Maladroit or Not? Learning to Be of Two Minds in the New Bijural Law Curricula

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The aim of this paper is to document how the introduction of an integrated (or bijural) approach to the teaching of the civil and common law at Louisiana State University in 2001, as at McGill University in 1999, represents a restoration of a way of thinking about law that was not uncommon in nineteenth-century Louisiana and Quebec.

An Archaeology of Bijuralism

The province of Quebec and the state of Louisiana are jurisdictions with a great deal to teach each other, but not as regards what it means to be a "civilian jurisdiction." While these two jurisdictions may ordinarily be classified as belonging to the civil law tradition, what they have to teach each other about is their respective *mixity*. This was a well-recognized fact in the late nineteenth century. For example, F. P. Walton, dean of the McGill law school, wrote in a piece called "The Civil Law and the Common Law in Canada": "In Scotland as in Quebec and in Louisiana the law occupies a position midway between the common law and the civil law. It has drawn largely from both sources."[1] Walton was here referring to the manner in which the Civil Code of Quebec (1866), though similar to the French Napoleonic Code in its plan and much of its wording, also embraced many legal concepts from Roman, Old French, English, and American law, and was therefore quite heterogeneous in its sources—as appears from the Reports of the Codification Commission.

One finds the same receptive attitude toward Louisiana expressed in various judgments from the era. For example, in *Price v. Mercier* Henri-Elzéar Taschereau (the first French Canadian chief justice of the Supreme Court of Canada) approvingly remarked: "As well said by the Supreme Court of Louisiana in a recent case under the article of their code corresponding with our art. 1485 . . . ."[2] The attraction of Louisiana for one such as Taschereau lay in its distance from Quebec, for he made a point of finding reasons or *motifs* for his judgments as far afield as possible. Like most Quebec judges of his era, he took

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1. 5 La Revue Légale 329, 338–39 (1899).
2. (1891) 18 Supreme Court Reports 303 at 324.

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a nomadic approach to the interpretation of the Civil Code, constantly testing the interpretation of its provisions against the dictates of the "general law" or "reason."[3] While he frequently made a tour of authorities from jurisdictions like Louisiana or France, he was just as inclined to discuss cases from Massachusetts or Great Britain in his decisions pertaining to Quebec.[4] Sitting on the Supreme Court of Canada, with its bijural jurisdiction, he also sometimes reversed the flow by citing civilian sources when disposing of a case from a common law province like Ontario.[5] The idea of "binding authority" was not completely alien to Taschereau, but he and most of the other judges of his era preferred, and more often found themselves in agreement with, "persuasive authority."[6]

This picture of a sort of free trade in legal wisdom between Quebec and the other provinces of Canada, or Quebec and Louisiana *and beyond,* was to change dramatically in the 1920s. The dominant Quebec voice on the Supreme Court of Canada in the 1920s was that of Pierre-Basile Mignault, author of the monumental treatise *Le droit civil canadien* and sometime professor of law at McGill.[7] In "L'avenir de notre droit civil," Mignault wrote:

> The eight provinces which surround us are governed by the English [common] law . . . . The danger is that the principles of that law, which for us is a foreign law, will infiltrate imperceptibly amongst us . . . . [T]he effect would be to alter the purity of our law . . . . Don't forget the case of Louisiana.[8]

What "the case of Louisiana" signified for Mignault was the danger of unruly citation. In his article he invoked reports that "the bulk of the practical law now in force" in Louisiana was "derived from common law sources" and that the "connection with the law of France" had accordingly diminished to the point of being "almost nonexistent."[9] Louisiana thus came to symbolize the "impure" jurisdiction (by contrast with Quebec's own "purity") and a model to be avoided rather than emulated.

By writing about "the *future* of our civil law" and the (allegedly) external "dangers which menace us," Mignault directed attention away from the mixity of Quebec's legal history. He purified that history of its mixity. Mignault also

3. See David Howes, From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875–1929, 32 McGill L.J. 323, 531 (1987). For an alternative appreciation see Michel Morin, Des juristes sédentaires? L'influence du droit anglais et du droit français sur l'interprétation du *Code civil du Bas Canada,* 60 Revue du Barreau 247 (2000).

4. See, e.g., Corporation of Aubert-Gallion v. Roy (1892) Supreme Court Reports 456, where Taschereau refers extensively to Joseph Story's (dissenting) opinion in Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge (1837) 11 Peters 420.

5. See, e.g., Monaghan v. Horn (1882) 7 Supreme Court Reports 409.

6. See H. P. Glenn, Persuasive Authority, 32 McGill L.J. 261 (1987).

7. 9 vols. (Montreal, 1895–1916).

