DYNAMICS OF LEGAL SYSTEMS AND LEGAL EDUCATION: INTERACTIONS IN THE UNITED STATES AND CONTINENTAL EUROPE*

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I. INTRODUCTION

Professor John H. Merryman in his comparative essay on legal education in the United States and Western Europe,[1] in particular Italy, asserts that:

> The reader may have formed the impression by now that I consider legal education in the United States to be superior to that in most civil law universities. That is a correct impression; ours is better. It is better because it has grander objectives; because it draws on the full time and energies of teacher and student; because it is concerned with human problems and their solution; because it engages students directly in the study and active discussion of such problems and of the process of their solution within the legal order; because it displays a higher opinion of the student and demands more of him; and because its conception of the work of the professional lawyer—and accordingly of the mission of legal education to prepare persons for that profession—is a much richer, more demanding and more realistic one.[2]

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[1] Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859 (1975).

[2] *Id.* at 876-77.

Having been exposed to two different legal traditions, as a student and law teacher in France and a graduate fellow and visiting scholar in the United States,[3] I would respectfully like to consider the statement in relation to my own legal experiences.

As Professor Merryman points out, the mission of legal education is to prepare persons for the legal profession. However, the relationship between legal education and the legal system of a society is a complex one. The legal system imposes its values on its educational subsystem and is at the same time reinforced by it. What are the values which each legal system will further, and how are they reproduced in legal institutions and legal thinking? Legal education will in turn shape and maintain the basic features of the legal system by trying to satisfy the demands which it expresses. What are the goals assigned to legal education by each legal system? How will they be enforced, and in what degree will they be realized?

This article will try to answer these questions in the following way: First, I will attempt to conceptualize each legal system by reference to a procedural and a substantive model, to analyze the different paradigms on which each model is grounded, and to consider their application in more precise areas of the law in France and the United States. Second, I will examine how legal education responds to the needs of the legal system in both countries by considering it as a dynamic process, in which various participants acting in different arenas and through various procedures try to achieve certain goals. Finally, I shall make an appraisal.

II. UNITED STATES AND WESTERN EUROPEAN LEGAL SYSTEMS

The contrast between the American and the Continental European legal systems can be conceptualized by reference to two models[4] that present distinctive features on a procedural as well

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[3] The author spent the 1981-82 academic year and the following summer at Yale Law School.

[4] The idea of taking two models has been inspired by two sources: first, by an article published by Professor Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975), in which the author used two procedural models, a hierarchical model, adopted from Max Weber's bureaucratic model, and a co-ordinate model, representing the patterns of authority characteristic of the American system; second, by the classification of legal systems with respect to their degree of rationality in decision-making, as set forth by Max Weber in his work. For a good presentation of Weberian typologies, see Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

For an appraisal of the limits of the use of such models, because of the limitation of focus resulting from the choice of variables, see Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 217 (1973).

as on a substantive level. These models are based on the paradigm of the legal system, which will operate as a regulating ideal. Obviously, some discrepancies will occur between the demands of the model and the realities of the system. Both demands and realities will express the needs of the legal system which shape the patterns of legal education in a given country.

A. *Procedural Model*

1. The Paradigm: Values and Legal Philosophy

The main values furthered by the Continental system are certainty and uniformity: "You ought to know the law before it is applied to your case." Law should be applied equally, i.e., "in the same way" to all persons in the same situation. The primary goal of such a system is not to achieve justice in the particular circumstances of each case but to make each decision fit into a larger scheme which is deemed to be just. In case of conflict between the facts and the law, in other words when some specific circumstances do not find their place within the general legal landscape, individualized justice will be sacrificed for the sake of this more abstract concept of justice, which one could describe as a second-level goal.

In the American system, although certainty and uniformity are important (because in a way they are the marks of the existence of the system itself) they are not primary objectives. The main goal of this model is to reach the decision most appropriate to the specific circumstances of each case, even if this operation can involve some complexities and contradictions. The rationalist desire for simplification is eschewed as leading to artificial and inequitable decisions. First-level justice is the regulating ideal. The selection process of facts (which events will be deemed relevant by the legal system) will be conceived in a very broad fashion. This will affect abstract justice: specific treatment, depending very much on individual decisionmakers, makes it more difficult to avoid unequal treatment among members of the same category of individuals.

In the Continental system, these values of certainty and uniformity can be achieved through a number of structural devices, all grounded on the same principle, which we could call a principle of authority. This concept of authority is central in continental positivism, which still remains the most influential school of

jurisprudence on the continent. In Kelsen's view,[5] the basic norm which he calls the "Grundnorm," merely establishes a certain authority, which may well in turn vest norm-creating power in some other authorities. Inferior norms are not obtainable from the basic norm by inference from the general to the particular (imputation concerns only superior norms), but have to be created through acts of will by those individuals who are authorized by some higher norms to create norms. Thus, authority is conferred by the normative order. The individual with authority has the right to issue obligating commands. What is prescribed by certain persons with certain procedures ought to be implemented, whatever the inherent qualities of their commands. Finally, authority is hierarchically organized in a pyramidal scheme. Superior norms regulate the creation and execution of inferior norms.

