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We do little more than rearrange, adorn, or modernize the old subjects. There is as if a stoppage of thought. It seems that the mind has fallen into a sort of inertia. There is vacuity and drought.

– Johan Huizinga¹

The illusion that a meaningful appreciation of a legal tradition or a legal system can emerge from the discursive space traditionally occupied by comparative work about law is at once tenacious and pernicious. In fact, the comparatist can only hope to gain significant insight if she is prepared to move beyond the orthodox enunciative boundaries, which have largely confined comparative legal studies to the delineation of legal families and the exposition of legal rules that give legal systems an oddly reiterative look. Thus, the comparatist must resist the synecdochic illusion which would lead her to believe that the representation of a legal system as a body of rules captures the whole and, therefore, involves no loss. Clifford Geertz's admonition is apt: 'Something ... less muscular is needed, something ... more reactive; quizzical, watchful, better attuned to hints, uncertainties, contingencies, and incompletions.'² I argue that the comparatist must operate at the level of *mentalité*. Specifically, she needs to focus on those factors which, although usually intervening in the realm of the unconscious, mould the structures of thought legal actors use to interpret and understand the social world around them and their own location within it.

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† An essay written on the occasion of the publication of John E.C. Brierley and Roderick A. Macdonald (eds) *Quebec Civil Law* (Toronto: Emond-Montgomery 1993) pp. lviii, 728. ISBN: 0-920722-47-4 \$90.00 [hereinafter *Quebec Civil Law*]. Vital steps in the argument are the product of fruitful discussion with Linda Rae Legault, who generously brought to bear her scientific expertise in cognitive psychology. The usual disclaimer applies. Translations into English are mine.

1 Johan Huizinga *L'automne du Moyen Age* trans. J. Bastin (Paris: Payot 1975) 306–7 [originally published in Dutch in 1919] ('On ne fait guère que remanier, orner ou moderniser les vieilles matières. Il y a comme un arrêt de la pensée. On dirait que l'esprit ... est tombé dans une sorte d'inertie. Il y a vide et sécheresse').

2 Clifford Geertz *After the Fact* (Cambridge, Mass.: Harvard University Press 1995) 44.

It is on the basis of these cognitive experiences that a legal community establishes its thought patterns and produces its collective meanings.

Only such a programmatic shift in comparative work about law can favour the conduct of inquiries into the mythologies of the civil law and common law worlds with particular reference to prevailing epistemological assumptions, that is, with especial concern for the mode of constitution of knowledge, for the way in which rationalities are shaped. It is these mythologies that perform the mediation between the objective conditions in which a legal community lives and the manner in which it tells itself and others about the way it lives. It is also these mythologies that capture the symbolic and symbolizing attributes with which a legal community describes itself.³ In the words of John Merryman, writing with respect to the civil law tradition, '[t]o understand a contemporary civil law system you have to know where it comes from and what its image of itself is ... In most of the civil law world legal professionals believe in that image. Even those who do not believe in it often feel compelled to act as though they do.'⁴ The comparatist's aim, thus, is to reveal a layer of knowledge that often eludes the consciousness of a legal community and is yet part of its legal discourse. More precisely, she should seek to outline the tenets by reference to which a legal community defines the objects of its study, forms its concepts, builds its theories. How is it possible for a legal community to think in the way it does, that is, to privilege a given form of knowledge? How do particular world-views (*Weltanschauungen*) become meaningful? How are other world-views accommodated? How are alternative world-views resisted?

The concept of *mentalité* allows the integration (and the rehabilitation) into the field of study of what is left unformulated, of what is apparently insignificant, of what remains buried at the level of unconscious motivations – of the *non-dit* – within legal systems. It is actively created and constituted within the situated context of a legal community's own daily experiences. As it gives life to an innumerable number of small facts by placing them in a larger setting and makes sense of a thousand little details ensuring that humdrum but crucial aspects of everyday life become more intelligible, the notion of *mentalité* allows for the most authentic expression of a collective identity, what

3 For the importance of a symbolic universe on a community, see Peter L. Berger and Thomas Luckmann *The Social Construction of Reality* (London: Penguin 1966) 120–1.

4 John Merryman [letter to the editor] (1987) 35 *Am. J. Comp. L.* 438, 441.

Michel Vovelle calls 'the treasure of a preserved identity.'⁵ In a privileged way, *mentalités* refer to memory, to a form of resistance revealed by the force of inertia of verbal structures. Accepting that collectivities do not think and that there is a limit to what can be achieved by the anthropomorphization of a legal community, it remains that the psychological notion of *mentalité* offers more stability and greater specificity than elements of the seemingly more objective world, such as propositions, governed as they are by contingent imperatives.⁶ To study a *mentalité* is to work on the *longue durée* in an attempt to uncover the framework of intangibles – otherwise known as a 'culture' – which has determined the identity of a particular legal or lay community *as community*.⁷ It is, ultimately, to engage in a phenomenological investigation of what is possible for a legal community and the semiotic subgroups it harbours, such as practitioners, judges, and academics. Indeed, one cannot afford to study a legal experience without examining what kind of legal experience is possible, for culture limits possibilities of experience: it constrains. In this sense, a culture is both a liminal and a finite space.

The most arresting features of John Brierley and Roderick Macdonald's *Quebec Civil Law* are precisely the *inevitability* of its existence and the *ineluctability* of its contents. My argument is that *Quebec Civil Law* attracts attention principally as yet another instantiation of the civil law myth. A first part, covering approximately one-quarter of the book, offers a historical survey of the civil law in Quebec with a firm focus on the role and importance of the civil code since its adoption in 1866. For example, the matter of the relationship of the civil code with other sources of law and that of its interpretation are addressed at some length. This section owes much to Brierley's percipient writings on codification.⁸ It is articulate, insightful, and stimulating. It also stands in

5 Michel Vovelle *Idéologies et mentalités* (Paris: Gallimard 1982) 22 ('le trésor d'une identité préservée').

6 Gaston Bouthoul *Les mentalités* 4th ed. (Paris: Presses universitaires de France 1966) 11.

7 See Fernand Braudel *Grammaire des civilisations* (Paris: Flammarion 1993) 53–4 (originally published in 1963); Jacques Le Goff *La vieille Europe et la nôtre* (Paris: Editions du Seuil 1994) 67.

8 E.g., John E.C. Brierley 'Quebec's Civil Law Codification Viewed and Reviewed' (1968) 14 *McGill LJ* 521; Brierley 'Quebec's "Common Laws" (*droits communs*): How Many Are There?' in *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur 1989) 111; Brierley 'The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Québec' (1992) 42 *UtlJ* 484; Brierley 'Les langues du Code civil du Québec' in *Le nouveau Code civil : interprétation et application* (Montreal: Thémis 1993) 129.

sharp contrast to the remainder of the text. Accounting for the bulk of the book, the second part of *Quebec Civil Law* attests to the trained inability of civilians to shed the besetting hobble of positivism. It reveals a holistic project which betrays a search for a totalizing understanding capable of formalization and which aims to encompass all civilian knowledge by removing any space of opacity. More than five hundred pages are devoted to a succession of essays on the law relating to persons, family relations, property, inheritance and liberalities, obligations, nominate contracts (such as sale and lease), security on movable and immovable property, and proof. Treatments of commercial and private international law are also included. I found these studies – a compendium of often terse and peremptory statements on the posited law – inadequate to the task of re-presenting a legal culture to itself and of introducing it to a foreign audience.

But, I do not propose to engage in a painstaking, if somewhat tedious, counter-articulation of the intellectual project put forward by the apologists of the expository approach. More interesting, for my purposes, is the way in which *Quebec Civil Law* reveals how civilian writers are limited to the dull banalities of positivism by the foundational myth of the civil law tradition – that of the exhaustive, autarkic, unitary, and sacred order of the civil law – which they feel, not necessarily consciously, must be preserved and propagated. It is this adherence to civil law mythology, a phenomenon little remarked upon and yet remarkable, that explains the civilian's commitment to the atomism of the descriptive approach and that accounts for his inability to shake the yoke of the glossarial format and to dispel the bland and irenic nature of his discourse. In other words, epistemological constraints operate in such a way that the civilian academic is simply not at liberty to produce any type of text about the civil law, if only on account of his inability to *conceive* of alternative genres. This assertion would also forcefully apply to writers operating in jurisdictions that are more typically civilian than is Quebec, such as are found in Europe and Latin America. Northrop Frye is being too prudent – almost optimistic – when he writes that 'it is not easy to break out of the mental habits formed by a mythical framework.'⁹

In my elaboration on the allegories of the civil law tradition, as epitomized by *Quebec Civil Law*, I aim to achieve two objectives. First, I want to show the relevance of the notion of myth for a deep appreciation of the civil law world. I contend that the comparatist should not be

9 Northrop Frye *The Critical Path: An Essay on the Social Context of Literary Criticism* (Bloomington: Indiana University Press 1971) 50.

satisfied with anything less than what Geertz, borrowing from Gilbert Ryle, calls a ‘thick description’ of his object of study.¹⁰ I further argue that an appreciation of mythology is the essential key allowing him to operate at that level. Second, I wish to explicate the central tenets of civil law mythology itself and demonstrate how *Quebec Civil Law* faithfully abides by them.

Before turning to the civil law world as such, a few general propositions may be advanced about myth. An initial question, as noted by Mircea Eliade, concerns the polysemy of ‘myth.’ Although the word means ‘fiction’ or ‘illusion,’ it also denotes ‘sacred tradition, primordial revelation, exemplary model.’ In that sense, therefore, myth means a ‘true story,’ albeit in a metaphorical guise.¹¹ Etymologically, the Greek *muthos*, indeed, refers simply to a group of words that have meaning. Yet, one readily expects modern law – and modern scholarship about law – to have moved away from myth. The Enlightenment is generally regarded as having substituted the rational for the irrational as the referential framework within which the (Western) intellectual quest for order and meaning is to occur. My thesis is that this transformation has not, in fact, happened and that myth remains an irreducible feature of contemporary law: it is constantly to be found within its practices and its jurisprudence, that is, at both the operative and theoretical levels.¹² Moreover, it is wanted, for it fosters the reaffirmation of core values and beliefs: ‘The function of myth ... is to strengthen tradition and endow it with a greater value and prestige by tracing it back to a higher, better, more supernatural reality of initial events.’¹³

The ascendancy of tradition carries concrete implications: ‘Myth assures man that what he is about to do *has already been done*, in other words, it helps him to overcome doubts as to the result of his undertaking.’¹⁴ In the words of Eliade, ‘[t]his periodic reiteration of what was

10 Clifford Geertz *The Interpretation of Cultures* (London: Fontana 1993) 6–10. Geertz is referring to Gilbert Ryle ‘The Thinking of Thoughts: What Is “Le Penseur” Doing?’ in Ryle *Collected Papers II: Collected Essays: 1929–1968* (London: Hutchinson 1971) 480 (originally published in 1968).

11 Mircea Eliade *Myth and Reality* trans. Willard R. Trask (New York: Harper & Row 1963) 1.

12 The pertinence of myth is not confined to law. For a discussion of salient links between myth and science, see, e.g., Paul Feyerabend *Against Method* (London: Verso 1975) passim, especially 295–309.

13 Bronislaw Malinowski ‘Myth in Primitive Psychology’ in Ivan Strenski (ed.) *Malinowski and the Work of Myth* (Princeton: Princeton University Press 1992) 114 (originally published in 1926).

14 Eliade, *supra* note 11, 141 (emphasis original).

done *in illo tempore* makes it inescapably certain that something *exists absolutely*.¹⁵ Because of the perpetuation of a referential framework and of the particular focuses of analysis that it entails or, in other terms, because of the act of faith that is allowed by myth as 'sacred narrative,'¹⁶ it is not unusual for myth, in time, to appear as a hegemonic statement. Myth frequently encodes the dominant ideological system in a given interpretive community. After all, myth accounts for how the world came to be in its current form. Yet, those who live by the myth – from which they derive their faith – refuse to acknowledge its role, which they regard as menacing: 'In identifying mythical elements in our own cultural or professional assumptions, we threaten our ethnocentric self-confidence. We discover a psychic dimension which recognizes the power of myth and unconscious desire as forces, not only in history, but in shaping our own lives. We open up a history which refuses to be safely boxed away in card indexes or computer programs: which instead pivots on the *active* relationship between past and present, subjective and objective, poetic and political.'¹⁷

Three conclusions follow. First, one notes the primordiality of myth. Malinowski's words, initially written to describe 'primitive' culture, are apposite: 'Myth fulfills ... an indispensable function: it expresses, enhances, and codifies belief ... Myth is thus a vital ingredient of human civilization; it is not an idle tale, but a hard-worked active force.'¹⁸ Second, one discerns the irrefutability of myth. The irrefragable character of myth is addressed by Cassirer, who comments that '[w]hat has its roots in this mythical past, what has been ever since, what has existed from immemorial times, is firm and unquestionable. To call it into question would be a sacrilege.'¹⁹ Third, one observes the concealed and unacknowledged action of myth. As we direct our minds to the civil law world proper, it is useful to meditate Paul Ricoeur's reflection to the effect that the legal mythology is 'the most enticing, the most fallacious of mythologies, accordingly the most difficult to deconstruct, but especially the one that resists to reinterpretation the most energetically,' notably on account of the intervention of legal

15 Ibid. 140 (emphasis original).

16 Alan Dundes 'Introduction,' in Dundes (ed.) *Sacred Narrative: Readings in the Theory of Myth* (Berkeley: University of California Press 1984) 1.

17 Raphael Samuel and Paul Thompson 'Introduction,' in Samuel and Thompson (eds) *The Myths We Live By* (London: Routledge 1990) 5 (emphasis original).

18 Malinowski, *supra* note 13, 82.

19 Ernst Cassirer *An Essay on Man* (New Haven: Yale University Press 1944) 224.

rationality in the fabrication of myth.²⁰ This adjunction of the rational (the clear, the rigorous, the continuous) to myth leads Ricoeur to refer to legal mythology as being 'mytho-logical' ('mytho-logique').²¹

The point is made that every myth both presupposes and illustrates a whole universe so that the student of myth must, sooner or later, penetrate sophisticated denotative and connotative networks.²² The confines of this essay, however, force me to privilege a reductionist analysis. I purport to establish how the original myth of the civil law tradition controls the way in which this tradition continues to be experienced and re-presented in contemporary civilian communities. In my view, essential aspects of the civil law tradition can be illuminated by taking seriously the analogy between the civil code and the Bible and by examining the implications that follow.²³ My goals are to demonstrate that the civil law tradition is built around the primordial character of a Text, to ascertain the sacred nature of that Text, and to establish how the pre-eminence of that Text fosters in the interpretive community (which it generates) an attitude of subjugation to the Word and an approach to the study of law characterized by literalism, dogma, and censorship. I argue that the form and contents of *Quebec Civil Law* support my assertions. I propose to divide my argument into a number of discrete propositions.

First proposition: The civil law is a law of the Text

The concept of 'order' appears as a cardinal element in the legal and religious worlds of the earliest societies. Nothing escapes the dominion of order, whether one is talking about the movement of the stars, the periodicity of seasons, the relations between human beings and their

20 Paul Ricoeur *Le conflit des interprétations* (Paris: Editions du Seuil 1969) 364–5 ('la plus captative, la plus fallacieuse des mythologies, la plus difficile par conséquent à déconstruire, mais surtout celle qui résiste le plus énergiquement à la réinterprétation').

