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## American Legal Culture and Traditional Scholarly Order

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## ARTICLE

### AMERICAN LEGAL CULTURE AND TRADITIONAL SCHOLARLY ORDER

*Christian Atias\**

*edited by Alain A. Levasseur\*\**

#### I. INTRODUCTION

##### *Two Major Assets of American Legal Thinking*

The expression "American legal culture" is common today. Historians and legal philosophers refer to it often; theoreticians in private law or in constitutional law also know it. In studies of this so-called "American legal culture," numerous authors have shown its specificity, related great periods in its formation, and described its main trends. Nevertheless, the notion itself—the implicit presuppositions or paradigms—seems not to have been especially examined. It is as if this concept forcibly entered the minds of the American jurists, as if it were obvious and without any question as to its nature or its significance.

This thesis is all the more plausible since American law—Louisiana law in particular—is distinguished by the complexity of its sources.<sup>1</sup> An American precedent, an English precedent, the French Civil Code, Spanish and Roman law, and the more renowned commentators can all be referred to in interpreting Louisiana acts. Consequently, an American

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1. J.P. Dawson, *The Oracles of the Law* (1968); J. Whitaker, *Sketches of Life and Character in Louisiana: The Portrait of Selected Principles From The Bench and The Bar* (1847); J. Hall, *Living Law of Democratic Society* (1949); T. Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* (1978); G. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840* (1979); J. Johnson, *American Legal Culture, 1908-1940* (1981).

jurist would not attempt to think that the whole law is contained in a code and in some cases; nor would he think that the whole of legal history is only the history of the legislature and the work of the courts. The American jurist could easily surmise from the available judicial data that a culture is progressively emerging.

In fact, French jurists trying to understand American legal thinking are astonished about, and may even become envious of, the guidance provided by such valuable sources. American legal theory is flourishing. It shows much more vitality than French legal theory. One only has to read the great American law journals to see that thought about key legal concepts not only has been important, as in France between the two World Wars, but also that, unlike in France, it remains important. Pound, Cardozo, Radin, and Llewellyn have their successors, if not their disciples. That legal controversies are still numerous is significant. When a book is published, particularly a theoretical one, editors solicit from another author neither formal compliments nor a simple description, but a true evaluation, a critical and thorough comment. This practice is constructive, in that, very often, it is the more classical questions of legal theory—conception of contract, economic and social effects of legal policy, functions of law, and legal reasoning—that are addressed. *The intensity of this theoretical production* is the first asset of the American legal culture. In the United States, legal education has prepared qualified practitioners without de-emphasizing theory.

There is another asset. History—not only history of law, but also history of legal studies and education—is a subject matter regarded as far more important in the United States than in France. Books relating to the lives and works of famous judges are many. In addition, there are monographies and papers which address more specifically legal education and legal scholarship. As early as 1923, Dean Wigmore examined the “interpretations of legal history.”<sup>2</sup> Another author, in examining the nature and extent of the contribution that case law has made to the legal systems of England, Rome, France, and Germany, took into consideration such factors as “the organized legal profession” and the “decay of French law schools.”<sup>3</sup> The study of a system of legal education is accepted without question upon the following justification: “[T]he study of legal education in Virginia is therefore significant and necessary to the understanding of the modern legal profession, its customs and doctrines, its qualities and its aspirations.”<sup>4</sup> In examining the legal

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2. R. Pound, *Interpretations of Legal History* (1928).

3. J. Cueto-Rua, *Judicial Methods of Interpretation of the Law* 155 (1981); compare Radin, *Sources of Law—New and Old*, 1 S. Cal. L. Rev. 411, 415 (1927-1928).

4. W. Bryson, *Legal Education in Virginia 1779-1979: A Biographical Approach* vii (1982).

evolution in the United States, the role of doctrine—that is, the influence of those who work to interpret, to explain, or to contribute towards the application of legal rules—must be considered. Although they give weight to judicial interpretation, American theoreticians, especially in Louisiana, stress the contribution of scholarly thinking:

The tradition of law and legal science characteristic of civil law jurisdictions has made possible an extremely imaginative and broad use of historical materials for the purpose of discovering the so-called will or intent of the legislator. The written general rules of law . . . may be linked to the theoretical contributions of civil law jurists and scholars. In this respect, such rules are the result of a long historical process of learning and teaching that goes back to Roman times.<sup>5</sup>

Thus, based on a literature particularly rich in legal history, American legal theory has been able to bloom and retain its vitality. It is the reason why one should not be surprised at the birth and the success of this idea called “American legal culture.” In comparison, one must notice that the expression “French legal culture” is used only very seldomly, if at all. It is with these assets in hand that American legal philosophers have been able to take advantage of recent epistemological developments.

### *The Handicap of French Legal Thinking*

It is not an exaggeration to say that French legal thought revolves around the so-called “sources of law” theory. For several decades, the determination of the true sources of law, on the one hand, and the analysis of the relations between those sources on the other, have been in the forefront of French legal philosophy; the mere questioning of these issues is in itself heavy with consequences. It is all the more so since this questioning is accepted by more than just theoreticians or scholars. Recently, however, legal philosophers have been less interested in this topic than during the first half of the century. Nevertheless, this theory—or better, these theories—remain important because they provide an unverified and implicit guide for judges, practitioners, and all other persons dealing with positive law. These theories probably best exemplify a judicial paradigm. That does not mean that all French jurists know the subtle discussions and the various answers contained in these theories; nor does it mean that they are concerned about “the enigma of judge-made law.”<sup>6</sup> It means simply that they are influenced by the common data underlying the sources of law theories.