Kelsen's system is inherently coherent. However, Kelsen's conception has been sharply criticized by the American Realists. They view law much more as a process of decision than as a system of rules. The most refined modern theory of authority that has been presented by this school is that of Professor Myres S. McDougal.[6] In his view, law is a process of authoritative decision. But authority has here a completely different meaning. It is not simply conferred by rules. Rules are only one of the factors affecting decision, both its making and application. Authority has to be sought "in the perspectives, the genuine expectations, of the people who constitute a given community about the requirements for lawful decision in that community."[7] Finally, authority in itself is not sufficient. A lawful decision needs also to be controlling, i.e., realized in fact and realized to a significant degree. For McDougal's integrative legal realism, the legitimating function has its roots in the social process instead of emanating from abstract concepts, as for instance, in a Kelsenian normative order.

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[5] H. KELSEN, GENERAL THEORY OF LAW AND STATE 120-32 (A. Wedberg trans. 1945).

[6] *See, e.g.*, McDougal, Lasswell & Reisman, *Theories About International Law, Prologue to a Configurative Jurisprudence*, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 43-141 (M. McDougal & W. Reisman eds. 1981).

[7] *Id.* at 56.

2. Application: The Organization of the Judiciary

a. *Structural Features*

Actual observation of the judiciary in Continental countries allows us to identify three main attributes:

—a strong distinction between authority and the person exercising it;
—a precise delimitation of authority; and
—a hierarchical ordering of authority.

i. Distinction Between Authority and the Person Who Exercises It

In the Continental system, the basic premise is that decisions are not made by individuals, but by the institution itself. An opinion is never signed by the individual who has written it. Judicial dissents are neither announced nor published. Actually the decision process is completely hidden. When one analyzes any of the very short and concise judgments of the French Cour de Cassation, one can observe that the court never seeks to justify its decision on extralegal grounds; nor does it state the underlying judicial policy. The court only states the abstract reason for the judgment in the context of the legal system. That is to say, the legal principle of law (not as stated by a particular individual, but as interpreted by the court) that applies to certain relevant facts permits the higher court to judge the particular decision of a lower court. The reason most frequently given to explain these characteristics is the desire to protect judges from outside interference and to enhance their authority.[8] Actually, if one analyzes the issue in the context of a procedural model, one can explain this absence of debate within the court opinion from two different perspectives:

—first, in regard to the decision currently made, if in an ideal conception of the judicial function, the decision-making process is conceived mainly as the application of norms, there can be no room for discussion.
—second, in regard to future decisions, this current decision will serve as a basis for decisions made by other decision-makers who in the continental model are deemed to need precise decision criteria.

In the American system, on the other hand, the court in itself is not considered an institution. The judge is the institution.[9] When

[8] *See, e.g.*, 2 R. PERROT, DROIT JUDICIAIRE PRIVÉ 642 (1981).
[9] American Justices, including Brandeis, Holmes, Frankfurter, and Douglas,

the bench issues a decision it need not speak with one voice. Judges can deliver individual opinions. Very often, one cannot even determine the opinion of the court as such. In contrast to the continental system, there is no artifact.[10] Judges expose their viewpoints and state their individual preferences. The decision process is disclosed to the public. It is perhaps also less rigid and at first sight leads to a better understanding of judicial decisions.[11] But it also presents some important disadvantages. It is a costly system in terms of economy of thought: American decisions contain a lot of repetition and sometimes contradictions, which would not occur in the Continental model. But more importantly, such a system cannot always provide clear guidelines. In fact, within the context of our procedural model, such guidelines are perhaps neither required, nor even desired.

ii. Delimitation of Authority

In the Continental system, the authority of courts is strictly defined by legislation. Courts have no inherent power.[12] The Codes fix their substantive competence. Facts have been ordered in categories that are defined by two criteria, subject matter and economic value, whose co-ordination determines first a specialized decision-making channel and eventually a precise decision-maker. In France the main division among these highly specialized jurisdictions is between the administrative and the ordinary courts, which themselves can be divided on the first level into civil, criminal, commercial, and labor courts. The interesting observation from our point of view is that as one progresses in the hierarchy, the less important it is for specialization to be grounded on facts (i.e., on subject matter and value). Facts are digested by the system. At the top, authority is not founded on factual criteria but on criteria which are furnished by the legal system itself.[13] The Cour de Cassation is competent for all subject matters. The specialization is only internal, and in the case of a contradiction between divisions, the question is solved by a

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have become famous for their opinions. Some courts have been personalized by reference to the name of the Chief Justice who presided over them, for example, the Taft Court, Warren Court, Burger Court, and so forth.