21 Ibid.

22 Norman Austin *Meaning and Being in Myth* (University Park: Pennsylvania State University Press 1990) 2.

23 For innovative reflections by American scholars on constitution-worship in the United States, cf. Thomas C. Grey 'The Constitution as Scripture' (1984) 37 *Stan. LR* 1; Michael Kammen *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf 1987); Sanford Levinson *Constitutional Faith* (Princeton: Princeton University Press 1988).

gods, or the interactions between human beings themselves.²⁴ Indeed, Simone Goyard-Fabre writes that ‘at the bottom of the legal crucible, it is the *need for order* that we notice.’²⁵ One of the most influential of such experiences of legal order in Western history remains that of codification – a distinctive and enduring ‘means of ordering reality’ and a ‘mode of perceiving, of construing, and potentially of controlling the social field.’²⁶

The earliest collections of edicts, often the most ancient documents to have been preserved from civilizations that vanished as long as four thousand years ago, were not codes of law in the modern sense. Not only did they not evidence an attempt to present the totality of a territory’s laws, but often they did not even carry legislative value. Moreover, they did not appear as a configuration of general statements partaking of a logical whole.²⁷ Accordingly, it is usually said that the first, and most significant, code for Western civilization remains Emperor Justinian’s sixth-century collection of Roman laws, later to be known as the *Corpus Juris Civilis*. But, once again, the word ‘code’ is abused, since the bulk of the Roman compilation – that part known as the ‘Digest’ – consists of an extensive casuistic patchwork offering literally hundreds upon hundreds of brief case studies and their solutions, all borrowed from the writings of leading juriconsults.²⁸ It is, however, accurate to say that a much smaller component of the *Corpus Juris Civilis*, identified as the ‘Institutes’ and meant as a student textbook, had little to do with the *Kategorienlehre* of the Digest and offered the salient elements that would nowadays be associated with a code of laws. Most characteristically, the Institutes sought to bring to light patterns of reality, to define them in terms of their abstract features, and to arrange them by reference to orders and genres.²⁹

24 Emile Benveniste *Le vocabulaire des institutions indo-européennes* II: *Pouvoir, droit, religion* (Paris: Editions de Minuit 1969) 100.

25 Simone Goyard-Fabre *Essai de critique phénoménologique du droit* (Paris: Klincksieck 1972) 273 (emphasis original) (‘Au fond du creuset juridique, c’est ... le *besoin d’ordre* que nous apercevons’).

26 Donald R. Kelley *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press 1990) 49.

27 Esther Cohen *The Crossroads of Justice: Law and Culture in Late Medieval France* (Leiden: Brill 1993) 4–7.

28 See generally H. Ankum ‘La “codification” de Justinien était-elle une véritable codification?’ in *Liber amicorum John Gilissen: Code et constitution* (Antwerp: Kluwer 1983) 1.

29 For the intellectual genesis of modern classification, see generally Michel Foucault *Les mots et les choses* (Paris: Gallimard 1966) 137–76.

The Institutes, deriving their inspiration from the jurisconsult Gaius (who himself had borrowed from an earlier systematizer of Roman legal science, Scaevola), purported to represent the world as a system by organizing reality exhaustively around the categories of persons, things, and actions (the latter term referring to the interactions between persons and things). It is the primacy thus given to the knowing subject using words capable of describing the world – the anthropomorphic focus of the Institutes – that allowed Donald Kelley to assert that ‘Justinian’s system ... was in effect the first system of social engineering.’³⁰ Roman jurists were acting on their unarticulated fundamental intuition that the world could be organized or harmonized, that social interactions should be captured and re-presented within the boundaries of written reason, and, finally, that such systematization was intrinsically useful. This deep conviction in the possibility of instituting an isomorphism between a cognitive system and the world it purports to encapsulate offers the early demonstration of a compelling phenomenon which continues to captivate: the faith of entire legal communities in the probative efficacy of propositional knowledge.

The end of the eleventh century witnessed an intellectual revival of the *Corpus Juris Civilis* as it became the subject of intensive scholarly study and provided the focus for the establishment of the first law schools in Northern Italy. Over the next centuries, the *Corpus Juris Civilis* and the extensive doctrinal literature which it spawned in writers searching for the immanent rationality of the Roman compilation progressively spread across most of Europe and eventually supplemented, or displaced, many of the local customs. In the process, that body of unenacted Roman law (which also comprised an important canon law component) became a kind of supereminent law common to most of Europe, a *jus commune*. The ever-growing ascendancy of Roman law, combined with the influence of humanist schools of thought privileging natural reason and mathematics, produced, in the seventeenth century, learned texts about law purporting to actualize and order the Roman compilation. The writers of these works aimed to optimize the accessibility and, therefore, the usefulness of the Roman model for European States by ‘domesticating’ it. In this way, Roman law was stripped of its more technical aspects and was organized on the basis of general principles in accordance with natural reason. Doctrinal writers set themselves the task of expressing these great principles and

30 Kelley, *supra* note 26, 53.

of exposing them according to deductive logic so that the whole of the subject-matter would be self-evident.

While one can identify diverse reasons why the view of the world as a single, determinate, rationalizable order failed to seduce English lawyers to the same degree and why these accordingly resisted the quest for formal rationality, the traditional absence of an influential body of scholarship about law in England, making English law 'a law without legal science,'³¹ must count as an important factor. The argument is not, of course, that continental jurists were more credulous than others or that English lawyers were less concerned with the accuracy of their observations or with rationality. Rather, the English lawyers' gaze was not bound to things by the same intellectual system on account of the different epistemological framework within which they were already operating.³²

Nationalistic fervour and authoritarian leaders subsequently channelled the body of learned work that had developed in continental Europe into the adoption of codes of laws known as 'civil codes,' the most influential and most celebrated of them – albeit not the earliest one, for the Prussian civil code had preceded it by ten years – being the *Code civil des Français* promulgated into force in 1804 under the aegis of Napoleon. The French code was in many ways a product of the Revolution and had, indeed, been preceded by four drafts that had been prepared and rejected in the decade following 1789. The adoption of the French civil code heralded a move away from a situation which had been dominated by a mixture of subnational, or local, customs and supranational law (the *jus commune*) to a case where the code would be seen as an important symbol of *national* unity, whether political or legal, and as a formal affirmation of the doctrine of equality of all citizens before the law.

Throughout the nineteenth century, most jurisdictions in continental Europe enacted a civil code, and many ensured that their colonies did likewise. Interestingly, although some civil codes were imposed from outside – Napoleon was a particularly keen proselytizer – a number of countries willingly adopted external models (it is noteworthy that, by contrast, no jurisdiction has ever voluntarily imported

31 J. Walter Jones *Historical Introduction to the Theory of Law* (Oxford: Oxford University Press 1940) 1 n1, referring to the German legal historian Rudolph Sohm ('ein Recht ohne Rechtswissenschaft').

32 I am adapting a thought by Foucault, *supra* note 29, 55.

the common law tradition).³³ Others yet developed home-grown products. Looking back, one sees that '[d]uring the last hundred years and more, codification ... has been the cardinal vehicle of law reform and unification of the national laws.'³⁴ Thus, Csaba Varga reports the findings of a UNESCO investigation published in 1957 which show that the form called 'codification' then existed in 67 per cent of known legal systems and that each system included an average of six codes.³⁵ One is tempted to quote Michelet: 'It is an important sight to witness the main legal symbols reproducing themselves in all countries, across the ages.'³⁶ In the process, the link between codification and the politico-legislative realm became firmly embedded. The perception of codification 'as an act of the deliberate and unfettered will of the ruler,'³⁷ as an act of power, has indeed led some authors to assert that 'codification is nothing but a means for the state to assert its domination by shaping and controlling the law.'³⁸ Mallieux, who presented the 1804 French code as 'a collection of orders given by the Master of the State,' would have concurred.³⁹

The importance of a civil code for a jurisdiction having adopted that form of legal ordering can hardly be exaggerated. A civil code is *norma normarum*. As a leading English historian reminds us, 'do not suppose

- 33 For stimulating analyses of the factors underlying legal transplants, see generally Rodolfo Sacco *Introduzione al diritto comparato* 5th ed. (Turin: UTET 1992) 147–52 (emphasizing the importance of prestige); Ugo Mattei 'Efficiency and Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 *Int. R. of L. & Econ.* 3 (stressing the role of efficiency).
- 34 Hessel E. Yntema 'The Jurisprudence of Codification' in Alison Reppy (ed.) *David Dudley Field: Centenary Essays* (New York: New York University School of Law 1949) 251.
- 35 Csaba Varga *Codification as a Socio-Historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) 18.
- 36 Jules Michelet 'Origines du droit français cherchées dans les symboles et formules du droit universel' in Paul Viallaneix (ed.) *Oeuvres complètes III: 1832–1839* (Paris: Flammarion 1973) 640 (originally published in 1837) ('C'est un important spectacle de voir les principaux symboles juridiques se reproduire chez tous les pays, à travers tous les âges').
- 37 F.A. Hayek *Law, Legislation and Liberty I: Rules and Order* (London: Routledge & Kegan Paul 1982) 84.
- 38 Varga, *supra* note 35, 334.
- 39 F. Mallieux *L'exégèse des codes et la nature du raisonnement juridique* (Paris: Giard 1908) 9 ('un recueil d'ordres donnés par le maître de l'Etat'). Cf. William T. Scott 'Codification' in Roberta Kevelson (ed.) *Law and the Human Sciences: Fifth Round Table on Law and Semiotics* (New York: Peter Lang 1992) 429: 'the central concept is that of control.'

that a civil code merely settles legal details: those small rules which will interest none but lawyers.' Rather, it deals 'with the most vitally important of all human affairs.'⁴⁰ What makes a civil code so significant from the perspective of a given society is that it has as its object the various passages or events in the life of the citizen and that it seeks to apprehend the world of interactions, social or otherwise, between one citizen and another. A civil code, for instance, is concerned with acts of birth, the authority of parents over their children, adoption, marriage, divorce, ownership, inheritance, contracts (whether sale, lease, or loan), and accidents.⁴¹ As will have been apparent, one finds here the same organizational trilogy that had characterized Justinian's Institutes: persons, things, and actions. It must be emphasized that modern codes systematically adopt this general outline or a variation thereof. The similarity is all but coincidental, for, as I have explained, the intellectual roots of contemporary codes can all be traced to Justinian's compilation through at least seven hundred years of writing about law. The web of relationships in which facts and events are placed as they are re-presented in terms of a code is not, therefore, the product of short-term experience alone: every code is an heirloom, the legacy of an incalculable sequence of generations.⁴²

A code is a cosmology. It attests to an effort to establish a body of absolute knowledge inscribed in categories, typologies, and polarities. The architectonics of a code finds its expression in a coherent structure which, in the case of the 1804 French *Code civil*, proceeds from books to titles to chapters to sections to subsections to articles. Through the series of pithy statements that are subsumed within this hierarchy of divisions, the code purports to offer a fully cohesive re-presentation of reality as it has come to be experienced by members of the society in which it is drafted – or, possibly more accurately, as they would wish to experience it. With a code, reality is abstracted through a process of mental ordering: it is temporalized and spatialized. Reality is also ordered, the provisions of a code being numbered consecutively in an uninterrupted sequence – the French code, for instance, beginning with article 1 and concluding with article 2283. In this sense, therefore,

40 F.W. Maitland 'The Making of the German Civil Code' in H.A.L. Fisher (ed.) *The Collected Papers of Frederic William Maitland III* (Cambridge: Cambridge University Press 1911) 481.

41 For an admirable description of the contents of the typical civil code, see Bernard Rudden 'From Customs to Civil Codes' *The Times Literary Supplement* 10 July 1992, 27.

42 I very closely paraphrase observations on language by Norbert Elias *The Symbol Theory* (London: Sage 1991) 129.

it does not seem excessive to assert that a civil code is a legal fiction since it represents a moulding or shaping of the world, 'the crafting of a narrative.'⁴³ Indeed, the Latin *factio* refers to 'creation' just as it connotes 'simulation.'

The result is an exhaustive and autarkic text. The code is exhaustive in the sense that it is without gaps as regards those fields of law it purports to embrace. Within its general ambit, a code, in other words, is never silent. Even when an issue arises which it does not explicitly address, the code makes provision for how such matter must be pursued. The autarky of the code, for its part, arises from the related idea that all of the basic law, pertaining to those fields of law covered by the code, is to be found in the code and not elsewhere and, moreover, that all of the code's provisions hide an underlying and fundamental unity. This is not to say, of course, that the code cannot accommodate legislative interventions outside its confines. Indeed, such measures are adopted daily in every jurisdiction where a civil code is in force. But, these statutes and regulations claim only adjectival status in the sense that, irrespective of their substantive importance, their application assumes, explicitly or not, the existence of the primary body of principles, doctrines, and rules to be found in the civil code. Moreover, when a statute or regulation is silent on a given issue, the interpreter naturally falls back on the civil code which, therefore, always acts as the legal substratum of the legal order: it is *incontournable*.

The virtues of exhaustivity and autarky claimed by civil codes show how the ascription of the label 'code' to a legislative intervention is hardly sufficient to turn a statute or regulation into a *code*. An illustration may be helpful. Article 1-103 of the American Uniform Commercial Code states that the application of the code depends not only on the provisions of the code itself, but also on a body of law – the common law and the law of equity – which, given its historical role within American law, cannot be regarded as being of adjectival character. In other words, there exists, in the case of the Uniform Commercial Code, a body of law that is of basic or fundamental character, that is necessary for the application of the Code, and that is to be found outside the Code itself. The Uniform Commercial Code is clearly not autarkic; it is, therefore, not a *code* in the traditional sense.

These remarks would be incomplete without at least some brief consideration being given to the matter of form, for a civil code is a

43 Natalie Zemon Davis *Fiction in the Archives* (Stanford: Stanford University Press 1987) 3.

noetic project linking norms and forms.⁴⁴ Robert Blanché notes that abstraction, through the formulaic expressions retained by the code, implies generalization.⁴⁵ One could add that codification also entails a stabilization and permanentization of the legal vocabulary. A code, thus, appears as a canonized form; indeed, Weber could write of the French civil code (with pardonable exaggeration) that many of its epigrammatic and monumental sentences 'ha[d] become parts of common parlance in the manner of ancient legal proverbs.'⁴⁶ Clearly, its systematicity and the prescriptive power of its lapidary provisions confer to a civil code a singular persuasive strength that captures the imagination of its interpretive community, in whose eyes it readily appears as inviolable and incontestable.

For all jurisdictions that have fostered a civil code, the field of law – known as the 'civil law' – that is subsumed under the institutional trilogy has consistently remained, by far, the most prominent branch within the legal order. Again, this assumption of centrality by the civil law, and by the civil code which is the civil law's cornerstone, finds its origins in the days when it was the focus of Justinian's compilation in the sixth century. In France, for example, the civil code acts as a citizens' constitution.⁴⁷ It is arguably a more powerful legal symbol than the formal constitution itself.⁴⁸ Perhaps the relative significance of the civil code may be measured by the fact that although France has experienced fifteen constitutions since 1789, the 1804 code remains: *les constitutions passent, le code reste*. It is in the civil code, for instance, that one finds a proclamation of the right to private ownership and its

44 I have addressed the matter at greater length elsewhere: Pierre Legrand, 'Civil Law Codification in Quebec: A Case of Decivilianization' (1993) 1 *Zeitschrift für Europäisches Privatrecht* 574.

45 Robert Blanché *L'axiomatique* (Paris: Presses universitaires de France 1955) 76.

46 Max Weber *Economy and Society* II Guenther Roth and Claus Wittich (eds) (Berkeley: University of California Press 1978) 865 (originally published in German in 1922).

47 For the 'constitutional' status of the French civil code, see Jean Carbonnier 'Le Code civil' in Pierre Nora (ed.) *Les lieux de mémoire* II: *La Nation* vol. 2 (Paris: Gallimard 1986) 308–9; Bernard Rudden 'Soviet Civil Law,' (1989) 15 *R. of Socialist L.* 33 (now *R. of Central & East European L.*). Contra: Antonio Gambaro 'Codes and Constitutions in Civil Law' in Alfredo Mordechai Rabello (ed.) *European Legal Traditions and Israel* (Jerusalem: The Hebrew University of Jerusalem 1994) 157.