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5. J. Cueto-Rua, *supra* note 3, at 154.

6. On this theme, see C. Atias, *Epistémologie juridique* 33, n.15; 36, n.17 (1985).

It would be a mistake to believe that there are many directions produced by this influence. Even if there are many theories, French jurists generally know the rough framework of just one theory; the *a priori* of their daily job comes from some simple ideas, some principles accepted by all the theories of the sources of law. The jurists' way of looking for legal solutions, of interpreting acts, of using principles, is deeply distorted by these influences. For the practitioner, the sources of law theory represents a catalog of the available and efficient sources of information. When a French jurist must solve a problem, he uses certain documents, certain books, rather than others.

A legal philosopher must be aware of the immense gap which might exist between his views and the daily work of the jurist. What is to the former a theory with good or bad foundations, is to the latter a concrete, working tool, capable of a precise determination of the places where he can find the law. Even a practitioner who believes he is sheltered from all philosophies, from all theoretical preoccupations, will willingly use this tool; he is not always aware of the unavoidable philosophical or ideological choices which he makes. In fact, the legal practitioner is not interested by the discussions which do exist about the theory of the sources of law. Hesitations about one rubric in the catalog, about the hierarchy among the sources or the foundations, are *not* important—what is important is the existence of the catalog.

The law student, after years in school, knows that he can work with a few predetermined documents. The best lawyer, a renowned judge, or a professor of law, might be one who uses only legal provisions and judicial decisions. He can forget other realities. He can ignore other sciences, such as economics, history, anthropology, sociology, and psychology, and no other jurist will blame him for that. He can even go as far as to ignore human nature. What is worse, though, is that he does not use these data either to explain or complete the pertinent legal provisions and judicial decisions, to verify or replace them. We may say, as did Dean Langdell, that printed books contain all the available materials of legal science, but we may also say that these books have been officially and definitively preselected. Therefore, we may suppose that somebody is entitled in fact and in law to establish the catalog of these books. Still, for the law student today, law is a set of written papers. To fight against this initial impression would be a useless endeavor.

Thus, it can be said that the theory of the sources of law is not a simple presentation of components of the legal system. Rather, it requires taking a stand about the nature of law. Reduced to a set of written papers, or some generally clear decisions, law does not need to be phrased in a theory which could be misrepresentative; it does not need an epistemology, since it exists solely because of its expression, by

this technical process which makes it known exactly as it is without any distortion between one who engenders and one who studies.

### *Two Juridical Epistemologies*

Many years ago, Karl Llewellyn said that studies regarding scientific knowledge were interesting for juridical theory.<sup>7</sup> Today, American legal thought is accustomed to juridical epistemology, the study of which touches on the two possible categories which this subject involves. The first is fundamental epistemology, the aim of which is to reflect upon the nature of law, considered as an object of knowledge. This fundamental epistemology is inevitably close to legal philosophy.<sup>8</sup> Its sole benefit, which by itself justifies that it be given an identity, is to emphasize the objects and processes of knowledge of the emerging law.

Many works are important in this domain. They have already borne fruit, even though, for instance, one may have lost the memory of Justice Brandeis' proposals, which loss could be explained by the declining faith with which increasingly available data are met.<sup>9</sup> Thanks to important printed works, we can hope that theoreticians, judges, and other jurists will no longer ignore "[t]he interplay between knowing and judging and between knowing and legislative valuing."<sup>10</sup>

Certainly the main characteristic of American research in epistemology is the considerable influence exerted by Thomas Kuhn's theory. This influence is the reason why it is not astonishing to see the growth of a juridical nihilism which reduces law to merely a language. In this conception, there would be no other juridical reality than this conventional and, probably mystifying, language: "As the values of the legal community begin to crumble and diversify . . . [i]t will be increasingly revealed that linguistic concepts are not terms through which to describe and view an independent reality, but that they constitute that reality."<sup>11</sup>

The increase in studies of the history of legal science has furthered development of the second category of juridical epistemology: descriptive epistemology.<sup>12</sup> This category attempts to reach "a relatively dispassionate canvass of the basic options that the present legal culture permits the profession to take seriously."<sup>13</sup> Its aim is to describe the origins and

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7. Llewellyn, *The Theory of Legal Science*, 20 N.C. L. Rev. 1, 14 (1941-1942). "Knowledge does not have to be scientific, in order to be on the way toward Science. Neither does it have to be scientific in order to extremely useful." *Id.* at 22.

8. *Id.* at 2.

9. J. Johnson, *supra* note 1, at 151.

10. Brillmayer & Kornhauser, *Review: Quantitative Methods and Legal Decisions*, 46 U. Chi. L. Rev. 116, 116 (1978-1979).