10 This statement has to be qualified. This absence of artifact can constitute by itself an artifact.

11 *See* Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. OF COMP. L. 43 (1976).

12 *See* Damaška, *supra* note 4, at 516.

13 The Cour de Cassation is competent for all subject matters, but it only decides on the law, not on the facts. *See infra* note 29.

super-division. The function of the Cour de Cassation is to provide for uniformity in decision-making. Such a conception can be rationalized in various ways. But there is only one which goes beyond the superficial level, namely, that it is grounded on the belief that the unity of the law does exist and that the more abstract your reasoning, the more common principles you will be able to discover.

In the United States, legislation concerning division of authority is very limited. There is no strict delimitation of authority in time. The trial judge can, for instance, modify his or her decisions after publication.[14] Nor does authority fit into a strict jurisdictional scheme. A litigant can, for instance, ask for a stay of execution from either the court of original jurisdiction or from the appellate court.[15] Anticipatory categories have not been created. Specialized decision-making channels have not been made available. However, as in the Continental model, one can find some specialized decisionmakers in the American system. Federal statutes have instituted special courts for fiscal or excise matters, patents, and questions involving state liability. Numerous administrative agencies have been attributed a special jurisdictional power. It is precisely in this area that the differences between these two systems are the most striking. These courts and agencies are piecemeal creations—responses to very specific problems. They are not organized into a whole scheme or system that preexists and anticipates every possible case. They are not elements of specialized decision-making channels. Decisions of these tribunals are subject to review by the Federal courts. Some explain the "inevitable dispersion" of the American judiciary by appealing to geographical and historical factors.[16] But, it is also linked to the substantive conception of law favored by the American system. There was no need for co-ordination because one could find no justification for it. Dissemination of authority means that for the American system the belief in the existence of one unique and complete body of law simply does not exist.

iii. Hierarchical Ordering of Authority

For the Continental model, authority is hierarchically ordered with regard to the importance of the question involved.

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14 *See* Damaška, *supra* note 4, at 516.

15 *Id.*

16 *See* R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 368-417 (1978).

The ranking of the court will determine the number of judges involved in deciding a case as well as their position within the hierarchy. As Professor Damaška remarks, "A single judge will be authorized to decide only minor offenses."[17] More important questions are decided by panels which at the level of the Cour de Cassation are controlled by super-panels. The hierarchy of courts is reinforced by the hierarchy of judges and supported by the fact that the number of those deciding a case increases with the importance of the court. All relations within the system are superior-subordinate relations. The principal purpose of such an ordering is to maintain the internal consistency of the system as a whole. Appellate review is traditionally presented as a prerequisite for proper administration of justice in France, because it permits reconsideration of the case by more experienced judges.[18] In the view of our procedural model, however, it is primarily a mechanism that enables the system to achieve formidable uniformity in decision-making. In France, it thus effectively limits the influence of lay people[19] in the administration of justice by submitting them to the control of professional judges who are members of the hierarchy and who will apply its standards. Lay participation is indeed completely excluded at the appellate level. More generally, the lower judge, knowing the legal views held by his superior, will usually follow them in order to avoid a reversal of his decision.[20]

In the American system, authority does not follow such a strict hierarchical ordering. Even the most unimportant judge can, for instance, strike down legislation as unconstitutional. Although the reluctance to exercise judicial review in France can be attributed to different reasons,[21] the fact that jurisdiction over questions of constitutionality has been vested in a special court, situated at the top of the hierarchy, is in this regard a good illustration of the differences in conception. Furthermore, appellate review in the sense of reconsidering a decision is not part of the

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17 *See* Damaška, *supra* note 4, at 499.

18 *See* R. PERROT, *supra* note 8, at 701.

19 In France, lay people participate in the administration of justice in lower labour courts or in lower commercial courts because of their practical experience and in order to realize a better acceptance of authority. They also form juries in criminal cases, but for the most serious offenses only.

20 *See* Damaška, *supra* note 4, at 496.

21 Historical reasons, going back to the French Revolution and to the reaction against the pre-revolutionary courts which prevented the King from implementing social reforms, can explain this actual reluctance to institute a real control on the acts of the legislator.

common law tradition.[22] Not all appeals to the United States Supreme Court, for instance, can be taken as of right, but instead may require obtaining a writ of certiorari that states the reasons for reviewing the case and grants permission for review.[23] Different reasons have been given to explain this situation. The development of appellate review would increase the number of judges and lead to bureaucracy.[24] It would be impossible to achieve because of the importance of lay jury trials. More than 100,000 cases a year are decided by jury trial, and jurors neither give the reason[25] for their decisions nor readily apply general and precise guidelines to individual cases.[26] Actually this argument hides the true reason, which is the tendency of the American system to refuse mediatized reality as well as the absence in this model of a strong demand for uniformity.