48 For a reflection on Dutch legal culture as offering another example of a civilian legal culture where the constitution is not central to the political tradition and carries limited symbolic prominence, see W.J. Witteveen 'The Symbolic Constitution' in Bert van Roermund (ed.) *Constitutional Review: Theoretical and Comparative Perspectives* (Deventer: Kluwer 1993) 94, 100.

corollary, a prohibition against expropriation without compensation. Likewise, it is the civil code that asserts the binding character of contracts and the integrity of the human person. One understands better how, in his famous reply to Vélez Sársfield's draft Argentine *Código Civil*, Alberdi felt moved to refer to the civil code as the 'civil constitution of [his] country.'⁴⁹

The hypertrophy of the civil law as compared with other fields such as criminal law or constitutional law reflects itself in the heightened status of teachers, practitioners, and judges operating within the intellectual confines of the civil code and its tributaries, in the structure of the legal studies curriculum (where, for instance, a first-year introduction to legal studies is, effectively, an introduction to the civil law),⁵⁰ and in the prestige attached to writing about the civil code and civil law in general. Thus, Jean Carbonnier argues that 'it is the civil law's traditional vocation to offer models to the other legal disciplines.'⁵¹ André-Jean Arnaud makes a related point when he writes that 'the civil law contains the philosophical premisses of all legislation.'⁵² Indeed, one author refers to those branches of the law that do not partake of the civil law as 'illegitimate child[ren].'⁵³ The use of the synecdoche by anglophones, who systematically refer to 'civil law systems' or to the 'civil law tradition,' captures some of this dynamics.

In all civil law jurisdictions, therefore, the law is (and has been, at

49 Juan Bautista Alberdi *El Proyecto de Código civil para la República Argentina* (Paris: Jouby & Roger 1868) 1. For this debate, see generally Victor Tau Anzoátegui *La codificación en la Argentina* (Buenos Aires: Universidad de Buenos Aires 1977) 373–85 ('Constitución civil de mi país'). I am grateful to Xavier Lewis, of the European Commission, for alerting me to the relevance of these texts for my research.

50 For the history of introductory courses to law in the civil law tradition, see generally Prosper-Louis-Auguste Eschbach *Introduction générale à l'étude du droit* 3d ed. (Paris: Cotillon 1856) xiii–xxiv; N. Falck *Cours d'introduction générale à l'étude du droit* 4th ed. trans. C.-A. Pellat (Paris: Gustave Thorel 1841) 46–53 (with specific reference to Germany). A decree of 19 November 1859 suppressed the chair of 'general introduction to the study of law' ('introduction générale à l'étude du droit') at the *Faculté de droit* of Paris: D.1859.IV.116.

51 Jean Carbonnier *Droit civil: Introduction* 22d ed. (Paris: Presses universitaires de France 1994) no. 1, p. 15 ('le droit civil a dans sa vocation traditionnelle d'offrir des modèles aux autres disciplines juridiques').

52 André-Jean Arnaud *Essai d'analyse structurale du Code civil français: La règle du jeu dans la paix bourgeoise* (Paris: L.G.D.J. 1973) 5 ('le Droit civil ... contient les prémisses philosophiques de toute la législation').

53 John W. Van Doren 'Things Fall Apart, or Modern Legal Mythology in the Civil Law Tradition' (1993) 2 *Widener J. Publ. L.* 447, 466.

least since the sixth century) a law of the Text in the sense that everything that is re-presented as the 'legal' has followed from a pivotal text, for many centuries a Roman compilation and more recently a civil code. Normalization having proved such a determining intellectual phenomenon in the history of the civil law tradition, the civil code appears as the key to the legal order prevailing in civil law jurisdictions and, moreover, as the essential clue to an understanding of the unique features of the civil law *mentalité*. Indeed, the enduring system of thought that finds its manifestation in the institutional trilogy of persons, things, and actions has been compared in significance to that other, linguistic, trilogy of subject, object, and verb.⁵⁴ The argument regarding the value of an emblematic document like the civil code can also be reinforced in an anecdotal mode.

I found myself at the central station in Milan (Stazione di Milano Centrale) on 20 December 1993. Having made my way to the newsstand (libreria), I noticed that, along with the illustrated books and glossy magazines on gardens and gardening, beauty care, first aid, exercise, honey and health, the test of sex appeal, curing insomnia ('a practical manual'), sheet music for popular Roman songs, and thirty ideas for Christmas decorations and presents, the Italian citizen could also readily acquire a handy copy of the *Codice civile*.⁵⁵ Bearing in mind that Italy has been said to be the prototypical civilian jurisdiction, notably on account of the fact that it combines French and German influences,⁵⁶ the story of the commodification of the civil code, no less than solemn disquisitions on the topic (other stories, really!), should convince the reader that, for an 'average' citizen from a civil law country, the civil code is very much part of her cultural heritage.⁵⁷ It is,

54 Kelley, *supra* note 26, 9. Cf. Shael Herman and David Hoskins 'Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations,' (1980) 54 *Tul. LR* 987, 994-5: 'Gaius and Justinian subscribed to a view of society as a civil drama that develops successively the actors (persons), the stage set (things), and the dramatic action (modes of acquisition).'

55 In the course of the fortnight that followed, I also spotted the Italian civil code at train stations in Venice, Bologna, Florence, and Genoa. On each occasion, the three other main codes – the code of civil procedure, the penal code, and the code of penal procedure – were also available.

56 John Henry Merryman and David S. Clark *Comparative Law: Western European and Latin American Legal Systems – Cases and Materials* (Indianapolis: Bobbs-Merrill 1968) 254-5.

57 Other anecdotes could make the point: in September 1993, I bought the official edition of the Swiss civil code at the bookshop in a small village in the Valais for the equivalent of a few dollars. It was on display with maps of the area.

of course, paradoxical that it should be the civil law that purports to be made readily accessible to the people, having been initially imposed onto the people by legislative fiat – nowhere more so than in Italy where the origins of modern codification can be traced to the Napoleonic conquests – while the common law, although spontaneously stemming from the people’s disputes over the centuries, remains but ‘a brooding omnipresence in the sky.’⁵⁸

In sum, the civil law world and the civil law *mentalité* are informed by an internalization of the civil code as an act of governmental power producing a fundamental legal text whose status is derived from the tenet of primacy of legislation. This doctrine is itself rooted in an understanding of legislation as a representation of the general consensus, as offering a bastion against inequality before the law, as marking a clear break with the past, as channelling the law to the people, as providing an autonomous and self-contained referential system of ‘law-finding’ that offers a compelling re-presentation of the existing world and that acts as a testimony to the values of legal systematization and deductivism, and as enshrining a form of words conducive to effectiveness and longevity. Within a given legal culture, the civil code, because of the crucial role it plays in defining the *mentalité* of a whole community of jurists (and, indeed, non-jurists), not only stands for order, but is a crucial ingredient in its realization. It is “ordering order” (*ordo ordinans*), not “ordered order” (*ordo ordinatus*).⁵⁹ The attraction of the code, however, also arises from its status as sacred Text.

Second proposition: The Text is experienced as sacred

The civil code is an atavistic legacy of the Bible. It is, itself, a (secular) Bible.

The conversion of Roman Emperor Constantine in the early part of the fourth century, the granting to the Church of the legal-corporate personality, and the establishment of Christianity as the official imperial religion consolidated the belief that the Roman emperor was the head of the Church and represented Christ on Earth. The Christian emperors of Byzantium considered it their Christian responsibility to revise the laws in an attempt to achieve greater humanity. A necessary

58 The expression is Oliver Wendell Holmes’s: *Southern Pacific Co. v. Jensen* 244 US 205 (1916) 222.

59 Ernst Cassirer *The Philosophy of the Enlightenment* trans. Fritz C.A. Koelln and James P. Pettegrove (Princeton: Princeton University Press 1951) 240.

step in the process of humanization was regarded to be systematization. If the encyclopaedic *form* can legitimately be considered as an agent of catholicity or deification,⁶⁰ the *contents* of the *Corpus Juris Civilis* also offer clear evidence to support the ascription of a holy character to that legislative document. Thus, Justinian's *De conceptione digestorum* – his instructions to Tribonian, his chief compiler – begins with the famous words 'Deo auctore' ('by the authority of God'), a phrase which can arguably be offered as the historical text where the European idea of theocracy finds its legal formulation.⁶¹ While I could highlight various excerpts from the texts of the juriconsults collected in the Digest, such as the one where Ulpian is reported to have written that 'knowledge of civil law is indeed a most hallowed thing' ('res sanctissima civilis sapientia'),⁶² I propose to limit my survey to three revealing quotations from Justinian's own *De confirmatione digestorum*, his preface to the work:

We, therefore, in our accustomed manner, have resorted to the aid of the Immortal One and, invoking the supreme Deity, have desired that God should become the author and patron of the whole work.⁶³

[O]ur majesty ... amended, in reliance on the Heavenly Divinity, anything that was found to be dubious or uncertain, and reduced it to a proper form.⁶⁴

[W]e gave abundant thanks to the Supreme Deity, who has vouchsafed to us ... the giving of the best laws, not merely for our own age but for all time, both present and future.⁶⁵

That Justinian himself should have created a climate of religiosity around his compilation by explicitly conferring upon it divine status reflects a more widespread phenomenon. As Frye underlines: 'It is particularly law and religious ritual that are most frequently thought of as divinely revealed.'⁶⁶ Indeed, as one turns to the revived Roman law of the eleventh and twelfth centuries, one observes that the *Corpus Juris Civilis* was then also readily associated with the Holy Scriptures. Jurists

60 Northrop Frye *Anatomy of Criticism* (London: Penguin 1990) 56: 'In the mythical mode the encyclopaedic form is the sacred scripture.'

61 *Deo auctore*, pr., in Theodor Mommsen, Paul Krueger, and Alan Watson (eds) *The Digest of Justinian I* (Philadelphia: University of Pennsylvania Press 1985) xlvi (hereinafter *Digest*).

62 D.50.13.1.5, in *Digest* supra note 61, IV, 929.

63 *Tanta*, pr., in *Digest* supra note 61, I, lv.

64 *Ibid.*

65 *Tanta*, 12, in *Digest* supra note 61, I, lx.

66 Frye, supra note 9, 36.

asserted that Roman laws were but divine commands expressed through the mouth of princes – a credo reflected in the phrase ‘Holy Roman Empire,’ reported in use as of 1157.⁶⁷ By then, Irnerius had described the Glossators as ‘ministers of things sacred’; later, the Great Gloss would employ terms like ‘sanctio sancta,’ ‘sacratissimae leges,’ and ‘donum Dei.’⁶⁸ A good illustration of the medieval discourse is offered by Boncompagnus’s thirteenth-century *Rhetorica Novissima*: ‘In the same way as God separated the elements from an original material and brought them to light, Justinian clarified the disorder, the origins, and the subject-matters of the Law to enlighten scholars and for the glory of the canon or civil Law.’⁶⁹ Such perceptions no doubt explain why Dante thought it apposite, in his *Divina commedia*, to install Justinian in the Second Heaven.⁷⁰ The links between Roman law and Christianity also took another form in that Roman law became the handmaiden (or a source) of canon law. Thus, canon law served as an important instrument for the reception of Roman law; for that reason, one can talk of a ‘romano-canonical’ legal system that gradually spread across Europe.⁷¹

67 Walter Ullmann *Law and Politics in the Middle Ages* (London: The Sources of History Ltd 1975) 95. The later date of 1254 is offered in Harold J. Berman *Law and Revolution* (Cambridge, Mass.: Harvard University Press 1983) 603 n15. Nothing turns on this point for my argument.

68 Jean-Louis Thireau ‘La doctrine civiliste avant le Code civil’ in *La doctrine juridique* (Paris: Presses universitaires de France 1993) 18.

69 Pierre Legendre *L’amour du censeur* (Paris: Editions du Seuil 1974) 91 n1 (‘De même que Dieu divisa les éléments d’une matière primordiale et les mit au jour, de même Justinien clarifia le désordre, les origines et les matières du Droit, pour illuminer les savants et pour la gloire du Droit canonique ou civil’).

70 Dante ‘Divine comédie’ in *Oeuvres complètes* trans. André Pézard (Paris: Gallimard 1965), *Paradis (Paradiso)* VI, 10, 1402 (originally written between 1316 and 1321).

71 I remain mindful of the reservations expressed by some regarding the use of this compound word. See, e.g., Harold J. Berman and Charles J. Reid ‘Roman Law in Europe and the *jus commune*’ in *Scintillae iuris: Studi in memoria di Gino Gorla* II (Milan: Giuffrè 1994) 989.

See, on the close imbrication of the ideas of *Romanitas* and *Christianitas*, the thorough exposition in Ullmann, *supra* note 67. For an extensive treatment of the influence of Christianity on the civil law world, with specific reference to the eleventh and twelfth centuries, see Berman, *supra* note 67, 47–269, especially 165–98. See also, on the role of religion in the emergence of a Western legal rationality and, specifically, on the impact of canon law on the formal rationality of law, Reinhard Bendix *Max Weber: An Intellectual Portrait* (Berkeley: University of California Press 1977) 391–416, especially 401. See also Henri Pirenne *Histoire de l’Europe des invasions au XVIe siècle* 7th ed. (Paris: Félix Alcan 1936) 28: ‘it is not because it was Christian, but because it was Roman, that the Church received and preserved for centuries the control of society’ (‘ce n’est pas parce que chrétienne,

The advent of the French *Code civil* marked a further consolidation of the theocentric character of imperial legislation. Napoleon, who, in the words of Victor Hugo, 'made codes like Justinian,'⁷² proclaimed himself to be God's servant on earth: 'Who represents God on earth? The legislator.'⁷³ As Shael Herman explains, 'the Civil Code was a secular gospel, as authoritative as ecclesiastical law had been before the Revolution. Where papal infallibility was once the inviolable rule, the Civil Code now stood for legislative infallibility.'⁷⁴ Accordingly, the civil law is confirmed as a theocracy, modern law being but the lay version of canon law, which rested entirely on the sacred authority of the Supreme Pontiff whose Word was inscribed in the Text, a text at once unitary and unique, intangible (*noli me tangere*), and endowed with an absolute Truth. The lay order becomes but a transposition of the Christian order: at this juncture in history, given the particular institutional crystallization that is experienced, the legislator is substituted for the Supreme Pontiff, the code for the Text. It is under the cover of codification that the canonical attributes of normativity, systematicity, and dogmatics will spread in the legal West.⁷⁵ In his famous recommendations to his son, d'Aguesseau had put him on notice: '[I]n studying the civil law, you will have learnt the canon law without thinking about it.'⁷⁶

Against this background, Joseph Vining's argument to the effect that theology, rather than social sciences or literary criticism, offers an elucidative analogue to law is better understood.⁷⁷ For Peter Fitzpatrick, '[t]he whole community professionally organized around law is redolent of religion, not just in the perception of outside observers but also

mais parce que romaine, que l'Eglise a reçu et conservé pendant des siècles la maîtrise de la société'); Frederick Pollock and Frederic William Maitland *The History of English Law* 2d ed., I (Cambridge: Cambridge University Press 1898) 116.

72 Victor Hugo *Les Misérables* ed. Maurice Allem (Paris: Gallimard 1951) 688 (originally published in 1862) ('Il faisait des codes comme Justinien').

73 Antoine-Clair Thibaudeau *Mémoires sur le Consulat* (Paris: Ponthieu 1827) 423 ('Qui tient lieu de Dieu sur la terre? le législateur').

74 Shael Herman 'From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture' [1992] *U. Ill. LR* 597, 618.

75 Jacques Chevallier 'L'ordre juridique' in *Le droit en procès* (Paris: Presses universitaires de France 1978) 35.

76 D'Aguesseau 'Première instruction' in E. Falconnet (ed.) *Oeuvres de d'Aguesseau II* (Paris: Napoléon Chaix 1865) 75 (originally written in 1716) ('en étudiant le droit civil, vous aurez appris, sans y penser, le droit canonique').