11. Hutchinson, *Book Review*, 94 Yale L. J. 209, 236 (1984-1985).

12. C. Atias, *supra* note 6.

13. B. Ackerman, *Private Property and the Constitution* 70 (1977).

influences of the trends of contemporary juridical thinking. This observation of the working jurist, of his presuppositions, of his reasonings and reactions, may facilitate subsequent reflection on the nature of law. Fortunately, American legal thinking has been spared, or has overcome, the obstacles to the emergence of legal philosophy and fundamental epistemology. A testimony to that good fortune can be found in the interest provoked by the idea of an American legal culture. The frequent use of that expression strongly indicates that the American legal profession is conscious of its identity, proud of its past and convinced that it has a social relevance.

Yet, in spite of the divergences in the content, in the role of some men or some events, in the value of some theories, the notion of an American legal culture seems to have common characteristics which reduce its impact. Thus, it may be asked if Kuhn's influence did not deprive American legal epistemology of one of its greatest opportunities. We cannot study here the fundamental question of whether Kuhn's conceptions fit fields other than physics and chemistry. More modestly, we may say that the notion of American legal culture could be more fruitful. This notion is full of unrealized possibilities, including the capacity to identify numerous aspects of legal reality. In many works it seems to be a container awaiting its contents. The notion of American legal culture deserves better treatment.

#### *The Notion of Traditional Scholarly Order*

The conceptual model needed to study the idea of legal culture, a notion closely related to the concept of a spontaneous social order, may be borrowed from Hayek. American jurists would be in a better position than French jurists to conceive such a concept. In the United States, works on social order are numerous.<sup>14</sup> At stake is the importance of showing that all the efforts displayed to acquire the knowledge of a provisionally<sup>15</sup> assured set law, and looked upon only as an object of learning, combine toward the creation of an ordered and coordinated whole which witnesses numerous and complex interactions.

The first significant concept to be remembered is that any word used to express a legal rule or solution cannot have a meaning independent from the set. The second is that this set cannot be conceived as having an instantaneous origin; it requires a long time to find its consistency and to give meaning to each word, to each concept, to each

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14. Among other references, see A. Diamond, *The Evolution of Law and Order* (1951); *Society and the Legal Order: Cases and Materials in Sociology of Law* (R. Schwartz & J. Skolnick ed. 1970); W. & R. Seidman, *Law, Order, and Power* 3-5, 306 (2d ed. 1982).

15. As a provisional stage of reasoning, but without forgetting that the influence of the study of law on its formation makes this hypothesis quite defective.

principle, and to select them progressively, while it enriches them by a phenomenon of sedimentation. Law cannot be studied without trying to receive a little bit of sumptuous inheritance left by many centuries of legal thought. Each author, each professor, each practitioner is able to make his contribution; each generation is like the tide bringing a new layer of alluvial—"deposits or accretions which form successively and imperceptibly on lands on the bank of a river or stream."<sup>16</sup> The man who looks at the bank only sees the smallest and latest part of the work. Today, when we speak about contracts, property, persons, public entities, liability, or gratuitous juridical acts, we cursorily and very imperfectly express many years of legal thinking. We certainly can emphasize one aspect or another, one meaning or another, but, in spite of everything, in spite of all carefully phrased remarks or of a formal and conventional language, the words used often express more than we intend them to convey. Such is this traditional scholarly order which slowly but surely erodes the best carved outlines of the most radical legislative or judicial decisions and gives them other meanings. The study of this order is necessary to understand the formation of law, its evolution, and its influence within the social order. We cannot simply say that "[t]hrough a vague cultural osmosis the *de facto* social order [thereby] assume[s] to register itself in the introspective consciousness of the legally realistic judge or sociologically minded jurist."<sup>17</sup>

This kind of research ought to be greatly facilitated in America by the interest in the history of the study of law and by the acceptance of the idea of legal culture proper to a particular professional community. If Kuhn had only confined juridical epistemology to this field of research, he would deserve a statue in all the law schools. The very awareness of the existence of this community of lawyers is the first step to overcome in grasping the notion of a traditional scholarly order. So, one may say that in its present use, the reference to the "American legal culture" has not yet acquired its full necessary impact and consistency. Although it resembles the traditional scholarly order in many aspects, it is nevertheless different in others. When one wishes to appraise the existence of a legal culture, one must acknowledge the important relevance of an order at work in the formation of law; still one cannot ignore the specific features of this traditional scholarly order.

## II. LEGAL CULTURE AS AN ORDER

### *From the Sources of Law to the Legal Culture*

As presently understood in the United States, the idea of legal culture is a fruitful component of the study of the legal phenomenon. Many

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16. French Civ. Code art. 556 (trans. by J. Crabb).

17. Northrop, Underhill Moore's Legal Science: Its Nature and Significance, 59 Yale L. J. 196, 203 (1949-1950).



important aspects of American law cannot be understood by anyone who would neglect the intellectual characteristics of the legal profession as a whole and would be satisfied with an analysis limited to statutes and court decisions. To resort to the idea of legal culture is to avoid the distressingly simplistic structure of the theory of the sources of law. When one speaks about a culture, one speaks about "a host of moral and intellectual conquests which constitutes the proper, if not the exclusive, asset of a nation or of a state."<sup>18</sup> Whatever are the meanings of this "pregnant" word, it always involves the dual idea of intellectually complex characteristics and a community at least partly defined by these characteristics. American legal theoretical works which use the expression "legal culture" illustrate the existence of both of these aspects.