Consideration of these structural features reveals that some conditions which are absolutely vital to the Continental model are not required by the American model. All these attributes are means to fight centrifugal tendencies. They are not required by the American system because it is a model which is basically grounded on decentralized decision-making.

b. *Dynamics*

A dynamic perspective would provide answers to two different questions:

—first, how does the judge fulfill his task in each of the models?

—second, what is the purpose of judicial decisions in each system?

i. The Function of the Judge

In the Continental system, the ideal perception of the

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22 *See* Damaška, *supra* note 4, at 514 ("[In England] whether in royal courts or local ones, criminal cases involved one-level adjudication."); *see also* 4 C.J.S. *Appeal & Error* § 18a ("The remedy or procedure by appeal is of civil-law origin, and was . . . entirely unknown to the common law."); *In re* Abdu, 247 U.S. 27, 29 (1918) (noting "broad distinction" between the right of access to *some* court and the necessity for express statutory grant of appellate power).

23 *See* 28 U.S.C. §1254 (1982).

24 *Cf.* Burger, *The Time is Now for the Intercircuit Panel*, A.B.A.J., Apr. 1985, at 86; *Q & A with the Chief Justice*, A.B.A.J., Jan. 1985, at 93 (interview with Chief Justice Warren Burger).

25 The jury, which is often perceived as a means to realize democratic decision-making and to keep justice within the society, is also a legal subterfuge which hides the reason for decision.

26 *See* Damaška, *supra* note 4, at 491.

judge's role is the mechanical application of the law. As Montesquieu put it, the judge should only be "*la bouche de la loi*," the mouthpiece of the law.[27] He or she should have no creative input. The technique he or she uses is syllogistic: he or she reads the law, states the relevant facts, and applies the law to the facts. Just after the French Revolution, he or she could not even interpret the law when the texts were obscure and instead had to address the question to the legislator by way of a special procedure called *référé législatif*.[28] Not only could the courts not legislate, but the opinions of higher courts were not binding on lower courts.[29] But, one rapidly admitted that the judge could interpret the law and there has always been a lot of creative activity involved in judicial interpretation. Actually the *Code civil* is not so much a comprehensive set of rules as it is a list of general orientations using very broad concepts.[30] Initially, interpretation was conceived as being limited to the text of the Code. This was the time of the Exegetic School whose leitmotif was *tout le Code Civil, mais rien que le Code Civil*.[31] Logical derivation and the use of very precise intellectual tools, namely, reasoning by analogy (*a fortiori, a pari*, etc.) should permit the judge to discover the presumed intention of the legislator within the limits of the text of the Code. This method, although criticized, has never been completely rejected and is still used today, especially with respect to recent enactments. Saleilles and Gény were among the main critics of the Exegetic School. Saleilles was influenced by the German historicists, and one century after the Code had been adopted, perceived a real need to adapt the old text to new realities. Gény went much further.[32] He asserted that sometimes the legislator really had no intention and that in that case the judge should be free to complete the text of the law by using a scientific

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[27] This conception of the judge's authority was adopted by the French Revolution for historical and political reasons, as a reaction against the conservatism of royal courts and against the conservatism of courts in general.

[28] The *référé législatif* was suppressed by statute in 1837.

[29] A decision of the Cour de Cassation only states the law, and is still not binding on the lower Cour d'Appel which will render the final decision by applying the law to the facts of the case. But, in the case where the Cour d'Appel does not comply, parties can ask the Cour de Cassation to deliver a second opinion which will be binding on the lower judge.

[30] See, for example, appendix I, Article 2265 of the French *Code civil*. The concepts of "good title" and "bona fide" are not defined.

[31] "The whole Civil Code and nothing but the Code." This maxim developed through the writings of those teachings in the 19th century.

[32] F. GÉNY, METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (1899).

method. The interpretation of rules now utilizes all these methods and remains one of the principal tasks of the Continental jurist.

In the American system, the judge does not interpret rules. He makes decisions. A decisionmaker starts from observation, from the legitimate expectations of the people. He does not necessarily have to consider the sources of law, i.e., anticipated normative programs which exist prior to and therefore, to a large extent, predetermine actual decisions. Although previous decisions are binding, the judge constantly creates law by distinguishing the cases on their facts. Facts are the source of law.[33] This constitutes a fundamental difference between the two models. The Continental approach to cases[34] states that they are simply the illustration of a general principle.[35] Facts by themselves are not important. The operative reasoning applies to the legal principles, not to the facts. When a Continental judge decides a case, he or she does not only solve a controversy, he or she once more applies the legal rule. Above all he or she has to consider the "overall picture" in which the decision must take its place.