77 Joseph Vining *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press 1986) 5 and passim, especially 187–201. For a presentation of the theology and legal doctrine as examples of 'dogmatic, interpretive, or symbolic disciplines,' see also Roberto Mangabeira Unger *Knowledge and Politics* (New York: Free Press 1984) 111.

in its own self-presentation.⁷⁸ In sum, the established civil law system is clearer if we remember that the civil law and the legitimacy of civilian power find their origins in canon law. Interestingly, the association between Church and civil code was magnified in Quebec due to the political situation prevailing there since the end of the eighteenth century. Because Roman Catholicism and the civil law had been conceded to the French-speaking settlers by the British conqueror, Church and code later stood together in the battle to maintain a francophone identity. Thus, from 1866 until the early 1960s, in a context of exaltation of rural life by much of Quebec's francophone intelligentsia, the land and the faith were the primary concerns while the notary and the priest remained the chief notables.⁷⁹

But, the canonical character of a text like the civil code – or the Bible – is not simply a function of its association with the Church. It also arises from the very fact that it is a text, that is, that it is in print. The impact of the canon within an interpretive community, its power in society, 'is predicated upon the written word.'⁸⁰ There tends to arise within interpretive (legal) communities an unlimited faith for everything that is consigned in a text, on account of what Roger Perrot calls a 'deformation of the legal mind.'⁸¹ A text is a weapon against time, oblivion, and the cunning tricks of the spoken word, which can so easily modify itself or deteriorate. The written character of words supplies a concreteness which is missing from oral discourse. The notion of text is, therefore, historically tied to a whole world of institutions: law, religion, literature, and teaching. A text subjugates; it demands that it be observed and that it be respected.⁸² Jean Ray adds that all the words that enter a text – for instance, a text of law – are *thereby* marked as endowed with a sacred character, a hidden wisdom. Even though borrowed from the vernacular, they acquire, as the component elements of a text – that is, as the technical elements of a

78 Peter Fitzpatrick *The Mythology of Modern Law* (London: Routledge 1992) 181–2. See also, on the suffusion of legal discourse by religion, Peter Goodrich *Languages of Law* (London: Weidenfeld & Nicolson 1990) 260–96.

79 David Fraser 'The Day the Music Died: The Civil Law Tradition from a Critical Legal Studies Perspective' (1987) 32 *Loy. LR* 861, 880–1.

80 Jack Goody *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press 1986) 122.

81 Roger Perrot 'De l'empreinte juridique sur l'esprit de la société française' in André Siegfried (ed.) *Aspects de la société française* (Paris: L.G.D.J. 1954) 191 ('déformation de l'esprit juridique').

82 I follow closely Roland Barthes, in *Encyclopaedia Universalis XXII* (Paris: n.publ. 1989) *sub* Texte (Théorie du).

technical whole that is only intelligible and, therefore, useful, for specialists – a prestige cloaked in mystery, a holiness which, in the minds of the lay community, is collapsed with the sign of social authority.⁸³ Ray thus makes reference to ‘this holiness of the Law, which is its permanent and universal feature.’⁸⁴

One of the salient attributes of the printed word is precisely that of its immutability. No matter how scathing the criticism of a text, once all has been uttered, the text remains, unaltered: “This is one reason why “the book says” is popularly tantamount to “it is true.” It is also one reason why books have been burnt. A text stating what the whole world knows is false will state falsehood forever, so long as the text exists. Texts are inherently contumacious.’⁸⁵ A text is, in other words, *res judicata* and, according to the Roman formula, ‘*res judicata pro veritate accipitur*.’⁸⁶ As Pierre Legendre observes, ‘the text offers itself to jurists not as a historical fragment, linked to given circumstances, but on an intemporal and mathematical mode.’⁸⁷ It is of interest to note, in this context, that Thibaut, in his spirited defence of codification, had already drawn the equation between civil law and mathematics: ‘Many of [the different parts of the civil law] are, so to speak, only a manner of pure legal mathematics.’⁸⁸

If the Text is apprehended as absolute knowledge, as *sola scriptura*, and if every rule thus takes its source in the Text, it follows that any science must emerge from the Text and must necessarily appear as a science of the Text. This dependency of science on the Text is aggravated by the very fact of there being words in print. Print ‘encourages a sense of closure, a sense that what is found in a text has been finalized, has reached a state of completion.’⁸⁹ This contention deserves to be amplified:

83 Jean Ray *Essai sur la structure logique du Code civil français* (Paris: Félix Alcan 1926) 37.

84 *Ibid.* (‘cette sainteté de la Loi, qui est sa caractéristique permanente et universelle’).

85 Walter J. Ong *Orality and Literacy: The Technologizing of the Word* (London: Routledge 1982) 79.

86 D.50.17.207, in *Digest* supra note 61, IV, 969 (‘*res judicata* is accepted as the truth’).

87 Legendre, supra note 69, 91 (‘Le texte s’offre aux juristes non comme fragment historique, lié à de telles circonstances, mais sur un mode intemporel et mathématique’).

88 Anton Friedrich Justus Thibaut *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg: J.C.B. Mohr 1840) 43 (originally published in 1814) (‘Viele derselben [die einzelnen Teile des bürgerlichen Rechts] sind so zu sagen nur eine Art reiner juristischer Mathematik’).

89 Ong, supra note 85, 132.

Print creates a sense of closure not only in literary works but also in analytic philosophical and scientific works. With print came the catechism and the 'textbook,' less discursive and less disputatious than most previous presentations of a given academic subject. Catechisms and textbooks presented 'facts' or their equivalents: memorable, flat statements that told straightforwardly and inclusively how matters stood in a given field. By contrast, the memorable statements of oral cultures and of residually oral manuscript cultures tended to be of a proverbial sort, presenting not 'facts' but rather reflections, often of a gnomic kind, inviting further reflection by the paradoxes they involved.⁹⁰

But more must now be said as regards the nature of the relationship between science and the Text in the civil law world.

*Third proposition: The civilian reveres the sacred Text
and engages in an act of propaganda⁹¹*

The last two chapters of Justinian's Digest are devoted to interpretation and maxims, respectively.⁹² They show that, as far as the classical Roman jurists were concerned, not all aspects of legal knowledge were reducible to rules.⁹³ To have knowledge of the law was also to be able to interpret words and to induce legal maxims. Other passages from the Digest evidence this understanding, thus the aphorism 'jus est ars boni et aequi' ('the law is the art of goodness and fairness').⁹⁴ Roman legal literature, however, reveals what Geoffrey Samuel calls 'a parallel tradition,'⁹⁵ that of the teaching manual, or Institutes. For the Romans, the Institutes aimed to offer a global view of the law and, therefore, focused on 'clarification and arrangement': '[P]ropositional language was the means by which knowledge of law could be transmitted to future generations.'⁹⁶ The didactic focus on rules was to be emphasized by the Glossators upon the intellectual rediscovery of the *Corpus Juris Civilis*. '[L]egal knowledge was considered by the Glossators to be a closed system: all that one needed to know about the civil law was to be found in the *Corpus juris*.'⁹⁷

Roman law, being dead law rather than living tradition, compelled

90 Ibid. 134.

91 I use the term in its original, canonical meaning.

92 D.50.16 and D.50.17, in *Digest* supra note 61, IV, 933–69.

93 Indeed, the Digest itself makes this very point at D.50.17.1, in *Digest* supra note 61, IV, 956–7.

94 D.1.1.1, in *Digest* supra note 61, I, 1.

95 Geoffrey Samuel *The Foundations of Legal Reasoning* (Antwerp: Maklu 1994) 37.

96 Ibid. 37, 39.

97 Ibid. 45.

systematic and scientific examination of the relevant texts, all the more so since the Glossators had taken Justinian to his word when he had referred to the Digest as 'a single harmonious whole, so that nothing should be found in it which was contradictory or identical or repetitious,' and had stated that 'all ambiguities [had been] resolved, without any discordant passage remaining.'⁹⁸ The Gloss was, accordingly, concerned 'to manage discrepancies by glossing them over.'⁹⁹ In the process, it would provide a certain re-presentation of the *Corpus Juris* – that document being itself a re-presentation of its writers' re-presentation of the world. From the Glossators' textism, a *scientia juris civilis* would emerge,¹⁰⁰ validating Jacques Derrida's remark that there are no hieroglyphs without a priesthood.¹⁰¹ This legal science continues to operate within clear parameters: the Supreme Pontiff is now the legislator, the Text – as the pillar of scriptural coherence – is now the code, and the Pontiff's oracle at the service of the Text is now the civilian commentator.¹⁰² Thus, the civilian practices a civil religion. She is the defender of the Text (for the textbook is but what allows the Text to be a discourse)¹⁰³ and the defender of Power (the Text is the legislator's work). In other words, '[t]he role of doctrine is to preserve a sacralized text.'¹⁰⁴ For this reason, the essential task of the civilian is that of an interpreter. It is to ensure, while remaining within the confines of the Text, that the Text speaks in all circumstances. The interpreter must 'provide the Law with its answer-to-everything.'¹⁰⁵ She is the 'living voice of the [civil law]' ('viva vox ... juris civilis').¹⁰⁶

The nature of the doctrinal exercise that the civilian continues to re-

98 *Tanta*, pr. and *Tanta*, 1, in *Digest* supra note 61, I, lv–lvi. See Jones, supra note 31, 13–14.

99 Ong, supra note 85, 104.

100 The expression appears, for instance, at D.1.2.2.35, in *Digest* supra note 61, I, 7.

101 Jacques Derrida 'Scribble (writing-power)' (1979) 58 *Yale French Studies* 117, 125.

102 For an expression of the link between canonical and civilian culture showing that, as regards the interpretation of texts, civilians react to them in the same way as canonists once did, see Paul Dubouchet *Sémiotique juridique* (Paris: Presses universitaires de France 1990) 135. Earlier texts attesting to an important penetration of canon law into civilian legal culture include Louis Charondas le Caron *Mémorables observations du droit français, rapporté au civil et canonique* (Paris: Etienne Richer 1637); J. Oudot *Conscience et science du devoir: Introduction à une explication nouvelle du Code Napoléon* 2 vols (Paris: Auguste Durand 1855 and 1856).

103 Legendre, supra note 69, 87.

104 Annick Perrot 'La doctrine et l'hypothèse du déclin du droit' in *La doctrine juridique* (Paris: Presses universitaires de France 1993) 189 ('[la doctrine] a pour rôle de conserver un texte sacralisé').

105 Legendre, supra note 69, 101 ('procurer à la Loi sa réponse-à-tout').

106 D.1.1.8, in *Digest* supra note 61, I, 2.

enact is aptly captured by the title of one of the leading nineteenth-century French textbooks, Frédéric Mourlon's *Répétitions écrites* on the civil code.¹⁰⁷ A helpful explication on the function of the caste of professional interpreters intervening as *interpositae personae* between the civil code and the society that it is designed to regulate is offered by Jacques Chevallier, who describes civilians as 'active agents of systematization, guarantors of order, who work to avoid hiatuses, to resorb distortions, to avoid contradictions.'¹⁰⁸ Earlier, Emile Boutmy had shown with great acumen the intellectual processes in which the interpreter of the code effectively engages:

To search in this text and to extract general principles, precise definitions, able to supply the major premiss of tight syllogisms, to bring everything down to this small quantity of simple data, and then to drive everything to clear solutions, to imperative formulas having the air and the tone that befit the law, such is the highest conscious ambition, the effort most often repeated, and, ultimately, the unconscious method of understanding. Abstract propositions, subtle verbal interpretations, deductions strongly linked, simplifications sometimes excessive, conclusions always categorical, such is the company within which the intellect learns and likes to move at all times.¹⁰⁹

Contemporary research in the civil law world is, therefore, fittingly presented as a flow chart making reference to (and usually following the order of) provisions of the civil code – which thus finds itself reinforced as the central cultural construct in any civilian legal culture.¹¹⁰ In

107 F. Mourlon *Répétitions écrites sur le premier examen du Code civil* (Paris: Marescq 1852); Mourlon *Répétitions écrites sur le deuxième examen du Code civil* (Paris: Marescq 1850); Mourlon *Répétitions écrites sur le troisième examen du Code civil* (Paris: Videcoq 1846).

108 Chevallier 'L'ordre juridique' in *Le droit en procès* supra note 75, 11 ('des agents actifs de systématisation, garants de l'ordre, qui travaillent à éviter les hiatus, à résorber les distorsions, à éviter les contradictions') See also Jean Rivero 'Apologie pour les faiseurs de systèmes' D.1951.Chron.99, 99.

109 Emile Boutmy *Des rapports et des limites des études juridiques et des études politiques* (Paris: Armand Colin 1889) 8–9 ('Chercher dans ce texte et en dégager des principes généraux, des définitions précises, propres à fournir la majeure de syllogismes serrés, tout ramener à ce petit nombre de données simples, et tout conduire ensuite jusqu'à des solutions nettes, à des formules impératives ayant l'allure et le ton qui convient à la loi, voilà l'ambition réfléchie la plus haute, l'effort le plus souvent répété, et, à la fin, la méthode inconsciente de l'entendement. Propositions abstraites, subtiles interprétations verbales, déductions fortement enchaînées, simplifications parfois excessives, conclusions toujours catégoriques, voilà dans quelle fréquentation de tous les instants l'intelligence apprend et aime à se mouvoir').

110 David Howes 'The Origin and Demise of Legal Education in Quebec (or Hercules Bound)' (1989) 39 *UNBLJ* 127, 128.

the general organization of its contents and in the treatment of each particular subject-matter, *Quebec Civil Law* offers manifest examples of such 'tracking' of the code. A random illustration can be found in the section dealing with the contract of sale where an influential judicial initiative compelling sellers to communicate to their buyers unsolicited information concerning the goods that form the object of the contract is relegated to a brief footnote because of, as the writer indicates, 'the absence of a codal text.'¹¹¹

Although doctrinal exposition can appear in different guises, the elaboration of large syntheses in the form of treatises or manuals remains most consistent with the ambition of systematization that characterizes the writing by the interpreter of an effective version of the pious tradition.¹¹² More than other formats, the textbook favours the representation of concrete situations in a language of specific legal consequence that purports to be at the same time a language of general coherence. In this context, the search for an 'elegant' legal solution to a given problem figures prominently.¹¹³ Bourjon's famous methodological excursus where, for example, he advocates that the writing of the law should be reduced to short statements, offers a relevant demonstration.¹¹⁴ Elegance, far from being a mere ornament that would be superimposed on legal reasoning, *is* that reasoning itself. More accurately, it is that visible side of the logical rigour that is understood by civilians to define legal rationality.¹¹⁵ In this way, it can be seen that legal systematization does not pursue a purely instrumental function aiming for an improved efficacy and serviceability of the legal norm; it also operates at the symbolic level and promotes the *belief* in the law's reason (and reasonableness) – without which the law cannot survive.¹¹⁶

The reverent reception and faithful transmission of the redacted Text that effectuates the catechetical intent of the civilian community's

111 *Quebec Civil Law* supra note †, 526 n67.

112 Jacques Chevallier 'Les interprètes du droit' in *La doctrine juridique* (Paris: Presses universitaires de France 1993) 268.

113 Jacques Lenoble and François Ost *Droit, mythe et raison: Essai sur la dérive mythologique de la rationalité juridique* (Brussels: Facultés universitaires Saint-Louis 1980) 248. For the rhetorical significance of aesthetics in law, see also Jan M. Broekman *Droit et anthropologie* (Paris: L.G.D.J. 1993) 98. See generally Peter Stein 'Elegance in Law' (1961) 77 *LQR* 242.

114 François Bourjon 'Dissertation sur l'union du droit commun de la France avec la Coutume de Paris' in Bourjon *Le droit commun de la France et la Coutume de Paris réduits en principes I* (Paris: Grangé & Rouy 1747) vii–viii.

115 Lenoble and Ost, supra note 113, 249–50.

116 Chevallier 'L'ordre juridique' in *Le droit en procès* supra note 75, 12.

interpretive project has important consequences.¹¹⁷ Thus, although it is always new and constantly expanding, civil law doctrine remains, ultimately, a means for the sacred Text incessantly to reiterate itself. My position is not that the repetitious literary production is not, nonetheless, varied and progressively richer, but rather that one is permitted to say something different from the Text only as long as it is the Text that is still speaking. I argue that because the material on which she labours is regarded by the civilian writer as finite, the intellectual product of her reflection necessarily consists of a closed universe of signifiers constantly worked and reworked by the jurist and her science. In this way, civil law doctrine entails the self-effacement of the exegete behind the sacred Text.¹¹⁸ The organizers of the stable body of knowledge that is the civil law can be seen to espouse a homogeneous behaviour – and to be doing so in a largely unself-conscious way (they are operating within a discourse, but it is a discourse that they are no longer hearing). The jurist is but the ‘reverberator’ of the code,¹¹⁹ that is, she remains a pure and simple glossator: she punctuates the Text. Commentators are assimilated to one another to the point where they become stereotyped and, therefore, interchangeable. Indeed, they seek this interchangeability by hiding themselves behind a borrowed language from which the concrete individual is missing: how many civilian jurists write ‘I’?