### *Intellectually Complex Characteristics*

#### *Cultural Realities and the Knowledge of Law*

American jurists are more conscious than French jurists of the role they inevitably play in the determination of legal solutions. They therefore reject as overly simplistic the theory of the sources of law. It is as incorrect to say that judges merely apply the law and attempt mainly to respect its boundaries, as it is to say that theoreticians and practitioners only deduct from statutes and judicial decisions the solutions which they propose to their readers or clients. Legal reasoning involves many other components, much other data, and many other forces. Nobody can decide to give to one and refuse to another the power to "*dicer jus*." Nobody is vested with the power to establish a list of the sources of law which are exclusively entitled to state the law and to give to the words used a particular meaning. The words used by legislators or judges possess culturally complex characteristics which are not within the power of anyone to master. According to the general education and legal education received, according to the influential ideologies prevailing during a period and in each country, depending on the working conditions and methods,<sup>19</sup> jurists will attach varying degrees of importance to, for instance, history, or ethics, sociology, anthropology, and other "human sciences," as well as to statistical data. Such assertions are not unsettling to an American jurist, at least one learned in theory. He knows that some ideas present in the legal culture are powerful.<sup>20</sup> He knows that certain "cultural realities" strongly influence stands taken by jurists,<sup>21</sup>

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18. Ph. Beneton, *Histoire de mots: Culture et civilisation* 55, n. 35 (1975).

19. B. Ackerman, *The Market Place of Ideas*, 90 *Yale L. J.* 1131 (1980-1981).

20. B. Cardozo, *The Paradoxes of Legal Science* 7-8, 17-18 (1928); B. Ackerman, *supra* note 13, at 41-42.

21. B. Ackerman, *supra* note 13, at 64.

and he is aware that these realities give meaning to words and guide the interpretation of legislative and judicial decisions. Legal culture is thus regarded as a true source of law; it channels and limits the availability of the fundamental choices made by jurists.<sup>22</sup> As Cardozo said in the beginning of this century, it is a "complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."<sup>23</sup>

### *Complexity and Order*

It is important to emphasize that this legal culture is, indeed, creative of a certain order. Even in those countries where the State believes to be both able and obliged to fashion the dominant ideology, after having deliberately defined it, this culture obviously never results from decisions taken by any such authority. It is impossible to predict if the legal philosophy of Kant, Marx, Hayek or Sartre will someday be adopted as the main trend of the culture of one community or another. This will depend on many sundry factors and events as difficult to foresee as they are difficult to determine *a posteriori*: the "Commune of Paris" and "Black Friday" are examples, but we could also mention Pasteur's discoveries, urbanization, and many others. It is easy to see, then, that this culture is by its very nature extremely complex. It is not made up of clear lines, signs and markers indicating unambiguously the way toward legal truth.<sup>24</sup> Many trends act within this culture; no single trend can explain all of the behaviors, all of the points of view on particular issues.<sup>25</sup>

Some specific ideas may be discerned, but they always compete or conflict with others. It is not possible to predict or even to measure precisely the influence of one idea or another. Quite obviously, a reform which would very decidedly favor a determined ideology could not by the same token eliminate all other cultural realities. Very often, the ultimate and decisive legislative choices are ambiguous. For instance, next to a first paragraph stating the principle—"agreements legally made take the place of law for those who make them"—there is always a third paragraph stating that "they must be executed in good faith," and a subsequent article adding that they "obligate not only for what is expressed therein, but also for all the consequences which equity, usage or the law gives to an obligation according to its nature."<sup>26</sup> Even if drafters could succeed in maintaining a single and perfectly consistent

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22. *Id.* at 70.

23. B. Cardozo, *The Nature of the Judicial Process* 167 (1921).

24. B. Ackerman, *supra* note 13, at 103, 110.

25. *Id.* at 32-43.

26. French Civ. Code arts 1134, 1135 (trans. by J. Crabb).

inspiration, unaltered by any other ideology, even unconsciously so, jurists assigned the task of studying, interpreting and applying the new provision could not follow the same unequivocal standpoint. A single case pointing out some of the problems resulting from the legislative choices will be sufficient to incite judges and lawyers to rely on arguments shaped out of different inspirations, more or less acknowledged. It is necessary to be aware of the power of these numerous influences. These cultural realities determine that part of the legal reality which jurists want to see and, therefore, can and actually do see. So, "just as leadership in the law was passing from the courts to the legislatures, the case method was serving to retard future lawyers' cognizance of this important transition."<sup>27</sup> The American legal theory is surely better prepared than its French counterpart to consider such influences.

### *The Level of Generality*

American theoreticians are particularly mindful of an essential feature of the legal culture. They emphasize the importance of the level of generality which jurists need to reach in order to grasp law. Would they rather refer to very general rules conceived to apply to a great number of cases, even if it means admitting some exceptions, or would they be more at ease with specific solutions? There is an important difference between being concerned with a case by case justice or, on the contrary, stressing the general coherence and the social consequences of the decisions made. It is, indeed, very difficult to explain precisely why jurists, in a particular country, and at a given period of time, are inclined to conceive law as an abstraction composed of ideal principles. It is no easier to understand why the Romans and the British have at given times adopted the opposite position.<sup>28</sup> Resorting to the notion of legal culture is most helpful in taking into account the influence exerted by these different intellectual positions. American legal theoreticians are aware of the usefulness of that notion and use it to attempt to characterize the present legal practice when analyzing its evolution.<sup>29</sup>

### *Culture as a Possible Epistemological Obstacle*

Likewise, American legal theory is conscious of the fact that describing the contents of statutes and judicial decisions is insufficient if one wishes to give an account of the present reality of the law. Legal positivism has created this impression. When legal culture is subjected

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27. J. Johnson, *supra* note 1, at 94.