In the American system, on the other hand, the operative reasoning applies to the facts. The great common law principle is that like cases should be treated alike.[36] The method is flexible: the judge has a choice with regard to the level of generality and to the weight of precedent. The adaptation of the law is easy. "By moving to treat cases alike on successively different levels of generality, common law courts could slowly adjust the law to fit new social policies."[37] In the United States, the judge gives the answer when the problems are posed. It is a progressive process. An anticipatory response does not preexist. The price of certainty in the Continental model is obviously a greater degree of rigidity and a greater necessity to hide the use of judicial powers[38] in adapting the law to new circumstances.

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33 Such a statement has to be qualified because it is a reduction of case law to a Continental concept.

34 *See, e.g., infra* appendix I.

35 *See* Damaška, *supra* note 4, at 497.

36 For an interesting utilization of the principle in the United States with respect to statutes, see G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 8-15 (1982).

37 *Id.* at 13.

38 The Continental system is still reluctant to recognize judicial decisions as a source of law. *See, e.g.*, J. GHESTIN & G. GOUBEAUX, TRAITÉ DE DROIT CIVIL—INTRODUCTION GÉNÉRALE 328-62 (1977).

ii. The Purpose of Adjudication

As I have stated, the main concern of Western European judges is to make their decisions fit into the larger scheme. They are much more concerned with the implications of their decisions than with individual cases. Thus conflict resolution is not the primary goal in the Continental model of judicial adjudication. Finding the truth,[39] as defined by the criteria developed by the legal system, is the principal goal. It is accepted that the solution that a judge gives to a case is indeed the only one possible. The American system is based on a different postulate. Consistency is not the main concern of the American judge.[40] The purpose of decision-making is justice as it appears in a given case.[41] He has no transcendent preoccupation. Parties fight each other in order to convince the decision-maker that their cause is just. They do not try to help him apply the right rule.

Many procedural differences between these systems can only be fully understood by referring to these different goals. The idea of having a lawyer win a suit is typically American. In the United States there even exist some devices which push the lawyer to fight more actively by interesting him financially in the outcome of the case, as exemplified by the contingent fee system. In Continental Europe, such a system is considered beneath the dignity of the legal profession.[42] There the ideal perception is that lawsuits are decided on their merits and not in favor of the party who has the best lawyer.[43] This also explains that, while in America the basic rule is that each party usually pays his or her own attorney's fees, on the Continent, the loser may be required to pay all fees. The underlying idea is that, in a way, the loser in the Continental system is guilty. He could only lose and he should have known it.[44]

Under the American system of criminal procedure, lawyers

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39 An example of the application of such a concept of truth is provided by the French *pourvoi en cassation dans l'intérêt de la loi*, which simply asks the court to declare that the law was misinterpreted without changing the situation of the parties.

40 For the consequences of such a paradigm and the need for ordering the legal system, see Vogel, Book Review, 58 IND. L.J. 286 (1982) (reviewing G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)).

41 *See* Damaška, *supra* note 4, at 483.

42 *See* R. SCHLESINGER, COMPARATIVE LAW 342-52 (4th ed. 1980).

43 The ideal perception that is presented does not correspond at all with reality. Lawyers, especially in civil matters where the provisions of the Code are open, can have a considerable influence on judges' decisions.

44 The French proverb *Nul n'est cense ignorer la loi*—nobody is supposed to ignore the law—can be interpreted in this sense.

will very often ask their clients to keep silent at the trial. The Supreme Court held in *Griffin v. California*[45] that one could not infer any conclusion from such silence. In some European countries, on the other hand, the defendant's silence may serve as corroborating evidence of guilt.[46] This is one of the reasons why, as Professor Damaška puts it, "almost all Continental defendants choose to testify at the trial."[47]

More generally, the judicial tactics which can or cannot be used under both systems furnish a good illustration for our statement. In American civil procedure, a party who has conducted discovery is ordinarily free to use or not to use the information gathered. No such freedom of choice exists in Continental civil law procedure, where you have to disclose all information to your opponent. Moreover in classical criminal procedure, under the American system, a defendant is not entitled to learn the substance of what the witnesses for the prosecution have to say.[48] He or she does not even know exactly who these witnesses will be.[49] This practice of trying to spring a surprise is completely rejected in Europe, where full disclosure is requested in advance.

American judicial tactics can be understood only in the context of a judicial fight in which, before trying the case, the parties do not really know the law that will apply to them.[50] On the other hand, in the Continental system, the parties know they will set in motion a process designed to apply a predetermined normative program whose scope and limitations are sharply defined, and whose content is both known in advance and unlikely to be reshaped by their case. Indeed the parties will more often disa-

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45 380 U.S. 609, *reh'g denied*, 381 U.S. 957 (1965).