Whether, to borrow from French doctrine, one is reading Aubert, Ghestin, or Malaurie on contractual obligations, the narrative is *fundamentally* identical. In each case, one is reading what is essentially the same gloss on the primordial Text, the French civil code. A similar observation could be made regarding French or German judges: their judgments are completely depersonalized. There is a ‘perfect substitutability’ of interpreters;¹²⁰ in other words, the civil law is a technology, and each operator uses the machine in the same way. Nor is the phenomenon recent. Georges Ripert, one of the most authoritative voices of French legal doctrine in the twentieth century, speaking of himself and his contemporaries, noted that they all singularly resembled their predecessors: ‘exegetes, explaining literally the articles of the

117 For the civil code as catechism, cf. André-Jean Arnaud *Pour une pensée juridique européenne* (Paris: L.G.D.J. 1991) 39.

118 Lenoble and Ost, *supra* note 113, 228.

119 Pierre Legendre *Jour du pouvoir* (Paris: Editions de Minuit 1976) 161 (‘résonneurs’).

120 Pierre Bourdieu ‘Habitue, code et codification’ (1986) *Actes de la recherche en sciences sociales*, No. 64 (Sept.) 43 (reprinted in Bourdieu *Choses dites* [Paris: Editions de Minuit 1987] 94) (‘substituabilité parfaite’).

Code.¹²¹ Indeed, he exclaimed: 'What more or what better are we doing?'¹²² For his part, Leibniz, regarded as a percipient student of the *Corpus Juris Civilis*, had already noticed that the numerous juriconsults referred to in Justinian's compilation, although sometimes chronologically far apart, all seemed to be one writer so that it would have been very hard to distinguish them if their names had not appeared before the excerpts.¹²³ One is tempted to quote Montaigne, a discerning comparatist in his own right: '[W]e are only glossing over one another.'¹²⁴

Clearly, then, what thinking arises within a civilian community is not the product of individuals, but rather that of a group having developed what Karl Mannheim calls a particular 'style of thought' by way of continual responses to a range of situations which they are confronting on account of the position in which all members of the group find themselves.¹²⁵ This conclusion should not prove surprising: the community of authorized interpreters of the Text brings together individuals who share a common educational background, who communicate in the same technical language, who expound the same values, and whose fundamental (self-)interest is identical: 'to preserve the monopoly which they hold on legitimate interpretation.'¹²⁶ None of the superficial internecine disputes about the meaning of a particular provision of the code changes the incontestable fact of the essential commonality of thought.

In more ways than one, the homage paid to the Text is, of course, a homage paid by interpreters to themselves, as a group and as individuals. For one thing, it is their academic predecessors who will have

121 Georges Ripert *Le régime démocratique et le droit civil moderne* 2d ed. (Paris: L.G.D.J. 1948) no. 5, p. 9 ('des exégètes, expliquant littéralement les articles du Code'). See also Rodolfo Sacco, in *Codification: valeurs et langage* (Québec: Conseil de la langue française 1985) 108–9, where the author notes that the French interpreter subjugated himself to the legislator in 1804 and that the situation has not varied since.

122 Ripert, *supra* note 121, no. 5, pp. 9–10 ('Que faisons-nous de plus ou de mieux?').

123 Gottfried Wilhelm Leibniz *Nouveaux essais sur l'entendement humain* (Paris: Garnier-Flammarion 1966) IV, ii, 13, 326 (originally published in French in 1765) ('tous ces juriconsultes des *Pandectes*, quoique assez éloignés quelquefois les uns du temps des autres, semblent être tous un seul auteur, et ... on aurait bien de la peine à les discerner, si les noms des écrivains n'étaient pas à la tête des extraits').

124 Montaigne 'Essais' in Albert Thibaudet and Maurice Rat (eds) *Oeuvres complètes* (Paris: Gallimard 1962) bk III, c. 13, 1045 (originally published in 1580) ('nous ne faisons que nous entregloser').

125 Karl Mannheim *Ideology and Utopia* trans. Louis Wirth and Edward Shils (San Diego: Harcourt Brace Jovanovich 1936) 3.

126 Chevallier 'Les interprètes du droit' in *La doctrine juridique* *supra* note 112, 269 ('préservé le monopole qu'ils détiennent sur l'interprétation légitime').

played a role in the construction of the civil code.¹²⁷ More importantly, the civilian acts as a defender of *his* Power for, in a very real sense, he is *of* the State of which the code is a product and with which it remains associated in the collective imagination (since the eleventh century, civilians have played a prominent role as advisers of rulers at various levels of government). Within traditional civilian communities – Europe is an example – the status of the academic, and, as I have noted, especially of the academic specializing in civil law, is high. This fact is largely a reflection of the historical circumstances which have presided over the development of the teaching of civil law as a leading humanistic enterprise in which the State took a direct interest ever since Justinian ordered the drafting of the Institutes with a view to formulating a teaching tool that would facilitate the formation of generations of ‘New Justinians.’¹²⁸ Since 1155, when Frederick I Barbarossa issued his constitution, *Authentica Habita*, at the behest of the masters and students at the law faculty in Bologna in order to ensure the protection of foreign scholars,¹²⁹ the State has sought to consolidate its imperium over law teaching. To this day, it is the case that in most European jurisdictions law professors are civil servants paid by the State and that the conditions they must fulfil in order to be allowed to teach law at all are prescribed by statutes and regulations.¹³⁰ In Germany, for example, the two general examinations validating a student’s programme of legal studies are set by the State (and are known as the first and second *Staatsprüfung*).¹³¹

127 Dubouchet, *supra* note 102, 135.

128 *Omnem*, 2, in *Digest* *supra* note 61, I, li.

129 Paolo Nardi ‘Relations with Authority’ in Hilde de Ridder-Symoens (ed.) *A History of the University in Europe I: Universities in the Middle Ages* (Cambridge: Cambridge University Press 1992) 78–9.

130 Illustrations lifted from the French statute book offer compelling evidence. Thus, in the 1804 *Loi relative aux Ecoles de Droit* S.1804.II.317, article 37 states that the appointment of professors will be made by Napoleon himself (‘La nomination des professeurs et des suppléants sera faite par le premier Consul’). Article 38-4° of the same act is to the effect that professorial salaries (‘le traitement des professeurs’) will be determined by regulation. See also, for example, *Décret impérial concernant l’organisation des écoles de droit (du 4 complémentaire an XII)* S.1804.II.489, article 12, reiterating that law professors are to be appointed by the Emperor (decree of 21 September 1804); *Règlement relatif aux concours dans les facultés de droit* D.1843.III.46 (regulation of 22 August 1843), as am. by D.1847.III.53 (regulation of 22 January 1847) and D.1847.III.74 (regulation of 16 April 1847).

131 This position should be contrasted with that prevailing in common law jurisdictions such as England and Ireland where it is the corporate bodies of barristers and solicitors that claim the power to control the contents of legal studies programmes.

The civilian's Power rests on the status of the civil law within society, which itself depends on the status of the civil code, which in turn rests on the code being perceived as immutable. In other words, in order to assert his Power within society, the civilian depends on the status of the civil code as a venerable and mysterious Text and on the authority which attaches to the values of coherence, structure, and logic perceived as inherent to legal norms and whose effect is compounded by the presumption of neutrality and rationality from which the legal discourse, like any technical discourse, readily benefits. His Power being ultimately derived from the Text, it would be naïve in the extreme to expect a civilian commentator to attack the Text¹³² – or, which is the same thing because it also leads to a loss of Power,¹³³ to disclose the conditions of its production, to reveal the traces of its political genealogy in a way which would make it appear contingent and arbitrary and would deprive it of the attributes of necessity and inevitability.¹³⁴ Rather, the civilian seeks to capitalize on the phenomenon of institutionalization which, through the act of publication (and the accompanying officialization) of the code, favours a homologation of, or collective adherence to, the Text. In essence, the scientific

132 I have argued elsewhere that, on the contrary, the English academic, for example, who, for historical and socio-cultural reasons, finds herself outside the established legal order and unable to derive any power from it, can more easily engage in a critique of that legal order: Pierre Legrand 'The Common Law *mentalité*. An Italian Primer' (1993) 13 *Legal Studies* 271, 274 (review of Ugo Mattei *Common Law: Il diritto anglo-americano* [Turin: UTET 1992]).

133 See Eliade, *supra* note 11, 15: 'knowing the origin of an object ... is equivalent to acquiring a magical power over [it] by which [it] can be controlled, multiplied, or reproduced at will.'

134 Chevallier 'Les interprètes du droit' in *La doctrine juridique*, *supra* note 112, 262. See also François Rigaux *Introduction à la science du droit* (Brussels: Editions Vie Ouvrière 1974) 5: 'the efficacy of law as a stabilizing principle in our society demands that its roots be out of reach' ('l'efficacité du droit comme principe stabilisateur de notre société exige que ses racines soient hors d'atteinte'); Pierre Bourdieu 'La force du droit,' (1986) *Actes de la recherche en sciences sociales*, No. 64 (Sept.) 1, 15: 'the law can only bring to bear its specific efficacy to the extent that it earns recognition, that is to say, to the extent that the more or less important part of arbitrariness which is at the source of its operation remains unknown' ('le droit ne peut exercer son efficacité spécifique que dans la mesure où il obtient la reconnaissance, c'est-à-dire dans la mesure où reste méconnue la part plus ou moins grande d'arbitraire qui est au principe de son fonctionnement'). See also Pascal 'Pensées' in Jacques Chevalier (ed.) *Oeuvres complètes* (Paris: Gallimard 1954) no. 230, p. 1151: 'we must ensure that custom be seen as authentic, eternal, and hide its beginning if we do not want it soon to come to an end' (originally published in 1670) ('il faut ... faire regarder [la coutume] comme authentique, éternelle, et en cacher le commencement si on ne veut qu'elle ne prenne bientôt fin').

discourse proffered by the civilian appears as a constant attempt to validate the textual reality (of the code) and to appeal to his audience – by mobilizing imagination rather than seeking to engage reason¹³⁵ – to subscribe to that exercise: the code remains perceived as a unitary and sacred order, at the root of all normativity, whose task it is to ensure submission. Norbert Elias's (restrained) conclusion readily follows: 'Law is, of course, through ... the existence of bodies of specialists with a vested interest in the preservation of the status quo, relatively impervious to movement and change.'¹³⁶

To say that the *mentalité* prevailing in jurisdictions governed by a civil code is emphatically dominated by that code is, therefore, an understatement. Such, indeed, is the power of civil codes over the collective consciousness that jurists from territories where a civil code is to be found will readily say that they live in codified jurisdictions, even though the civil code covers part of their law only. In this way, it can be seen that civil codes help to delineate a legal identity (and, moreover, a *national* identity). The civil code's 'power to fascinate, its hold over us and thus the images and figures through which it defines a destiny,' remains unabated.¹³⁷ In all things, the jurist initially reasons from the legal and social perspective embodied in the code. It is not unusual for the interpreter, even today, to make reference to the 'sanctity' of the code and to allude to the 'reverence' which it commands. As a result, 'the authority of the legal system at home and abroad is seen to depend on the prestige of the code. To admit grave weaknesses in the civil code is to attack the basis of the legal order.'¹³⁸ Thus, in his *discours de réception* at the *Académie de Rouen*, focusing on a then recent book by Gaston Morin, judge Louis Gensoul stated: 'The mere thought of questioning, but for a moment, the virtues of the civil code, to raise a sacrilegious hand on it, should cause me to quiver!'¹³⁹ There is no other truth than the Text: the civil law is characterized by a professional

135 Chevallier 'L'ordre juridique' in *Le droit en procès* supra note 75, 12; Lenoble and Ost, supra note 113, 223.

136 Norbert Elias *The Civilizing Process* trans. Edmund Jephcott (Oxford: Blackwell 1994) 531 n49 (originally published in German in 1939).

137 Peter Goodrich 'Poor Illiterate Reason: History, Nationalism and Common Law' (1992) 1 *Social & Legal Studies* 7, 9.

138 Alan Watson *The Making of the Civil Law* (Cambridge, Mass.: Harvard University Press 1981) 143.

139 Louis Gensoul *La révolte des faits contre le Code* (Rouen: Académie des Sciences, Belles-Lettres et Arts de Rouen 1921) 5, commenting on Gaston Morin *La révolte du droit contre le code* (Paris: Sirey 1945) (for the most recent edition) ('La seule pensée de mettre en doute, ne serait-ce qu'un instant, les vertus du Code civil, de porter, sur lui, une main sacrilège, devrait me faire frémir!').

acceptance of the articles of the code as establishing the Truth of the law (and of the world) – as, one is moved to say, *articles of faith*.

Criticism, in terms of one or the other of the provisions of the code, can – and, of course, regularly does – intervene. But, one is here talking about cosmetic or ornamental criticism. To borrow a fitting metaphor from Arnaud, each intervention at that level is like a vaccine serving to inoculate a little more effectively the original *corpus*.¹⁴⁰ It is not accepted within the civilian community that a critic can accomplish opportune and important acts beyond that sphere, that *critique* can perform a dynamic contrapuntal function in the face of established dogma. There is, in other words, an absence of critique: one cannot touch the Pontiff and his Text, cannot question his sacred role, and cannot challenge his sovereign right to define for others (those that are below) what is most suitable for them.¹⁴¹ The code and the statements of law which it contains are regarded as a system of signs that is accepted by the greatest number and that, like some bulwark, should *protect from critique*.¹⁴²

The role envisaged by the civilian interpreter for himself lies elsewhere. The textbook or manual purports to embrace the dogmatics of utility; it strives to offer the practitioner a type of referential axiomatics allowing him rationally to organize all solutions. The law, dispersed in its practices, finds its ideal of (artificial) unity in the doctrine that gives meaning to the view that it exists as a deductive system. Thus, the textbook or manual assuages the need for legal security and certainty. Its writer nurtures his false consciousness by convincing himself that expository law can be considered essential in an age like ours, characterized by legislative transformation, dispersion, and inflation.

The impact of the code and of the *mentalité* which it promotes on law teaching – including isagogic literature – is of overriding significance. Through the many propaedeutic tasks that she performs in order to reinforce the exercise of her intellectual authority, the law teacher seeks to promote adoption, emulation, and propagation of the Text (the etymology of ‘professor’ suggests a person who professes a religion publicly). She fosters a training in civility, and, borrowing from Gargantua’s letter to his son, continues to intone: ‘Of the civil law, I

140 Arnaud, *supra* note 52, 13.

141 Legendre, *supra* note 69, 237.

142 Jean-Marc Trigeaud ‘L’image sociologique de l’homme de droit et la préconception du droit naturel’ in Trigeaud *Essais de philosophie du droit* (Genoa: Studio editoriale di cultura 1987) 227.

want you to know by heart the beautiful texts.’¹⁴³ The teaching of civil law is the teaching of organized knowledge constantly focusing on the Text. Acting in the name of the Text, the law teacher sacrifices her subjective judgment. She yields to external evidence; she honours her debt to the Text (which has conferred Power onto her). As the representative of the Text-as-Creditor, the teacher notifies the student of his obligation to pay his dues to the Text in turn. He, too, must sacrifice his subjective judgment.¹⁴⁴ Faith is demanded of the student at the outset: it is not expected to arise at the end of the civilian discourse as having been generated by the persuasive character of that discourse. Rather, it is an in-built premiss of that discourse.¹⁴⁵ (And faith is given because it is *wanted* to be given. Because he *wants* to see Truth in the Text, the student sees Truth in the Text and does not perceive it as a construction. He believes because he wants to believe. He wants to maintain morale in the face of uncertainty. He, too, is looking for reassurance, for order. He, too, aspires to Power.)¹⁴⁶

The aim pursued by the law teacher remains to socialize the law student into the central tenet of the faith: an unstinting respect for the civil code as the unique repository of Truth. Weber had already drawn the link between law teaching in the civilian world and the priestly tradition.¹⁴⁷ As Legendre notes, the law teacher exerts a strategic function which consists in ‘locking’ the system of the code against any inimical intervention from outside.¹⁴⁸ The vocation (in French, *sacerdoce*) of the law teacher is perceived by herself – and by others – as training young jurists in order to put them in a position where they will be able, at a later stage, to fulfil practical tasks.¹⁴⁹ Accordingly, the law teacher inculcates the rules in force in a normalized and formalistic fashion.¹⁵⁰ Indeed, ‘[i]t is one of the great glories of codified law that it makes possible, if not exactly desirable, adequate law teaching at a very low level of competence.’¹⁵¹ An excerpt from a late-nineteenth-century

143 Rabelais ‘Pantagruel’ in Jacques Boulenger (ed.) *Oeuvres complètes* (Paris: Gallimard 1955) c. VIII, 205 (originally published in 1532) (‘Du droit civil, je veux que tu saches par coeur les beaux textes’).

