generation have undertaken graduate study in a foreign country, and bring a more cosmopolitan perspective to their research. Because they no longer consider themselves to be just private lawyers or just public lawyers, significant academic cross-

fertilization is occurring, as they discover the intellectual challenges to be found in historical, sociological and economic analyses of private law. Experience elsewhere has shown that there are few better stimuli to high-quality legal research than inter-generational intellectual conflict.¹²⁷ There is, therefore, cause for real excitement about the future of fundamental civil law scholarship.

IV. CONCLUSION

It is now appropriate to address explicitly the question why, given the important theoretical position of analytical studies in the civil law, fundamental non-empirical scholarship has not yet flourished in Quebec. Several contributing factors have already been mentioned: the relatively recent university tradition in law; the small size of the legal academic community, comprising at most one hundred professors; the deflection of scholarly energies to the Civil Code Revision Project; the seduction of public law in the 1960s and 1970s; and the demands of magisterial pedagogy. Considering these various impediments, it is remarkable that much research in civil law of any dimension has been generated by law professors.

Yet there is one other factor which cannot be ignored: the scholarly tradition in Quebec private law has been harmed by its insularity. In 1985, however, the prognosis is favourable. The broader interests of younger civil law scholars — in empirical research, comparative law and historical, economic and sociological analysis — will eventually transform the agenda for civil law research. If the university tradition flourishes as one of openness and embrace, the unique features of Quebec's private law culture, including its bilingual and bisystemic character, will propel civil law scholarship to the vanguard of twentieth-century Canadian legal research. In this sense, 'understanding civil law scholarship in Quebec' means understanding that the historical record of, and immediate prospects for, fundamental analytical scholarship (*la doctrine*) are indeed much brighter than elsewhere in Canada.

¹²⁷ The tension between realists and formalists that was played out in the United States in the 1930s is only the most well known of these controversies. For a civil law perspective see Atias, "La controverse doctrinale dans le mouvement du droit privé" (1983) 8 R. de la recherche juridique 427.