28. A. Yiannopoulos, "The Civil Codes of Louisiana," Louisiana Civil Code at XXII (West 1985).

29. B. Ackerman, *supra* note 13, at 13, 14, 136.

to its influence, it serves as a screen; it filters through all the data coming from the "sources of law" as well as from social reality, and it alters their meanings. For instance, events and trends of public opinion which fashion legislative and judicial decisions<sup>30</sup> do not become apparent in those statutes and judgments. It is for the jurists to take them into account, a task as to which their own legal culture will either help them or hinder them. When the "Grand Style" or "Mechanical Jurisprudence" are in fashion, it is more difficult to discover the shaky presuppositions from which flow the attractive logical deductions and the seemingly inevitable conclusions.<sup>31</sup> It is often only several years later that an author will show that one solution or another had no foundation; in the meantime, the ideology which masked that solution's weaknesses and flaws will have simply lost a part of its power.

All legal systems are replete with great principles which are imprecisely employed and whose origins could not be traced without unmasking their limits and even their lack of justification.<sup>32</sup> All legal systems have heard and still hear these peremptory assertions which end up making the legislator say the opposite of what he had meant to say. Besides, these assertions are often preceded by a solemn proclamation of an indestructible attachment to the strictest form of legalism.<sup>33</sup> Taking into consideration the cultural realities which guide jurists is the best safeguard against the pitfalls in which many have fallen. The attraction of generality and of the taste for the rigid and abstract formulation of unrealistic principles is so powerful that some jurists are led to believe that therein lies the reality of law and legal security.

When American theoreticians ponder over the intellectually complex features which explain the opinions held by the jurists in their country, they avail themselves of the means of grasping and understanding a larger extent of the legal phenomenon. To recognize the significance of this legal culture is to acknowledge the idea of an order which is fashioned out of a human reality confronted with situations arising out of many data and in which institutional decisions only play a minor role. Lastly, to recognize the importance of this legal culture means also to look into the melting pot wherein this culture is born and grows, and to observe this community of jurists which finds therein its identity.

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30. Haines, General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges, 17 Ill. L. Rev. 96, 114-16; J. Johnson, *supra* note 1, at 10.

31. J. Johnson, *supra* note 1, at 10.

32. See, e.g., L. Robine, *L'interprétation des textes exceptionnels en droit civil français*, (thèse, préface J. Bonnet, 1933); compare J. Johnson, *supra* note 1, at 11-13.

33. J. Johnson, *supra* note 1, at 11-13.

*The Community of Jurists**Existence of a Legal Profession*

A culture cannot emerge without a group forming it by spontaneously selecting certain ideas, eliminating others, formulating a hierarchy for itself and, finally, passing on this evolutive complex. Any jurist knows that the words he uses, the principles and arguments capable of carrying his belief, are not merely products of his imagination. He would be most presumptuous if he were to think that he could study law without ever using the vocabulary and the methods inherited from his predecessors. Every jurist is therefore a member of a community which supplies him with his tools, with his culture.

American legal theory has taken a great interest in this community, its present features, its history and, more importantly, its influence. In the United States it does not seem to be overly heretical to write: "Many of the types of extra-legal authority that are important to appellate courts today were fabricated by the legal community itself between 1910 and 1940."<sup>34</sup> Presenting the evolution of their law in this way, American jurists do not have the feeling that they are misconstruing the constitutional structure of the State or the principles of democracy. They know that this community inevitably exists from the very moment that men devote their time—all their "professional" time—to the study of law. Their language, their concerns, their functions, and their aims tend to draw them closer together. They cannot but have an influence on the elaboration and implementation of the law.

While education is one of the decisive factors which characterize a legal community, it is not the only one. The organization of the various legal professions (recruitment, control, number of members, career, remuneration, type of activities, possibilities of professional training, relations between all the professions, etc.) also explains why the community of jurists can become a closed one, turning away newcomers or being deaf to "non-standardized" or pre-coded information, or why on the contrary, it is open to the outside and willing to accept changes while preserving its cultural traditions. The modes of expression, the places where ideas can be exchanged and discussed (e.g., associations, institutions, reviews, colloquiums) can also either further free debates, or lead to the systematically respectful and rigid restatement of previous works. Who would deny that certain circumstances are not more favorable than others to critical minds?<sup>35</sup>

An example may enable us to insist on the importance of the role played by the community of jurists to each of its members. The habit

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34. *Id.* at 54.

35. See R. Bouveresse, *Karl Popper ou le rationalisme critique* 80 (2d ed. 1981).

of reasoning at a certain level of abstraction does not depend solely on each particular jurist's disposition. While it is probable that the community tends to repulse those whose personality varies too greatly from the general trends of the time, the collective pressure is influential and can manifest itself in many ways. A highly abstract thought does not appear spontaneously in all countries and in all jurists' minds. Such a thought must be learned before being assimilated.<sup>36</sup> It appears, therefore, that the influence of the community on an individual's convictions, as well as on the evolution of law, is considerable. It should be pointed out that the range of voluntary decisions, of deliberate choices, is here very limited. Those many interactions are of another nature.