144 Pierre Legendre *Les enfants du texte* (Paris: Fayard 1992) 220–1.

145 Vining, supra note 77, 189.

146 See supra, text accompanying note 25.

147 Weber, supra note 46, 789–90.

148 Legendre, supra note 69, 18.

149 Sacco, in *Codification: valeurs et langage* supra note 121, 111.

150 Chevallier ‘Les interprètes du droit’ in *La doctrine juridique* supra note 112, 265.

151 Watson, supra note 138, 173.

text focusing on higher education deserves to be reproduced at length on account of its ability to render *contemporary* practices and states of mind:

The law is the written law. Therefore, the role of the faculties of law is to teach to interpret the written law. The result is that their method is deductive. The provisions of the code are so many theorems between which the links must be shown and from which the consequences must be drawn. The pure jurist is a geometer; purely legal education is purely dialectical.¹⁵²

Mary Douglas describes the search for purity as ‘an attempt to force experience into logical categories of non-contradiction.’¹⁵³ This creed accounts in large part for the dogmatic way in which the civilian tends to teach and write about the law. After all, ‘[the forms of speech] form the thought; they are part of the thought itself.’¹⁵⁴ Thus, learning a particular mode of cognitive analysis lies at the core of the law school experience. For instance, the privileged method of instruction within the civil law tradition remains the lecture, understood here in the French sense of *cours magistral* and in contradistinction to the American model of an interactive dialogue between teacher and student or the English tutorial (*lectura* stems from *legere*: reading the text – which itself, as Benveniste teaches, is etymologically linked to *religio*).¹⁵⁵ The traditional lecture which, for example, continues to reign supreme and largely unquestioned in continental Europe offers a mode of teaching that is authoritarian and uncritical and that emphasizes definitions and classifications. It is a noteworthy paradox that the dogmatism – this ‘law of conservation’¹⁵⁶ – which is advocated by the civilian jurist is only made possible through a deliberate intellectual subjection on her part to the code and to the system of thought it generates. For the civilian, to repeat the Text by using formulas prepared by her predecessors is at once to assert her Power and to declare her submission and acknowl-

152 Louis Liard *L'enseignement supérieur en France* II (Paris: Armand Colin 1894) 397 (‘Le droit, c’est la loi écrite. Partant, leur tâche [aux facultés de droit] est d’apprendre à interpréter la loi. Il en résulte que leur méthode est déductive. Les articles du code sont autant de théorèmes dont il s’agit de montrer la liaison et de tirer les conséquences. Le juriste pur est un géomètre; l’éducation purement juridique est purement dialectique’).

153 Mary Douglas *Purity and Danger* (London: Routledge 1966) 162.

154 Vining, *supra* note 77, 35.

155 Benveniste, *supra* note 24, 270–2.

156 Legendre, *supra* note 69, 250 (‘le dogmatisme est au fond une loi de conservation’).

edge her subordination to an institution. Throughout, one feature of the act of interpretation of the Text remains visibly displayed: '[W]hether by proclamation or codification[,] the effort is always to avoid strife, to exclude misunderstandings and misuse, and to make univocal understanding possible.'¹⁵⁷

Somewhat unsurprisingly, perhaps, since, as has been observed, the law teacher is *of* the State, there is historical evidence to suggest that the dogmatic approach to the teaching of law is actively supported by the State. After the French law schools had been closed in 1793, a *loi* of 22 *ventôse* an XII (13 March 1804), reorganizing law teaching, stated that civil law had to be taught 'in the order established by the civil code.'¹⁵⁸ A decree of 21 September 1804 also enacted that 'during part of their lectures, professors will dictate notebooks that students will have to write by themselves. Professors will explain and develop orally in each lecture the text that they will have dictated.'¹⁵⁹ Later, an administrative order (*arrêté*) of the *Conseil royal de l'instruction publique* dated 22 September 1843 asserted that civil law examinations must be taken according to the order of the code.¹⁶⁰ Only with a decree of 18 October 1890 and a subsequent administrative order of 24 July 1895 did a limited measure of liberalization intervene.¹⁶¹

157 Hans-Georg Gadamer 'Text and Interpretation' (trans. Dennis J. Schmidt and Richard E. Palmer) in Diane P. Michelfelder and Richard E. Palmer (eds) *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* (Albany: State University of New York Press 1989) 35–6.

158 *Loi relative aux Ecoles de Droit* S.1804.II.317, article 2 ('On y enseignera [dans les écoles de droit], 1° le droit civil français, dans l'ordre établi par le Code civil'). Article 38-1° of the same act is to the effect that the following will be prescribed by regulation: 'The detailed description of the contents of the teaching, the books that will be used in the faculties, the determination of the days and hours of study, and the duration of holidays' ('La désignation détaillée de la matière de l'enseignement, des livres qu'on emploiera dans les écoles, la fixation des jours et heures d'étude, et ... la durée des vacances').

159 *Décret impérial concernant l'organisation des écoles de droit (du 4 complémentaire an XII)* S.1804.II.489, article 70 ('Pendant une partie de leurs leçons, les professeurs dicteront des cahiers que les étudiants seront tenus d'écrire eux-mêmes. Les professeurs expliqueront et développeront verbalement, dans chaque leçon, le texte qu'ils auront dicté').

160 *Arrêté du conseil royal de l'instruction publique relatif aux examens dans les facultés de droit* Recueil des lois annotées Sirey, 2d Series: 1831–1848, 769. For spirited criticism of this legislative intervention, see Julien Oudot *Observations sur l'enseignement du droit civil en France* (Paris: Joubert 1844).

161 The 1890 decree stated that the chairs of 'civil code' at the *Faculté de droit* of Paris were to be renamed chairs of 'civil law': D.1891.IV.93, article 1 ('Les chaires du code civil de la faculté de droit de Paris prendront, à dater de ce jour, le titre de

Whether in the context of writing or teaching, the interpreter seeks to promote a progressive assimilation of what she presents as the legitimate or the normal or the objective and what she regards as the legal. In conclusion, the image of reality enshrined in the code is offered as the only one that is acceptable.¹⁶² The strategy operates as follows: By subjecting himself to these norms, the citizen will feel that he is submitting to norms that are surrounded with the aura of science rather than to some arbitrary legal prescriptions; accordingly, the will to be 'normal' (within the norm) will favour the spontaneous submission to the norm and allow for the standardization of behaviour.¹⁶³ In the words of Norbert Rouland, 'the code is the tangible sign of the submission which we must show towards the laws of the State.'¹⁶⁴ Against the background of the doctrinal aim of avoiding any drift away from the legal norm, it must be said that the dogmatism of the established system proves even more effective as a factor in the normalization of behaviour to the extent that the constraint on the interpreter to 'proclaim the good belief, to say that the Law is the unique and the only Law' is not perceived as such by her.¹⁶⁵ The fact that the phenomenon of co-optation by the Text operates at a level that largely eludes the consciousness of the jurist, and is yet part of scientific discourse, shows that it has been interiorized in such manner that the interpreter, while feeling that she is acting freely, will spontaneously behave in the way expected of her by the Legal Order.

What remains the orthodox position is expressed by François Laurent who argues that the civil code, written in clear and precise lan-

chaires de droit civil'). For its part, the administrative order of 1895, at article 3, allowed professors to arrange their teaching as they wished provided students were adequately prepared for the topics covered by the three annual examinations of the three-year programme of legal studies. Interestingly, the subject-matter of each examination is prescribed in detail in article 1 of the same administrative order and shows that the sequence of annual examinations largely reproduces the order of the civil code: *Arrêté relatif à la répartition des matières du droit civil entre les examens des trois années de la licence en droit* S.1895.L.1072.

162 I follow closely Danièle Loschak 'Droit, normalité et normalisation' in *Le droit en procès* (Paris: Presses universitaires de France 1978) 61.

163 *Ibid.* 75.

164 Norbert Rouland *Anthropologie juridique* (Paris: Presses universitaires de France 1988) no. 233, p. 416 ('le Code est le signe tangible de la soumission dont on doit faire preuve envers les lois de l'Etat').

165 Legendre, *supra* note 69, 242 ('Afficher la bonne croyance, dire que le Droit est l'unique et le vrai Droit').

guage, gives to the law 'a fixed and unshakeable basis,'¹⁶⁶ and adds that 'the text offers us definite principles; from the moment we move away from it, everything necessarily becomes indefinite.'¹⁶⁷ In other words, certainty and clarity are not only qualities that should be wanted (and, apparently, the only ones), they are also achievable. Once there is the civil code, there is in place a scientific (or scientific?) construction of the world. This structure becomes the only source of knowledge within the legal and lay communities. She who is able to mobilize the 'scientificity' or appearance of scientificity thus established, who is able to enlist its strength or power or efficacy, finds her discourse admitted by the audience (within or outside the legal community), predisposed as it is to accept the superiority of the priestly reason that preserves orthodoxy. In law as elsewhere, scientificity is legitimacy, and 'the science of the jurist consists first and foremost in knowing how to capture her text.'¹⁶⁸ In civil law jurisdictions, the civil code is the fountain-head of legitimacy.¹⁶⁹ In this way, it must be seen that codification is more than an opaque object through which events are perceived: it is a form of action determining how communities construct, think, and talk. Through the mediating role of the interpreter, it affects what communities experience.

In the manner in which it disciplines knowledge, that is, in the way it organizes the intellectual framework within which the experienced life will be apprehended, the civil code reminds one of Foucault's critique of governance (or governmentality) in modern societies: '[T]his putting in writing of real lives operates as a procedure of objectivization and subjugation.'¹⁷⁰ In every society, the production of discourse is controlled. It is the result of a choice by those who know (there is an etymological affinity between *elegantia* – that which is pursued so earnestly by the civilian – and *eligere*, to choose), and it is, in the end, a process which seeks to subdue the dangers that are perceived to be

166 F. Laurent *Cours élémentaire de droit civil* I (Brussels: Bruylant 1881) 74 ('une base fixe et inébranlable').

167 Ibid. ('Le texte nous offre des principes certains; dès que l'on s'en écarte, tout devient nécessairement incertain').

168 Legendre, *supra* note 69, 93 ('La science du juriste consiste à savoir capter son texte, d'abord et avant tout').

169 Alain Bernard and Yves Poirmeur 'Doctrine civiliste et production normative' in *La doctrine juridique* (Paris: Presses universitaires de France 1993) 131–2.

170 Michel Foucault *Surveiller et punir* (Paris: Gallimard 1975) 193 ('Cette mise en écriture des existences réelles ... fonctionne comme procédure d'objectivation et d'assujettissement [sic]').

associated with any innovation or risk.¹⁷¹ One of the keys to an understanding of the phenomenon lies in Mannheim's percipient remark: '[I]t is not primarily the man of action who seeks the absolute and immutable, but rather it is he who wishes to induce others to hold on to the *status quo* because he feels comfortable and smug under conditions as they are.'¹⁷² Let us remember that, at the root, codification is a *bürgerlich* movement. The civilian is who he is and acts as he acts because he enjoys Power. To critique the Text would be to question *himself* and, ultimately, to risk losing Power. A fetishist the civilian may be; a masochist he is not.

As the civilian jurist becomes 'suspended in webs of significance he himself has spun,'¹⁷³ the phase of exegetical loyalty has the effect of operating an academic closure of the field of legitimate interpretation, marking in the process a break with the lay community, which becomes disqualified and disenfranchised. Indeed, the carving of an area of 'distinction' is at work within the legal community itself where the practitioner, for example, not being regarded as a legitimate interpreter, is relegated to the rank of a mere handmaiden for her unsophistication and partiality. More importantly, what Frye refers to as the anxieties of coherence and continuity imply that 'voices of doubt or dissent' within the community of academic interpreters itself are 'to be muted at all times.'¹⁷⁴ The University must prevent any critique *intra muros*.¹⁷⁵ It must 'silence' the apostate.

*Fourth proposition: The interpreter is a Censor
and acts as Excommunicator*

The civilian is frightened, very much in the way a tyrant can be (though, like a tyrant, he will not admit it). His insecurity arises from his false consciousness, that is, from his intuition that his Power rests on questionable pretences, that his system – the ideological *prêt-à-porter* he offers – may not be the only epistemological system conducive to the

171 Ibid. *L'ordre du discours* (Paris: Gallimard 1971) 10–11.

172 Mannheim, *supra* note 125, 87. Cf. Trigeaud 'L'image sociologique de l'homme de droit et la préconception du droit naturel' in Trigeaud, *supra* note 142, 226, who describes the typical civilian as 'the man of law who yields to "intellectual comfort," to the tranquillity of being able to rest on the existing law reduced to "statutes" ('C'est l'homme de droit qui cède au "confort intellectuel," à la quiétude de pouvoir se reposer sur le droit existant ramené aux "lois"').

173 Geertz, *supra* note 10, 5.

174 Frye, *supra* note 9, 37.

175 Legendre, *supra* note 69, 237.

knowledge of law, but may rather be *a* system that can, in fact, be challenged and hence, ultimately, destroyed. Through her unceasing gloss, the civilian is battling to maintain her own Faith in her system (and in herself): she is concerned to preserve the anagogical meaning of the Text. In the words of the 'founder' of modern comparative legal studies in France, Edouard Lambert, 'the jurist brings to the defence of his traditional dogmas all the more energy and intolerance given the fact that he is aware of fighting ... for the preservation of his professional faith and ideal.'¹⁷⁶ As a result, 'the obsessional reference to the good thought, to the good science' remains rife.¹⁷⁷

Aware that to tell the Truth in law is but to convince an audience,¹⁷⁸ the civilian engages, individually and collectively, in much self-aggrandizement and readily extols the virtues of her work. Thus, in that part of *Quebec Civil Law* devoted to an exposition of the positive law of obligations, the civil law literature in Quebec is variously described as 'ric[h]',¹⁷⁹ 'helpful',¹⁸⁰ 'interesting',¹⁸¹ 'valuable',¹⁸² 'detailed',¹⁸³ 'most helpful',¹⁸⁴ 'extensive',¹⁸⁵ 'good',¹⁸⁶ 'enormous',¹⁸⁷ 'extremely rich',¹⁸⁸ 'impressive',¹⁸⁹ 'useful',¹⁹⁰ and 'comprehensive'.¹⁹¹ Reading those passages, I am unwittingly reminded of Merryman's observation where he notes that the attitude of the civilian believing (and needing to believe) in her superiority *vis-à-vis* other legal traditions has 'itself become part of the civil law tradition.'¹⁹² These laudatory formulas, however, are not

176 Edouard Lambert *Le gouvernement des juges* (Paris: Giard 1921) 223 ('le juriste apporte à la défense de ses dogmes traditionnels d'autant plus d'énergie et d'intolérance qu'il a conscience de lutter ... pour la sauvegarde de sa foi et de son idéal professionnels').