46 *See* R. SCHLESINGER, *supra* note 42, at 453. This is also the rule in England, where the judge is authorized to suggest to the jury that it draw an adverse inference from the defendant's failure to respond. *Id.* at 452.

47 *See* Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 527 (1973).

48 This is commonly referred to as the "sporting theory of justice." While still firmly embedded in American jurisprudence, this theory has come under increasing attack by commentators advocating increased use of discovery in criminal cases. *See* Comment, *A Proposal for Discovery Depositions for Criminal Cases in Illinois*, 16 J. MAR. L. REV. 547 (1983).

49 This is the "majority rule." However, some state procedural systems allow for the disclosure of the state's witnesses at the trial judge's discretion. *See, e.g.*, Comment, *supra* note 48; Note, *Discovery of State's Witnesses*: State v. Walters, 43 LA. L. REV. 1549 (1983).

50 This situation is perfectly illustrated by Hart's statement: "There are no easy cases."

gree over which "set" of norms is applicable, than over actual substance of the normative program.

B. *Substantive Model*

1. The Paradigm: Values and Legal Philosophy

At a greater level of abstraction and in a complementary fashion, autonomy and neutrality are the main values furthered by the Continental model. More precisely, the Continental European legal systems are grounded on the explicit formulation of these principles. They are the purpose of the system and serve as regulating ideals. "The law of Western society traditionally is analyzed as an autonomous, logically consistent legal system in which the various rules are derived from more abstract norms."[51] This statement perfectly describes Kelsen's theory. Kelsen regards validity as derived from higher norms and ultimately from the "Grundnorm." Derivations from the "Grundnorm" are made from the general to the particular, from the superior norm to the inferior norm. They are external to social reality and form a complete abstract universe. Actually, abstract norms covering all factual possibilities constitute a rational counterpart to reality. Such an autonomous system is purportedly neutral par excellence. It is immune from the conflicts which are inherent to the social process. In Europe, neutrality is considered as the necessary characteristic of a good legal system. It corresponds to the Continental concept of justice, i.e., justice before the law in the broad sense, not justice in the particular case. Kelsen goes so far as to say that a legal norm may have any kind of content, and that its validity cannot be questioned on the ground that its content is incompatible with some moral or political value. Actually, Kelsen's normative system is completely independent from the social process. Policy is metajudicial. The only point of contact between the social and the legal system is the "Grundnorm."

American realists completely reject the positivist conceptual approach and theoretical framework. In their view, such a pure theory of law is artificial and, in fact, constitutes a subterfuge.[52] In Kelsen's view, if the law merely represented what is going on, it would lose its normative character in reference to which "what is going on" has to be judged. Thus, he advocates a body of standards which are completely external to social reality. By do-

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[51] L. POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 275 (1971).

[52] *See* Morrison, *Myres S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 3 (1976).

ing so, he denies the complexities and multiplicity of legal processes involved in a human society. The law of the state is not the only law. Besides this myth system, there is an operational code. Indeed, the law of a criminal gang can be more effective than the law of the state. Furthermore, as it has been definitely demonstrated,

> the legal systems form a hierarchy reflecting the degrees of inclusiveness of the corresponding subgroups, the total of the legal systems of subgroups of the same type and inclusiveness . . . [constituting] . . . a legal level. As there are inevitable differences between the laws of different legal levels, and because an individual, whether a member of an advanced or a primitive society, is simultaneously a member of several subgroups of different inclusiveness, he is subject to all the different legal systems of the subgroups of which he is a member.[53]

In a system in which law is said to be grounded in the social process, questions regarding the policy content of a given regulation, the degree of its effectiveness, and the factors and context of choice, become fundamental and are no longer considered outside the scope of legal inquiry. Consideration of interests or claims replaces logical derivations. Rules are downgraded to the rank of factors of decision and are much more respected because they correspond to the subjective expectation of people rather than because of their alleged normative content.

2. Application: Property Law

a. *Structural Features*

The French *Code civil* defines ownership as an absolute right. The owner is a sovereign. Legal ownership remains exclusive, single, and indivisible. Only one person can own the same thing at the same time.[54] There is no intermediate possibility between ownership and nonownership. Everything is owned by somebody. The Code cares for all situations. The legal landscape is completed. Accordingly the *Code civil* provides:

> Article 544. Ownership is the right to enjoy and dispose of things in the most absolute manner, provided that use is not made of them in a manner prohibited by law or regulations.

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[53] Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, J. OF CONFLICT RESOLUTIONS, Mar. 1967, at 9.

[54] Co-ownership does exist, but in this situation each co-owner owns a share in the *res*, but not a determinate part of it. Ownership itself remains indivisible as an absolute and liberal concept.