### *Limits of the Idea of American Legal Culture*

This feature, unintentional rather than deliberate, is an essential aspect of the order generated by the legal community. And yet it appears that the American legal theory seems to neglect it, when it stresses the importance of precise events and individual positions. This focus is in part dictated by the very idea of culture which very often includes a conviction of superiority over the other cultures. Common law jurists, in particular, are fond of pointing out, in contrast with the virtues they attribute to their own legal system, "the tradition that inhibits French courts in exploiting the modern resource of the reasoned opinion."<sup>37</sup> This tendency of self-satisfaction prompts jurists to congratulate themselves on the solutions that they reach as if those solutions resulted from conscious and deliberate choices. There always exists the temptation of explaining one's success by one's efforts and qualities, rather than by chance or the combination of uncontrolled forces. Thus, American legal theory runs the risk of ignoring the main features of what it calls "legal culture." It is not enough to identify that culture as an order: it is necessary to realize that this order is a scholarly and a traditional one.

### III. LEGAL CULTURE AS A TRADITIONAL SCHOLARLY ORDER

#### *Idea or Notion?*

The notion of American legal culture does not bear, perhaps, all the fruits one would be entitled to expect. Although consistently present in theoretical legal works, it seems to appear often merely as a symbolic reference, as a conventional expression that needs no further precision. It evokes, in only an abbreviated manner, the evolution of American

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36. B. Ackermann, *supra* note 13, at 90.

37. J. Dawson, *supra* note 1, at 431.

legal science. As it appears under the pen of some writers, it seems to have for its single purpose to distinguish the legal evolution of the United States from that of England. It would be stretching the point to say that American jurists always use the expression "American legal culture" to refer to a true concept. The lack of development and deeper analysis of this idea can easily be explained. It has been so well received and has entered so easily into the habits of thinking of American theoreticians that further analysis has not appeared necessary. As opposed to what would occur in France if an author were to try to demonstrate the influence of legal culture on the interpretation and application of legislative and judicial decisions, the idea of American legal culture is not meant to be one which provokes and challenges. It is rather just an archetype, a sign of rallying, a given expression which, in its principle, is not debatable.

Nevertheless, those authors who often do invoke the American legal culture do not think solely about a single set of rough data, about some memorable reform, or about a particular action of a renowned judge. More specifically, the use of this idea conveys a certain interpretation of the entire evolution of American law, a reference to certain selected main stages as well as a certain explanation of their sequence. To refer to this notion is revealing of an ideological choice. The philosophy which inspires the historical analysis is an omnipresent voluntaristic individualism, an ideology which restricts the theoreticians' field of view and deprives the idea of legal culture of part of its interest. This voluntaristic individualism bears heavily on an accurate conception of the legal community and on the evolution of ideas which guides it. It conceals the main features of this traditional scholarly order which acts within the social order.

### *A Scholarly Order*

#### *Conception of the Legal Community*

What is the environment which exudes the legal culture? Some American theoreticians answer this question in a very revealing manner: they emphasize the contributions of certain leading personalities. According to these theoreticians the legal community is made up of "the most influential members of the American legal profession—prestigious attorneys, appellate judges, and the most published professors at leading law schools."<sup>38</sup> More specifically, the evolution of the legal culture is linked with the action of "leading figures," of "the small but influential group of legal actors who guided the course of American law."<sup>39</sup>

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38. J. Johnson, *supra* note 1, at 6.

39. *Id.* at 4.

This approach has the great advantage of identifying relevant historical references and laying landmarks of significant meaning. However, it has the inconvenience of ignoring the complexity of phenomena which result in the formation of a culture. The choices made by a few jurists cannot provide a general explanation for the evolution of legal culture. It is particularly true to say here that social phenomena may be "the result of human action, but not the execution of any human design."<sup>40</sup> Historical paradoxes are numerous. For instance, those jurists were trained in the case method, "devoted to the scrutiny of appellate court cases as the route to an understanding," "created sources that would help to diminish the authoritative bite of the common law," and they incited their successors to use this information as truly distinct sources of law.<sup>41</sup> The existence of such historical ironies demonstrates that we cannot insist too much on individual actions. The "great man hypothesis"<sup>42</sup> very quickly meets its own boundaries. It simplifies too much phenomena which can be explained only by multiple interactions and conjunctions. In the final analysis, to define the legal community as only a set of leading figures is to revert back insidiously to the sources of law theory. A step further and the changes occurring will be attributed to some members of the legislature or to some judge. It is another way of saying that the legal evolution is the result of decisions taken by selected individuals, by authorities identifiable in advance by the power vested in them. Indeed, theoreticians who point to the emergence of the American legal culture from the legal community do not in fact limit their analysis to statutes and judgments; nevertheless, they tend to add only the most spectacular positions taken by the most famous authors. It is as if these men had been invested with a quasi-official power conferred, not by any constitutional authority, but merely by their influence and general success. The word "culture" is inappropriately identified with the study of a few great men, dates, or names—however important they may have been.