8. 1 Revue du Droit 56, 60, 116 (1923) (translation mine).

9. *Id.* at 105. In his condemnation of the diminution of the "connection with the law of France," Mignault failed to appreciate how Louisiana judges borrowed just as freely from the Spanish civil law as from the American common law. See Mark Fernandez, From Chaos to Continuity: The Evolution of Louisiana's Judicial System, 1712–1862, at 62–73 (Baton Rouge, 2001).

contributed to a sharp involution of Quebec legal thought (and thus the invention of Quebec as a civilian—rather than mixed—jurisdiction) by treating the Civil Code as "binding" and championing the textual method of codal interpretation. According to this method, the articles of the code are to be interpreted by reference to each other, and there is no need to search outside the code when the text is clear. This method was, in fact, a foreign imposition. It was first propounded by the law lords of the British Privy Council in relation to the English Bills of Exchange Act and extrapolated by them to the Civil Code of Quebec in the case of *Despatie v. Tremblay:* "The purpose of such a statute surely was that, on any points specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities."[10] Armed with the Privy Council decision, Mignault never missed an opportunity to denounce the use of "foreign" authorities, and so, given the intellectual climate he created on the Supreme Court, the old practice of constantly lifting the curtain of codification and entering into dialog with all sorts of arcane and exotic sources fell into desuetude, to be replaced by the practice of cross-referencing codal articles.

The success of Mignault's battle against the nomadic method of interpretation is reflected in Jean-Louis Baudouin's assertion that it was out of "intellectual laziness" that Taschereau and his ilk made such "indiscriminate use of previously decided cases of common law jurisdictions to interpret civil law."[11] It is further reflected in the astounding presentism of Jean-Gabriel Castel's avowal:

> To know the Quebec law of contract, it is sufficient to read the articles of the Civil Code dealing with this topic and the cases decided since its enactment. If in the common-law system it is absolutely necessary to know history to understand, for instance, the essential division between law and equity . . . this is not the case in France or in Quebec. There, the civil law is logically organized, it is not the product of a historical evolution or of a long line of decided cases.[12]

Judicial Nomadism in Louisiana

Interestingly, the Louisiana judiciary entertained much the same respect for and daily use of "foreign" authorities throughout the nineteenth century, despite the efforts of Edward Livingston and his supporters to codify Louisiana private law first in the form of the Digest of 1808 and—following the unsuccessful reception of that (admittedly partial) exercise in codification—the Louisiana Code of 1825. It should be noted that the authority of the code was reinforced by a further statute in 1828 that repealed the Spanish, Roman, and French laws in force at the time of the Louisiana Purchase. The fact that

10. (1921) [English] Appellate Cases 702 at 709. The Privy Council remained the ultimate court of appeal for Canadian litigants until 1949.

11. The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec, *in* The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions, ed. Joseph Dainow, 1, 20, 17 (Baton Rouge, 1974).

12. The Civil Law System of the Province of Quebec 34 (Toronto, 1962).

none of these efforts to curb judicial nomadism succeeded, and the penchant for consulting foreign precedents persisted, has been put down by critics to the (predominantly Anglo-American) Louisiana bench and bar being poorly trained in the interpretation of civilian traditions. However, as Mark Fernandez has capably shown in *From Chaos to Continuity:*

> Nothing could be further from the truth. Under both [Supreme Court justices] Mathews and Martin, Louisiana attracted a competent pool of jurists trained in both the Anglo-American and civilian traditions. Far from being well-intentioned boobs who mingled traditions arbitrarily to do the "best they could for their day," Louisiana's judges and lawyers moved easily within both systems and adopted measures from each that ensured the traditions most important to the state's residents and most applicable to the American [common law] tradition of justice. Indeed the features of private law preserved in Louisiana became the model for similar code-sponsored legislation throughout the American South and West.[13]

One of the most famous cases in which the Louisiana judiciary asserted its independence of the perceived straitjacket of the code and the repealing statute is that of *Reynolds v. Swain et al.* In this case Chief Justice Martin read the repealing statute as invalidating only those written laws which it explicitly addressed, thereby exempting "those unwritten laws which do not derive their authority from the positive institution of any people, [such] as the revealed law, the natural law, the law of nations . . . ." Martin went on to base his decision on a Roman convention which had been applied in a Supreme Court decision that antedated the Louisiana Civil Code, proclaiming: "Although the Roman law, on which the case of Christy v. Cazanave [1824] was determined, had no intrinsic authority here, the reason that dictated that law has great cogency."[14] Thus, cogency, not purity, provided the ruling standard.