Article 545. No one can be forced to yield his ownership, unless for public purposes and with prior, just compensation.

Article 546. Ownership of a thing, either movable or immovable, gives a right to all which it produces and on that which unites with it accessorily, either naturally or artificially. Such right is called right of accession.

Article 539. All property unclaimed and without a master, and that of persons who die without heirs, or whose successions are abandoned, belong to the public domain.

Ownership in the Continental model is a legal concept which exists by itself. It has a precise legal structure and a definite place among legal categories. Ownership is a real right (*droit réel*). Real rights, as opposed to personal rights (*droits personnels*), are rights which you may exercise directly on things, instead of persons. This categorization implies a number of legal consequences. For instance, because real rights are absolute rights, you can enforce them against anybody—this means that everybody has to respect them. All real rights are listed in the Code and every situation is covered, i.e., all other rights are personal rights. Ownership, as derived from Roman law *dominium*, is composed of three elements: *jus utendi, fruendi, abutendi*.[55] Thus, lesser rights can be manipulated, but the range of operation is predetermined. For instance, if you subtract one element, you obtain a different concept: if you add *usus* and *fructus*, you obtain another real right, a right of *usufruct*.[56] Finally, the concept of ownership exists by itself, independent of the different elements which constitute it. The distribution of lesser rights among different persons will not affect ownership itself. There will always be one identifiable person who will be the owner. In the case of *usufruct*, for instance, the owner will be the person entitled to *abusus*.

American jurists have pointed out that Continental ownership could be thought of as a box containing certain rights.[57] Whoever has the box is the owner, even if the box is empty. They have criti-

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55 *See* W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 188 (1921).

56 *Usufruct* is defined as "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing." BLACK'S LAW DICTIONARY 1384 (5th ed. 1979).

57 Merryman, *Ownership and Estate (Variations on a Theme by Lawson)*, 48 TUL. L. REV. 916, 927 (1974).

cized the Continental conception because of its rigidity and artificiality. But, the independent existence of concepts corresponds to the idea that the whole legal system preexists. It is also necessary for a flexible operation of logical derivations; thus, the lesser rights which compose property and which have been divided among different persons for some period of time can come back into the box before being used in other combinations. In the American system, such a concept of property does not even exist. There is no box. There are merely various sets of legal interests. You do not own something. You own a right in something, and different persons can own different rights in the same thing at the same time. Abstract concepts are replaced by effective powers. This is the conversion formula[58] which explains why comparing similar legal institutions of both systems is so difficult.

Usufruct, for instance, is similar to a life estate. The owner who grants an interest to another person has an interest which is very much like reversion. But the reversioner in the American system can never be considered an owner. He owns an estate, a future interest, while the life tenant owns a present interest. For the same reasons the institution of trust is completely unknown in the Continental system. In the simplest scheme, three different interests are created: that of the trustee, that of the beneficiary, and that of the person who will, on termination of the trust, become a kind of owner. Actually, one would find some similarity between the trust and our concept of ownership which can also be divided among different persons. However, in the case of the trust, nobody really owns the thing. Furthermore, the trust is not a legal concept in the Continental sense of the word. The parts do not add to the whole. As Professor Merryman remarks, the corpus cannot be wasted or invested in speculative ventures even with the consent of all parties.[59] Furthermore, the corpus is immune from the general creditors of both trustee and beneficiary. "Thus, when property is placed in trust, there may be not only a division, but also a contraction, of ownership."[60]More generally, the absence of mediatization through legal concepts multiplies the opportunities for building up legal combinations which would be impossible to realize under Continental law.

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58 This conversion formula is not entirely neutral, and does not give an objective representation of the reality. Here it consists of presenting an American legal instrument in Continental terms.

59 *See* Merryman, *supra* note 51, at 941.

60 *Id.* at 941 n.65.

b. *Dynamics*

The purpose here in using two decisions—one of the French Cour de Cassation and one of the United States Supreme Court—is to show how the courts use different techniques when they solve a real case. However, such a comparison is not fair because judicial decisions do not have the same legal function in each of these systems. In order to make a useful comparative evaluation, they have to be placed in their contexts. With respect to the French decision, this is a relatively easy task to perform. It is enough to state which rule of the *Code civil* is applicable. The same operation is impossible to realize in the case of an American decision whose context is constituted by other relevant decisions. This points out another difference between the systems. In the Continental model, substantive decision-making could be represented by a series of concentric circles containing the specific decisions, whereas in the American model it could be much better represented by clusters of lines on which decisions take place.

i. Decision of the French Cour de Cassation

The decision of *Rebeyre c/Maire D'Ussel*[61] interprets Article 2265 of the *Code Civil*, which reads:

> He who acquires real property in good faith and by a proper title obtains ownership of it by prescription in ten years if the true owner lives in the jurisdiction of the Cour d' Appel within whose perimeter the property is situated, and in twenty years if he is domiciled outside of the said jurisdiction.[62]

In order to reduce the ordinary term of prescription from thirty years to twenty or ten years, you need to satisfy two cumulative requirements: you have to act bona fide and possess a proper title. But the *Code civil* does not define the content of these two concepts. Thus the Cour de Cassation has in a series of decisions defined their meaning under the cover of interpretation. In the view of the Cour de Cassation, a proper title needs to satisfy certain very precise conditions, only one of them being under consideration in our case.[63]

In its decision, the Cour de Cassation declares that, as it follows

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[61] *See infra*, appendix I.