177 Legendre, *supra* note 69, 236 ('l'obsessionnelle référence à la bonne pensée, à la bonne science').

178 C. Perelman *Logique juridique: Nouvelle rhétorique* (Paris: Dalloz 1976) no. 51, p. 107.

179 *Supra* note †, 378.

180 *Ibid.* (twice).

181 *Ibid.*

182 *Ibid.* 388 and 466.

183 *Ibid.* 430.

184 *Ibid.*

185 *Ibid.*

186 *Ibid.* 430 and 467 (twice).

187 *Ibid.* 466.

188 *Ibid.* 467.

189 *Ibid.*

190 *Ibid.*

191 *Ibid.*

192 John Henry Merryman *The Civil Law Tradition* 2d ed. (Stanford: Stanford University Press 1985) 3.

enough to bolster the civilian's confidence. In addition, she must promote the active suppression of discourse which could be regarded as contrapuntal to the hegemonic argument which she advances. Because the civil code is presented and perceived as definitive and authoritative, the college of interpreters,¹⁹³ seeking to protect the definitiveness and authoritativeness of the code – from which the law and they themselves derive their only legitimacy – will, in a remarkably cohesive way, want to preserve its assumed coherence by ascertaining its consistent meaning. In other words, the community of civilians is not prepared to allow for any lived experience that does not sustain its intersubjective world-view and practices. Thus, correct and incorrect meanings of the civil code will emerge.

An early illustration of this concern for evangelical certitude appears in Justinian's presentation of the Digest:

that no one, of those who are skilled in the law at the present day or shall be hereafter, may dare to append any commentary to these laws, save only insofar as he may wish to translate them into the Greek language in the same order and sequence as those in which the Roman words are written ...; and if perhaps he prefers to make notes on difficulties in certain passages, he may also compose what are called *paratitla*. But we do not permit them to forward other interpretations – or rather, perversions – of the laws, for fear lest their verbosity may cause such confusion in our legislation as to bring some discredit upon it. ... If any should presume to do such a thing, they themselves are to be made subject to a charge of fraud, and moreover their books are to be destroyed.¹⁹⁴

Elsewhere, Justinian had already written: 'Let it suffice to make some reminders by indexes alone and simple headings, in such a way that no offense arises through interpretation.'¹⁹⁵ Ever since, the civilian academia has maintained an efficient censorship apparatus, seeking to throw outside the (religious) community those who fail to conform. Through its *autos-da-fé*, it has incessantly privileged the theme of 'the triumph of the Faith and the crushing of Error.'¹⁹⁶

193 For the concept of 'invisible colleges' see Diana Crane *Invisible Colleges: Diffusion of Knowledge in Scientific Communities* (Chicago: University of Chicago Press 1972), where the author discusses connectedness between scholars within a given research area.

194 *Tanta*, 21, in *Digest* supra note 61, I, lxii and lxiii.

195 *Deo auctore*, 12, in *Digest* supra note 61, I, xlix.

196 Legendre, supra note 69, 242 ('le thème ... du triomphe de la Foi et de l'écrasement de l'Erreur'). See generally Pierre Legrand 'Strange Power of Words: Codification Situated' (1994) 9 *Tul. Euro. & Civ. L. For.* 1, 10–12.

In this way, one sees that the Power of the civil law lies not only in its ability to construct reality, but also in its capacity to obviate different visions of social life. The norm is instituted (far from being necessary, it reflects prior choices, or *pre-judices*) and is instituting (it determines the normal, the acceptable).¹⁹⁷ The focus on legal norms privileged by civilians arbitrarily monopolizes the academic discourse in a manner which not only ensures that 'the arguments *pro* and *con* are developed within the zone defined by the text,'¹⁹⁸ but which also excludes alternative views of justice or other ways of understanding the world. Diversity that is *hors norme* is assimilated to deviance. As Jean Dabin notes, systematization leads to 'the sacrifice of any truth that is unamenable to the logic of the "system."¹⁹⁹ To write the civil law without adhering to the rationality espoused by the civilian confraternity is, therefore, to run the risk of being ignored if not ostracized. The weak psyche of civil law doctrine is unable to accommodate any work that would seek to expose the illusions upon which it rests (such as logic or certainty) and on the basis of which it is able to secure the allegiance of interpretive communities. The danger of disbelief that might follow from a challenge to received dogma and authority is too serious to be allowed to arise. Accordingly, civil law doctrine fulfils a boundary-maintaining function that imposes 'a clear drawing of lines against even the most neighborly of heresies.'²⁰⁰

Beyond the collective limits upon forms of communicative discourse within law set by the dominant creed, the interpretive effort is regarded as illicit, that is, as subversive. If it cannot be dissuaded, it will be ignored. Arguably, ignorance is an even more violent act than reply or counter-criticism: to ignore an argument is to deny its most basic entitlement to existence and recognition. Civilian knowledge separates what is thinkable from what is unthinkable. In other words, the community of civilian writers operates on the premiss that data for analysis can be divided into what is acceptable and what is not. This belief, in

197 Georges Canguilhem *Le normal et le pathologique* 4th ed. (Paris: Presses universitaires de France 1993) 182: 'the norm is what determines the normal on the basis of a normative decision' ('la norme est ce qui fixe le normal à partir d'une décision normative').

198 Legendre, *supra* note 69, 107 ('les arguments *pour* et *contre* se développent dans la zone définie par le texte').

199 Jean Dabin *La technique de l'élaboration du droit positif* (Brussels: Bruylant 1935) 356 ('le sacrifice de toute vérité réfractaire à la logique du "système"').

200 Frye, *supra* note 9, 51.

turn, arises from the concern of civilian writers with purism;²⁰¹ they wish to avoid the flow into legal analysis of elements perceived by them as alien and, thus, preserve a given form of discourse from putative foreign elements held to be undesirable. As is noted by Douglas, '[p]urity is the enemy of change, of ambiguity and compromise.'²⁰² Thus, critical articles written by idiosyncratic voices are to be regarded as anathema and excluded from mainstream law journals without any further ado. Civil law editors readily practice 'silencing.'²⁰³ Against this background, is it a coincidence that the contributors to *Quebec Civil Law* are fourteen academics from the same law faculty?

The tradition of reflexive allegiance to civil codifications by their interpreters is compounded, in Quebec, by a permanent trait of intellectual life to the effect that any autonomous position which takes its distance from, and proves critical of, an indigenous noetic enterprise, such as the civil code, is immediately rejected as contemptuous²⁰⁴ – hence the apposite designation of a Quebec intellectual as an 'apparatus intellectual,'²⁰⁵ something having rather little to do with the intellectual as *Aufklärer*. A documented example of this censorial attitude is offered by a Quebec judge who tried to ensure that the civil code would not have to face criticism either from outside or from within the Quebec legal community.²⁰⁶

Yet, the refusal to acknowledge a traumatizing reality remains a function of the interests at stake. One understands, therefore, the extreme violence of the resistance shown by the civilian – the owner of a cultural capital – when confronted with analyses bringing to light the

201 See George Thomas *Linguistic Purism* (London: Longman 1991) 31, who defines the purist as 'one who maintains a dualistic view of a referent as containing desirable and undesirable elements, who feels able to recognise these elements in a given referent and who, prompted by a desire to promote its well-being and prestige, seeks to remove those elements he deems undesirable.'

202 Douglas, *supra* note 153, 162.

203 This assertion can be documented.

204 See Marc-Henry Soulet *Le silence des intellectuels: Radioscopie de l'intellectuel québécois* (Montreal: Editions St-Martin 1987) 63: 'for the intellectual ... there is no salvation ... outside of his attachment to the Quebec *oeuvre*' ('pour l'intellectuel, ... il n'est point de salut ... en dehors de son attachement à l'oeuvre du Québec').

205 *Ibid.* 61 ('intellectuel d'appareil').

206 Jean-Louis Baudouin 'Reflections on the Process of Recodification of the Quebec Civil Code,' (1991–92) 6/7 *Tul. Civ. L. For.* 283, 290, who, making reference to the 1994 Quebec civil code, claimed that critics had forfeited the right 'to cast doubt on the recodification of our law' apparently on account of the fact that the recodification process was 'well underway and ... entering into its final stage.'

conditions of production and reproduction of a discourse which he persists in denying.²⁰⁷ In any civil law text, it is, thus, crucial to look for the *non-dit*: the decision by a writer to ignore certain contributions (or types of contributions) is, in and of itself, pregnant with information. For the comparatist, the *non-dit* is as much part of civil law doctrine as what the reader finds explicitly stated. Reacting to the ruthless exclusion of alternative paradigms of thought and expression that do not subscribe to the dogmatic order created by the reigning (civilian) academy, Frye remarks that '[t]he only way to forestall the work of criticism is through censorship, which has the same relation to criticism that lynching has to justice.'²⁰⁸ Perhaps, given this obscurantist terrorism, it is only too appropriate that the etymology of 'order' – the civil code is an *order* – should suggest at once 'arrangement' and 'command,' 'organization' and 'repression.' At this point, the reader familiar with civil law literature in Quebec may wish to consider, for instance, the doctrinal authorities supplied – and the doctrinal authorities *silenced* – in the chapter on contractual obligations in *Quebec Civil Law*.²⁰⁹

Ultimately, bearing in mind that what counts as law and what is accepted as the legal is exclusively and comprehensively determined by civilians from *within* the system,²¹⁰ the fundamental question remains the following: how can the civilian belong to the system that pays her and within which she purports to act as scientific scholar, while simultaneously taking a distance *from* the system such as is expected of the woman of science and such as is a prerequisite to the formulation of a critique of the system? How can the jurist challenge, for example, the underlying structure on which the institutional framework rests and the belief in the obligatory character of the civil code without having to subscribe to the blandness and desultoriness of the presentation of the civil law adopted by orthodox civilian doctrine (which makes any textbook look like a company report designed to allay the fears of shareholders) and yet without being regarded as a rebel and, therefore, having to suffer exclusion from the debate?²¹¹ In the way the civilian community undertakes to manage this dilemma lies the key to the

207 Pierre Bourdieu *Leçon sur la leçon* (Paris: Editions de Minuit 1982) 30–1.

208 Frye, *supra* note 60, 4.

209 *Supra* note †, 388–431.

210 Bourdieu refers to '[le] droit de dire le droit': Bourdieu, *supra* note 134, 4 ('the right to say the law').

211 I paraphrase in part André-Jean Arnaud 'La transmission du savoir juridique et ses effets politiques et sociaux' (1980) *Procès: Cahiers d'analyse politique et juridique*, No. 5, 48.

future of civil law doctrine: is one to expect yet more textbooks or manuals or is there finally a realistic hope of witnessing the emergence of an intellectual tradition within the civil law world? Is the civilian doomed to be a glossator or can he aspire to move *beyond the gloss*?

Epilogue: The heretical imperative

[N]onconformism is the *sine qua non* of intellectual achievement.

– Hannah Arendt²¹²

To summarize: *Quebec Civil Law* is operating within a space circumscribed for it by its predecessors,²¹³ all party to the 'great legalistic manipulation' which generates a huge universe of fiction, yet so *real* that the civilian readily forgets its constructed character.²¹⁴ Central to this imaginary world is, of course, the civil code as numinous document. The code symbolically represents the world as it has come to be experienced by a group of individuals in the society where it is drafted at a particular historical juncture: it is the distilled product from the interaction of a range of now forgotten interpretive agendas. In the end, civil law narratives construct a world in which values have been defined through the selectivity and creativity of the narrator. Because they have too much information at their disposal, the writers of a code, when they engage in its drafting, make (unreflexive) judgments based on their own life experiences: they determine what to include and what to exclude. By seeking to reflect reality, the code must operate a selection from reality, which in turn functions as a deflection of reality.²¹⁵ a code does not differ from any chemistry model. Because the landscape of reality is, in fact, too rich to be revealed with one spot-

212 Hannah Arendt, unpublished address, 1948; in Elisabeth Young-Bruehl *Hannah Arendt: For Love of the World* (New Haven: Yale University Press 1982) xv.

213 Stanley Fish *Is There a Text in This Class?* (Cambridge, Mass.: Harvard University Press 1980) 350.

214 Legendre, *supra* note 119, 151 ('grande manipulation légaliste'). See also Algirdas Julien Greimas *Sémiotique et sciences sociales* (Paris: Editions du Seuil 1976) 99; Oudot, *supra* note 102, I, xi, where the author indicates that the focus of civilian legal studies is not 'man' but rather 'an imaginary being' ('un être imaginaire'). Although my presentation has focused on the legal discourse in law, the 'manipulation' goes further, for '[t]he discourse of law asserts the ability to organise in its own grammar and lexicon other dialects and idioms': Costas Douzinas and Ronnie Warrington *Postmodern Jurisprudence* (London: Routledge 1991) 161.

215 Joseph R. Gusfield 'Introduction' in Kenneth Burke *On Symbols and Society* ed. Joseph R. Gusfield (Chicago: University of Chicago Press 1989) 13.

light,²¹⁶ clearly, therefore, the code inevitably distorts or conceals the real world: family law is totally unlike the family.²¹⁷

The code, then, once having come into force, assumes a life of its own. Although the initial determinations regarding its contents were based on personal experience (that is, on human partiality), the interpretive community readily forgets all about the assumptions upon which the code is founded. It thinks of the code as reality, as true, forgetting that a leap was made at the early stage of selection. The phenomenon of formalization of the object of knowledge, to the extent that the re-presentation found in the civil code is apprehended *as if it were the real world*, is also attributable to the fact that the words that constitute the civil code appear in print: '[W]ords can more easily be seen to be separate from things when they are seen to exist on their own, in written form.'²¹⁸ A text operates an abstraction, that is, it effectuates a universalization (it effaces specificities) and a rationalization (it resolves ambiguities) which function as a wall between the scholar and reality (the object of knowledge) in a way that differs from orality where the interaction between the inquirer and the object of inquiry is more direct and dialogical: a text cannot answer questions.²¹⁹ And so 'the written word becomes a separate "thing,"'²²⁰ and the civilian turns her attention to a type of rationality rather than to daily experience. She then purports dogmatically to reproduce to infinity a particular discourse which, coincidentally, confers onto those who perpetuate it the key role of high priests within the system. Through what Foucault calls '[l]e moutonnement du commentaire,'²²¹ the civilian is in the service of the State and acts as its intermediary (even though she may think that the State is outside of herself): she engages

216 Ilya Prigogine and Isabelle Stengers *La nouvelle alliance* (Paris: Gallimard 1979) 312-13.

217 This is not to say that, over time, one pole on the continuum may not move towards the other. Thus, the real family may become like the family in the code or vice versa.

218 Jack Goody *The Domestication of the Savage Mind* (Cambridge: Cambridge University Press 1977) 103.

219 Goody, *supra* note 80, 129. Ong makes the point that a text 'separates the knower from the known': *supra* note 85, 43.

220 Goody, *supra* note 218, 46.

221 Foucault, *supra* note 170, 27. A translation of this expression seems awkward. The imagery is that of commentaries whose authors, frightened and apprehensive, reflexively follow, like sheep, in the footsteps of their predecessors.

in what Rousseau called 'a purely civil profession of faith.'²²² For Roussel, 'the interpreter is the intelligent slave of the legislator.'²²³ The coupling of the systematicity in which he couches his argument and the prescriptive power inherent to a legal discourse combine to confer to the interpreter's rhetoric a unique persuasive strength by draping it in the aura of incontestability. Trying to accomplish 'the great dream of the deductive synthesis, in which faith and knowledge are indissolubly linked,'²²⁴ the civilian arrogates to himself the benefit of that strength and derives his own Power from it.