A further way in which the Louisiana judiciary asserted its intellectual independence lay in the active role it played in supervising admission to the bar. The syllabus that the bench imposed on prospective applicants included a wide range of English common law and American treatises, in addition to various standard works of civil law—reflecting a distinctly bijural conception of the kind of knowledge required to be a competent lawyer.[15]

Bijuralism Today

Fast forward to today. Would Livingston or Mignault have approved of this conference celebrating the inauguration of a bijural law school curriculum at Louisiana State and at McGill? Would they have condoned the idea of an integrated approach to the teaching of civil and common law, or advocated their continued segregation?

It is instructive to note that in 1920, two years after Mignault left his teaching post at McGill, the first experiment in bijural education was insti-

13. Fernandez, *supra* note 9, at 88. See also C. M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (Westport, 1981).

14. Reynolds v. Swain et al. (1839) 13 Louisiana Annals 193.

15. See Fernandez, *supra* note 9, at 50–54.

tuted at that university,[16] as if confirming the old saw "When the cat's away, the mice will play." But the mice did not play for long (the experiment collapsed four years later), largely because of the intellectual climate Mignault had created on the Supreme Court. This experiment was nevertheless resurrected in 1968 with the establishment of the National Program at McGill, to be followed in 1999 by the instauration of the new transsystemic program in legal education.

The new law school curricula at Louisiana State and McGill are decidedly forward- and outward-looking, motivated in no small part by the demands that the phenomenon of globalization has placed on the legal profession. But as I trust I have shown in the preceding pages, the new programs could also profit from being backward-looking—that is, from encouraging students to adopt as part of their "personal culture" (in Nicholas Kasirer's phrase) the style of judicial reasoning that was prevalent in both Louisiana and Quebec throughout the nineteenth century. Far from being intellectually lazy, the judges of that epoch strove to be of two minds (civil and common) about most issues; and, rather than being *maladroit* (in the sense of bungling, but also in the sense of doing the law a disservice, undermining its purity), their judgments, while transgressive of the positive law perhaps, were nevertheless informed by a "principled eclecticism" which ensured that "reason" would always out. This is probably the chief lesson we need to learn from the examples of nineteenth-century legal culture considered here: "reason" had not yet been relativized to a particular "tradition"—or "paradigm"—and so could be expressed as well as found across paradigms.

There are signs that the nomadic (or nonstatist) tradition of legal reasoning is making a comeback in Quebec as in Louisiana—albeit mostly among legal scholars, not the judiciary. In the case of McGill-based legal scholars, for example, H. Patrick Glenn recently published *Legal Traditions of the World,* which is noteworthy for its emphasis on the commensurability (rather than integrity) of legal reasoning across a range of traditions—civil and common, but also Talmudic, Islamic, Hindu, and chthonic (aboriginal).[17] As another example, Roderick Macdonald and Nicholas Kasirer have introduced many fine nuances to our understanding of the relationship between law and language in their respective reflections upon the theoretical foundations of the practice of legal bilingualism.[18] In the case of Louisiana, there is the example of the *Louisiana Civil Law Treatise,* particularly volume 2, *Property,* by A. N. Yiannopoulos, which is a treasure trove of transsystemic legal wisdom.[19] There is also the "new Louisiana legal history" pioneered by Warren M. Billings and Mark Fernandez. This innovative approach has prompted a new

16. See Yves-Marie Morissette's contribution to this symposium. There had been other experiments in bijural education at other Quebec law schools. See David Howes, The Origin and Demise of Legal Education in Quebec, 38 U. New Brunswick L.J. 127 (1989).

17. Legal Traditions of the World: Sustainable Diversity in Law (Toronto, 2000).

18. Roderick Macdonald, Legal Bilingualism, 42 McGill L.J. 119 (1997); Nicholas Kasirer, Dire ou définir le droit? *in* Français juridique et science du droit, eds. Gérard Snow & Jacques Vanderlinden (Brussels, 1995).

19. 3d ed. (St. Paul, 1991).

appreciation of the place of Louisiana as a model and important component of the dialog (rather than an anomaly) in the American judicial system.[20] The thread uniting the work of all these scholars is their focus on the interface, rather than the bounds, of the world's legal cultures. Concentrating on the interface radically destabilizes the certainties of positive legal science while at the same time creating a space where it is possible to be of two minds about most legal issues—and thereby give effect to the oldest legal maxim of all: *audi alteram partem.*

20. See Fernandez, *supra* note 9. See also Billings & Fernandez, eds., A Law unto Itself? Essays in the New Louisiana Legal History (Baton Rouge, 2001). My one criticism of the new Louisiana legal history has to do with its proponents' failure to problematize how the *ancien population* of Louisiana was silenced by the powers that be, and the Creole contribution to official Louisiana legal culture therefore elided.