In fact, the community of jurists comprises a much larger set. Although it is possible to narrate its history by selecting some noteworthy events, the understanding of its internal functioning is not possible without considering the number of its members, along with the diversity of their education and tasks. Surely, prominent individuals can have a considerable influence on the science of law. A major work by a known scholar may trigger a new trend in the history of the science of law. Political, philosophical and religious convictions, declared and promoted,

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40. Ferguson, *An Essay on the History of Civil Society* 187 (1767), quoted in F. Hayek, *Droit, Législation et liberté*, t.1, *Règles et ordre*, 23 (R. Audouin trans. 1973).

41. J. Johnson, *supra* note 1, at 68.

42. *Id.* at 30.



may explain the lightning-fast success of a doctrinal theory. It remains true that a culture is constituted only after these outstanding individual innovations have been received in a determined circle. It is this "communal acceptance" which gives meaning to the theory promoted and enables these diffused pre-notions, these paradigms, to exercise their influence. The professional group's intellectual inertia,<sup>43</sup> its working conditions and position in society are just as important as the ideas of the most prestigious leaders. Without this overall perception which recognizes the contribution of the more humble jurists, of the less imaginative office worker, one cannot understand the delay which always accompanies the influence of a particular work. It is often fifty or seventy years before this work becomes part of the legal culture. If one focuses only on the more brilliant individuals, one cannot explain why their disciples always retain a lesson somewhat different from that offered by the master. Is Dean Francois GénY, for French legal culture, an idealist who fought tooth and nail for a natural law revival, or a materialist who presented law as the direct result of the scientific observation of certain data?<sup>44</sup> Surely, he wanted to be the former, but during his time he was not understood as such. The example of Kantian natural law is even more illustrative.<sup>45</sup> These events have taken place because every writing, every personal proposal, every opinion, gets recasted, recomposed, reinvented by many readers, by a large community whose conceptions change slowly. Each idea does not quietly follow the other; they are superimposed on and run into one another. Each idea is only understood through the prism of a collective memory enriched by all the previous ideas. A legal culture is not only a scholarly order, it also obeys the rules of an evolutive process which can be called tradition.

### *A Traditional Order*

#### *Continuity and Sedimentation*

In American legal culture, there exists a tendency to attach a preference, depending on the cases, the aims and the individual pre-dispositions, either to history or to the need for an ideal consistency. It is not certain that theory always finds its due. The search for an ideal consistency supposes a bias which needs no further emphasis. It is certain

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43. *Id.* at 74; Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *Colum. L. Rev.* 431, 454-56 (1930); Haines, *supra* note 30, at 116.

44. F. GénY, 4 *Science et technique en droit privé positif* 161, t. 2 (1924).

45. Villey, *Préface to E. Kant, Métaphysique des moeurs*, part I, *Doctrine du droit* 11-12, 22-24 (A. Philonenko trans. 1971).

that consistency is important in the elaboration of law.<sup>46</sup> And yet, it is clear that this requirement often gives way to totally different concerns. Unless one regards law as the execution of a preconceived plan, it is impossible to believe that its evolution can be explained, mainly or solely, by this search for consistency.

The historical approach is also important in the science of law. Many authors like to recount events, to describe the distinct periods of doctrine, much like an historian of the arts emphasizes differences in styles. This kind of history thus focuses on the work of a few men; it places emphasis on events that marked their lives, their intellectual education, their careers, their convictions, and the originality of their positions. Although this historical analysis is very useful, it has the drawback of presenting the evolution of legal science as a succession of waves, each one covering and erasing the previous one. What emerges from this analysis is only a snapshot, an account of moments, episodes, or even flashes. This same analysis fails to reveal the underlying causes, the global meaning, or the mode of reception of these moments and episodes by the jurists. Under these waves, however, there exists the sea which is the true strength. What need be analyzed is the discrete, unconscious and diffused survival of the ideas thrown but a moment to the surface and then absorbed in the sea of prejudices, pre-concepts, paradigms used in all legal reasoning.

Quite obviously common conceptions shared by jurists, in the United States as in France, are not formed by a succession of qualitative leaps, of brutal breaks followed by *ex nihilo* creations. What is particularly complex and most important is the permanent sedimentation of concepts which occurs in the legal community—these partial “filiations” and repudiations which also carry a certain weight. They explain that legal culture contains a rich variety of exotic doctrinal notions which simultaneously result from different inspirations present in the legal tradition.<sup>47</sup>

All in all, the most enlightening exercise does not consist in attempting to forecast what ought to be the decision of a judge on the basis of his personal choices and convictions. Rather the study of culture, if it exists, should help to understand how those choices are guided and made. While culture cannot provide a list of criteria which would enable a consistent judge to recognize that the existence of a norm is engendered by the dominant set of institutions,<sup>48</sup> it can still disclose that in the legal system, there exist cultural realities which act on the jurist’s mind through centuries of tradition.<sup>49</sup>

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46. Reference is made here to an influence on “sources” of law and on doctrinal activity of coordination.

47. B. Ackerman, *supra* note 13, at 110.

48. *Id.* at 96.

49. *Id.* at 87; Haines, *supra* note 30, at 116; B. Cardozo, *supra* note 20, at 7-8.