The image that is projected – necessary for the upholding of the myth of the good law – is that of a process which is disinterested throughout: 'the jurisconsults acting as interpreters present themselves as moderate scholars.'²²⁵ The prestige of the civilian in civil law jurisdictions is, indeed, derived from his supposedly apolitical and relatively non-controversial expertise in (private) law. The integrity of the community of interpreters finds its guarantee in the presence of the Text, which ensures interpretive subservience to itself. Accordingly, one of the most insistent rhetorical tropes of the civil law is that a book like *Quebec Civil Law* can be written under the banner of apoliticism, that the discourse it contains can be objective. Not only is this assertion an illusion, but it is a dangerous illusion.²²⁶ In fact, in the way it uses only that which is relevant to its narrative coherence, and therefore excludes the rest, the civilian project is engaged in the development of its own, pure, story. Every concept, by being a concept, implies a derivation. Systematicity is not an intrinsic quality of the legal order that would make it ontologically superior. It is simplistic to think that because reality comes first, the civil code is necessarily a rendition of it. Systematization takes place according to a subjective criterion chosen by the person who classifies according to the tasks she must solve.²²⁷ Actually, the code builds on the reality that it projects more than it

222 Jean-Jacques Rousseau 'Du contrat social' in Bernard Gagnebin and Marcel Raymond (eds) *Oeuvres complètes* III (Paris: Gallimard 1964) bk IV, c. 8, 468 (originally published in 1762) ('une profession de foi purement civile').

223 Adolphe Roussel *Encyclopédie du droit* 2d ed. (Brussels: Gustave Mayolez 1871) 114 ('l'interprète est l'esclave intelligent du législateur').

224 Frye, *supra* note 9, 104.

225 Oudot, *supra* note 102, I, xi ('les jurisconsultes interprètes se présentent comme des savants modestes').

226 Fish, *supra* note 213, 43.

227 Witold Wolodkiewicz. *Les origines romaines de la systématique du droit civil contemporain* (Wrocław: Ossolineum 1978) 3. I am greatly indebted to Dianella Melani, of the Biblioteca Medicea Laurenziana, in Florence, who facilitated the consultation of this text for me.

describes it: it is *post hoc*. Christian Atias emphasizes this assertion through a consideration of what he calls the constitution of epistemological units, that is, of units measuring the relevance of legal data or, in other words, delineating what is regarded as relevant to a persuasive legal argument in terms of time, space, subject-matter, and audience. One has in mind, for instance, the exclusion from the debate within a given legal community of old decisions or foreign data or what is regarded as 'non-legal' information. It is essential to note that these delineating units are not established *ex post facto*, which would assume that all possible knowledge would have been gathered together and that a sifting process would *then* have taken place against various parameters. Rather, they are determined *ex ante facto* and, therefore, colour the collection of that data which is considered relevant by commentators. Of course, the fascinating question is how such units come to inhabit the collective consciousness of a legal community.

How to justify, for example, the emergence of a given division of subject-matters which prompts an academic to ignore a particular case because it falls outside a given field? How to account for the fact that, at a particular point, the past ceases to be significant? How to explain that other (that is, foreign) experiences of legal order are readily perceived as irrelevant? Why is a particular body of information considered sufficient? Clearly, to go beyond the traditional epistemological units prevailing in any given legal community becomes difficult as one must then challenge the intellectual habits of that community – conditioned as it is by such factors as the cultural background of lawyers, their legal training, their idea of their role in society – in order to bring to its attention data outside the usual boundaries. The regulatory nature of these epistemological units and the reductionism they necessarily entail contribute to the establishment of a hierarchy of arguments: the impact on teaching and literature about the law must be obvious.²²⁸ The veneration of the civilian for the code betrays the fact that the code is more an artefact, the essential meaning of which is found *outside* the system, than it is an exercise in formal logic. Against that background, it remains endlessly captivating how the civil law teacher persistently 'choose[s] not to characterize it as an arbitrary or politically biased practice which has recourse to linguistics only to veil the naked application of interest.'²²⁹

228 Christian Atias *Épistémologie du droit* (Paris: Presses universitaires de France 1994) 77–85.

229 Ian Maclean *Interpretation and Meaning in the Renaissance* (Cambridge: Cambridge University Press 1992) 7.

The civilian project, offered to us as a science, is not innocent. There is prejudice, misunderstanding, ignorance, and fallibility. Bergson's observations are apt: '[T]he normal work of intelligence is far from being disinterested work. We do not aim, in general, to know for knowing, but to know to take a side, to make a profit, in sum, to satisfy an interest.'²³⁰ There is repression in the act of constant reiteration: there takes place an active denial of plurality. Indeed, it is arguable that the civil law defines itself in terms of this institutional and intellectual closure. The situation is exacerbated in a legal system like Quebec's: monolithism and ethnocentrism are even more seductive for a *mentalité de survivance*.²³¹

'The cult of the text, the primacy of doctrine and of exegesis go together with a practical denial of the economic and social reality and a refusal of any scientific apprehension of that reality.'²³² Nowhere more so than in *Quebec Civil Law's* surveys of the various branches of the civil law is the studied indifference of the civilian to the relationship between law and society made apparent. The academic who researches the civil law perceives his subject as an autonomous field, regardless of time and place, and understands it largely according to issues not contexts, that is, approaches it in a formalistic way with little, if any, interdisciplinary sensibility. Robert Gordon notes 'the old Formalist belief that only specialized-law-stuff-separate-from-politics is law.'²³³ There is, therefore, no acknowledgement that law is embedded within a specific temporal and geographic context and within a given social and cultural scheme; that law is but a re-presentation of the manner in which we experience social relations, of the way we see the world. Legal knowledge is kept apart from its natural place amongst the social sciences or the humanities. Legendre adroitly refers to the 'inhumanity' of legal knowledge.²³⁴ In *Quebec Civil Law*, civil law doctrine is seen to assume its self-ascribed, post-Enlightenment, complacent destiny marked by autonomy and, specifically, (alleged) autonomy

230 Henri Bergson *La pensée et le mouvant* (Paris: Presses universitaires de France 1938) 198-9 ('le travail normal de l'intelligence est loin d'être un travail désintéressé. Nous ne visons pas, en général, à connaître pour connaître, mais à connaître pour un parti à prendre, pour un profit à retirer, enfin pour un intérêt à satisfaire').

231 Cf. Christian Atias *Savoir des juges et savoir des juristes* (Montréal: Centre de recherche en droit privé et comparé du Québec 1990) 33.

232 Bourdieu, supra note 134, 18 ('le culte du texte, le primat de la doctrine et de l'exégèse ... vont de pair ... avec une dénégation pratique de la réalité économique et sociale et un refus de toute appréhension scientifique de cette réalité').

233 Robert W. Gordon 'Critical Legal Histories' (1984) 36 *Stan. LR* 57, 122-3 (emphasis original).

234 Legendre, supra note 119, 154 ('inhumanité').

from politics. The detached discourse produced by the contributors 'cluster[s] around the poles of the mechanical, efficient, and standardizing, versus the cultural, social, and historicizing.'²³⁵ It seeks, by offering itself as a coherent and luminous whole, to achieve an aesthetic ideal that requires the exclusion of moral, cultural, and political elements. In this way, the identity of any of the expository chapters within *Quebec Civil Law* is not only positive, in that it is of the book and shares a common identity with all the other chapters in the book, but also negative, in that it is distinct from social reality, which is *not* accounted for in the book. A brief illustration must suffice.

In the section on lease, the writer notes that 'the lessee has a ... fundamental obligation: to use the thing as a prudent and reasonable person (art. 1617, para. 1).'²³⁶ There seems little awareness, however, of the capital political ramifications flowing from this (time-honoured) formula. While he intones them like a mantra, the writer does not remark on the ambivalence emerging from words which disclose a confusion between the descriptive order and the realm of ideals. No notice is taken of the fact that the referential notion of 'prudent and reasonable person' erases the necessary distance between the average and the ideal citizen. On the one hand, the behaviour of the 'prudent and reasonable person' is offered as a model. But, on the other hand, this model is itself constituted from what we assume to be the habitual and spontaneous behaviour of the average citizen, normally respectful of another's property. Indeed, the use of words like 'reasonable' hides the arbitrary character of the judicial appreciation and the fact that, in the end, it is the judge who decides what is normal. The normal is not 'out there' for everyone to see: it is constituted by, and instituted through, a judgment which is necessarily subjective.²³⁷ Yet, the obvious socio-political implications following upon the use of a phrase such as the 'prudent and reasonable person' are not treated by the civilian as a topic fit for scholarly debate or investigation. Nor is he preoccupied to ascertain the (political) reasons underlying the use of the very word 'person' in preference to 'man.' Such matters simply do not concern the pristine, apolitical civil law. Thus, 'the law becomes a sort of reality imposed upon the social given, shaping it, and becoming in the end more "true" than the facts.'²³⁸ There ensues a *décalage* between the law

235 Paul Rabinow *French Modern* (Cambridge, Mass.: MIT Press 1989) 58.

236 *Supra* note †, 544.

237 I follow Loschak 'Droit, normalité et normalisation' in *Le droit en procès* *supra* note 162, 71.

238 Jacques Ellul *Histoire des institutions III: Le Moyen Age* 9th ed. (Paris: Presses universitaires de France 1982) 27 ('Le droit devient une sorte de réalité imposée

and the facts – what Foucault might have referred to as a divorce between ‘les mots et les choses’²³⁹ – with the consequence that the private legal order propounded by the community of civilian writers becomes increasingly detached from the world it is supposed to have seized and to be faithfully rendering.

I do not propound the extreme view that legal forms and practices can be explained in full by making reference to political, economic, and socio-cultural factors. But, even if I accept that, within limits, these forms and practices arise and operate as independent variables in the field of social experience,²⁴⁰ it remains imperative to acknowledge the impossibility of formal closure as proposed by *Quebec Civil Law* (and its predecessors). Thus, Gödel’s theorem – which Douglas Hofstadter perceptively notes can suggestively be translated into other domains provided one specifies in advance that the translation is metaphorical and not intended to be used literally – shows that the search for a totalizing theory is an illusion: no sufficiently complex (mathematical) system can simultaneously achieve completeness and consistency.²⁴¹ Edgar Morin reinforces this argument: ‘any conceptual system that is sufficiently rich necessarily includes questions to which it cannot answer by itself, but to which it can only answer by referring to what is outside of itself.’²⁴²

There is, indubitably, a need for a profound realignment in the discursive field occupied by traditional civil law doctrine. Plainly, it appears futile to worry extensively about abstract definitions and categorizations (such as is advocated, in typical civilian fashion, in the section introducing obligations or in that describing ‘innominate contracts’ in *Quebec Civil Law*).²⁴³ It would prove more heuristic and more ethnographic to explore how these definitions and categories have come to arise and how they have been understood and used by their self-interpretive community. In other words, the civilian lawyer ought to become increasingly aware of her mythological conditioning

au donné social, le mettant en forme, et finissant en somme par devenir plus “vrai” que les faits’).

239 Foucault, *supra* note 29.

240 I closely paraphrase Gordon, *supra* note 233, 101.

241 Douglas R. Hofstadter *Gödel, Escher, Bach: An Eternal Golden Braid* (New York: Vintage 1989) 696 and 265, respectively.

242 Edgar Morin ‘Epistémologie de la complexité’ [1984] *Revue de la recherche juridique* 47, 63–4 (‘tout système conceptuel suffisamment riche inclut nécessairement des questions auxquelles il ne peut pas répondre de lui-même, mais auxquelles il ne peut répondre qu’en se référant à l’extérieur de ce système’).

243 *Supra* note †, 378–88 and 507–12, respectively.

so as to extricate herself from herself-as-civilian to an extent that will allow her to articulate more dialogically and less disjunctively the relationship between the ineffable reality and her doctrinal work. Specifically, she ought to realize that '[t]he virtues of clarity, certainty, and institutional autonomy are contingent, not absolute.'²⁴⁴ It is arguable, moreover, that the civilian's traditional quest for rationality, foreseeability, and coherence strikes a profoundly anti-humanist note. What is needed, in sum, is 'a bit of detergent discourse.'²⁴⁵ A valuable start towards an enhanced understanding of law in society would be made if only the civilian could acknowledge that a 'law-as-rules' representation of the legal world intervenes as an epistemological barrier to *legal* knowledge, that it leads the jurist astray by suggesting that to have knowledge of the law is to have knowledge of the rules (and that to have knowledge of the rules is to have knowledge of the law).²⁴⁶

Ever since Justinian's experiment, civilians have maintained a conventionalized way of talking about the law that has privileged boundary-speech and that has used the speech of law unthinkingly as an explanatory resource in itself. In the process, civilian writers have created discrete ontological zones both between the law and the outside world, on the one hand, and within the law itself, on the other. My plea could be said to be for a move away from a process of purification to one of hybridization. But the case is more complex than it appears, for it is arguable that, unbeknownst to civilians themselves, hybridization has always been a feature of their discourse no matter how formalistic it has chosen to make itself. Because the doctrine of formalism is *itself* a political practice and since the option in favour of formalism is, therefore, a political decision, the civil law has always been more than a technique and has always been, also, politics and culture (and so much more). My contention is, thus, that civilians ought to acknowledge that, under the fig-leaf of formalism, their dogmatic constructions are inevitably political. Yet, the condition of the present must dictate one's view of the future. The day is far away when the

244 Philip Selznick *The Moral Commonwealth* (Berkeley: University of California Press 1992) 437.

245 Roland Barthes *par Roland Barthes* (Paris: Editions du Seuil 1975) 126 ('un peu de discours détergent').

246 For the concept of 'epistemological barrier' ('obstacle épistémologique'), see Gaston Bachelard *La formation de l'esprit scientifique* 14th ed. (Paris: Vrin 1989) *passim* (originally published in 1938). For an application to civil law, see generally Michel Miaille *Une introduction critique au droit* (Paris: François Maspero 1976) 37–68.

psittacine race of civilian writers that has marked the civil law tradition becomes extinct as the dodo. It is most unlikely that the next edition of *Quebec Civil Law* – that which will take into account the new Quebec civil code which came into force on 1 January 1994 – will mark a break with the mechanistic tradition that has become second nature for the civilian. But, meanwhile, the civilian academy can at least be examined for what it is: it represents *a* perspective, if an impoverished one, on the law in society. For all its imperious claims to Truth, it certainly does not offer *the* perspective on the law in society. Civilian legal thought is simply one instance in an infinite series of arational and equally possible attempts to capture social experience in reproducible form.²⁴⁷

Because legal discourse is inherently political, the threat must come from the existence of a homogeneous discourse focusing on the sempiternity of the Text like that propagated by the civilian academy for more than fourteen centuries – an orthodoxy whose commitment to the pursuit of Truth proves inimical to *scholarship*. The promise is a discourse that remains critical and plural. The most urgent civilian project must be, therefore, to do away with doctrine-as-homily and to recuperate the *counter*-memories of the civil law, to bring to light what has been repressed. As George Steiner asserts: 'There are questions we must be tactless and undiplomatic enough to raise if we are to stay honest with ourselves and our students.'²⁴⁸

W.H. Auden, who must have had something of the civilian in him when he wrote 'Law Like Love,' could easily have pointed to much of *Quebec Civil Law* in support of his disillusioned remark:

Law, says the priest with a priestly look,
Expounding to an unpriestly people,
Law is the words in my priestly book,
Law is my pulpit and my steeple.²⁴⁹

Commenting on Wagner's *Parsifal*, Nietzsche thought it 'too Christian, chronological, limited.'²⁵⁰ *Quebec Civil Law* is not *Parsifal*, and I am not Nietzsche. But, it *is* 'too Christian, chronological, limited.'

247 I very closely paraphrase Gary Peller 'The Metaphysics of American Law' (1985) 73 *Calif. LR* 1151, 1155.

248 George Steiner 'To Civilize our Gentlemen' in Steiner *Language and Silence* (London: Faber & Faber 1967) 82.

249 W.H. Auden 'Law Like Love' in Edward Mendelson (ed.) *Collected Poems* (London: Faber & Faber 1976) 208.

250 Giorgio Colli and Mazzino Montinari (eds) *Nietzsche Briefwechsel II/5: Friedrich Nietzsche Briefe: Januar 1875 – Dezember 1879* (Berlin: de Gruyter 1980) 300 (letter of 4 January 1878 to Reinhart von Seydlitz) ('zu christlich zeitlich beschränkt').