The ultimate aim cannot be to describe the present state of this particular field of knowledge, described as legal. Rather the aim is to explain current positions by revealing the extreme complexity of their origins. Legal culture is characterized by its continuity, by its temporal unity, and, thereby, it gives meaning to words beyond their superficial significance. It inevitably loads them with a richer and more complex meaning than the ordinary user can imagine. Because of this legal culture, it is particularly true to say that one does not do with words what one wants; they always keep something of their etymological weight<sup>50</sup> as well as the weight of their successive uses and of words akin or opposite to them. Without this continuity it would be impossible to understand why so many principles, condemned by history—their original and justified meaning having been misrepresented—and by theory—no satisfactory foundation can be given to their present meaning—survive the most conclusive criticisms and preserve their appeal. Today, French law is cluttered with many of these scoria all the more called upon as their meaning is vague and uncertain: principles of strict interpretation of exceptions, autonomy of the will, absolute right of ownership, permanence of servitudes, relative effect of contracts. No explanation based on the theory of the will could help one to understand how these principles have survived in the face of the meticulous and sometimes conclusive criticisms they have been subjected to. Other considerations come into play. Among them the modes of formation and renovation of ideas in a professional community deserve special attention. It is a fact that once they are formulated and introduced in the thinking process, categories and concepts tend to take on an appearance of strength, realism and intrinsic value which has no other foundation.<sup>51</sup> Likewise, a theory of the will explanation could not help in understanding why jurists and politicians of conflicting beliefs may, nevertheless, agree with one another, while other jurists and politicians sharing the same convictions can disagree on the same issues.<sup>52</sup>

### *Continuity and Selection*

To the process of sedimentation one must add a mechanism of selection. If the meaning of words, concepts and principles grows as they are used in different circumstances, the phenomenon is not exclusively cumulative. Indeed, these experiences carry with them losses of meaning or the establishment of hierarchies between the different meanings. For instance, the general view today is that the strictest exigencies

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50. M. Villey, "Correspondance," *Droits, Revue Française de théorie juridique*, n. 2 (1985), *Les droits de l'homme*, Paris, P.U.F., 36.

51. Llewellyn, *supra* note 43, at 453.

52. But see B. Ackerman, *supra* note 13, at 63.

of the autonomy of the will or of the absolute right of ownership have been abandoned. The abolition of slavery can also be cited as an example. On the one hand it amounts to a decline of the meaning of the word "ownership"; on the other hand, that word has been enriched by the protection granted to intellectual property rights. Thus, choices are made. Some solutions are rejected as being against nature or as being in conflict with civilization; others, on the contrary, are promoted to an unexpected success. This progressive selection cannot be solely explained by deliberate decisions, by the genius or perverse intuition of a jurist or another who would have succeeded in convincing the community.<sup>53</sup> There are deep currents which may explain the many different intellectual influences, the reactions of sentimental or aesthetic enthusiasm, the more or less reasoned reactions of fear, the working conditions, the conceptions of the role of jurists and their place in society.

It must be regretted that American legal theory generally neglects this aspect of things. The important question to be asked is the following: is it possible to study the present status of the legal culture? Or more precisely, can a culture have a present existence totally distinct from its past? There is a reality so complex that it cannot be grasped at a given moment without comprehension of the previous stages. To try to understand the present meaning of this concept or that principle, we must consider all the stages they went through before being presented to us. There is no other way to discover what was left by successive historical experiences under each word, each proposal, each conviction. The study of the legal culture is thus the study of its progressive and never finished formation. This search for origins bears directly on the meaning and the extension of contemporary concepts; it is the straight through which the analysis of the present state of the legal culture of a country must find its way. It is also the reason why we cannot neglect the information furnished by the literary, philosophical, artistic, scientific, and common cultures. There might occur instances of convergence and specific evolution.

#### *The Parable of Talents*<sup>54</sup>

Such is the lesson which can be given by a descriptive legal epistemology. A fundamental legal epistemology would go much further. The latter would wonder what would be the effects of these phenomena of sedimentation and selection upon the knowledge of legal reality. If

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53. See B. Ackerman, *supra* note 13. Individualism is perceptible very often in Ackerman's book: at 72 (on the influence of Kant), 77 ("the objectives of the legal system"), 83, 85, 88 (deliberate opinions). The preoccupation with legal consistency can also have this connotation.

54. See Matthew 25:14-30.

we were to describe it as realistic epistemology, it would assert that this dual movement, while it progressively enriches the legal language and reasoning with successive testings and more or less corrected mistakes, imperceptibly brings the jurist closer to a reality which no isolated individual can perceive straight away. Individual reason is *a priori* disarmed in front of the complexity of data that one must take into account in order to understand all the aspects of human nature confronted with circumstances always changing. No one can be nourished by the ambition of attaining the truth if one refuses all the fruits of legal tradition. One could not even pretend to be able to gather them all; a whole life spent reading and thinking would not suffice. As it is, it is already an accomplishment to be able to pass on some parts of these fruits. To understand how the legal community and the jurists' continuous efforts can help the individual reason, we must reject the dialectic conception of the evolution of legal knowledge. It is necessary to consider the dual phenomenon of sedimentation and selection which describes it as leading progressively not to the clash of conflicting meanings created by opposite interests, but, rather, to the meeting of complementary meanings. Each jurist is the "pontifex" of this legal culture which, in spite of himself and more or less perfectly, he carries from his predecessors to his successors, attempting to contribute to its enrichment and improvement. Such are the "talents" which, according to the famous parable, are entrusted to each jurist on the condition that he makes them bear fruit.