[62] Note that this provision expresses a clear policy without stating it openly: the person whose domicile is not too far away from the place where the property is located is supposed to be in a better position to prevent a third party from exercising adverse possession.

[63] French cases never deal with global concepts but with the particular elements they are composed of.

from the terms of Article 2265, the title which transfers the ownership of the real estate, acquired *a non domino*, constitutes, through prescription, a proper title vis-a-vis the real owner. In other words, a proper title is a title which could have transferred the ownership had it been passed by the real owner. *A contrario*, this statement excludes all titles whose effect is only declaratory of rights which have been previously transferred. Such is the case, under French law, of a partition. Article 883 of the *Code civil* states indeed: "Each co-heir is considered to have succeeded alone and immediately to all the effects comprised in his lot. . . ."[64]

The way of handling the issue is a good illustration of Continental legal reasoning. Through the operation of very precise definitions, the court achieves determinative results which seem ineluctable. In the Continental paradigm, the specific situation of the parties in the case is only one decisional factor, its influence on the court's decision is less momentous than would be the case in the United States.

ii. Decision of the United States Supreme Court

In *Alfred Dunhill, Inc. v. Republic of Cuba*,[65] an American cigar importer asked for reimbursement of mistaken payments made to the intervenors of confiscated businesses in Cuba. The Cuban government refused to repay the funds and interposed the "act of state" doctrine. Under American law, "acts of states," for example, nationalizations, expropriations, and confiscations, are usually not subject to review by the judiciary.

In the context of what line of decisions does the *Dunhill* case take place? The act of state doctrine originated in 1897 in *Underhill v. Hernandez*,[66] a case where the United States was unwilling to grant recognition to a government (entitling a claim to sovereign immunity) that might fall in short time, but where, on the other hand, the United States did not want suits brought against a potential foreign sovereign. A highly simplified exposition of the recent state of the law in this area can be made by referring briefly to the position of the Supreme Court in two cases: First, the decision in *Banco Nacional de Cuba v. Sabbatino*,[67] an exception to the *Bernstein* doctrine, affirmed in 1947[68] and 1949,[69] which

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[64] C. CIV. art. 883.

[65] 425 U.S. 682 (1976).

[66] 168 U.S. 250 (1897).

[67] 376 U.S. 398 (1964).

[68] Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

[69] Bernstein v. N.V. Nederlandsche Amerikaansche Stoomuaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949).

stated that the courts could not intervene in matters with a foreign component unless the executive branch asked them to do so. In *Sabbatino*, the Court actually declared that even if the executive branch asked for intervention, it would refuse to intervene, because such a decision could create subsequent embarrassment. Second, in *First National City Bank v. Banco Nacional de Cuba*,[70] the majority opinion delivered by Justice Rehnquist affirmed that the courts should wait for a signal from the executive branch before exercising jurisdiction. The dissent, on the other hand, although admitting that courts had to show deference to the executive department in these matters, insisted on the independence of the judiciary.[71]

Thereafter, the *Dunhill* decision actually attempted to limit the act of state doctrine by, for instance, distinguishing between commercial and noncommercial matters.[72] But on this issue it received only plurality support. The point is that in order to perceive what the act of state doctrine really is and what it will be in the future, one has to look at all these cases. The law is disseminated along different lines which intersect with each other. Actually, one case which is still part of an old line can already contain or indicate new orientations, especially through the statement of minority opinions. Linear decision-making incorporates a slowly evolutive process.

The act of state doctrine as stated by the Supreme Court in *Dunhill* is not a legal concept in the Continental sense of the word. It is presented much more as a legal instrument created in order to achieve certain results. This does not mean that in Europe law is not a "means to an end," as Von Ihering put it. What one can say is that it is never presented that way, and that such a conception does not correspond to our official perception of what law is or should be. Technically, the Supreme Court does not try to define the content of the doctrine, presumably because it has no permanent structure. Once more, concepts do not exist in American law. In this regard, what would have been the attitude of a French court in dealing with the act of state doctrine? A French court would have enumerated the criteria of the act of state, and the most important part of its decision would have been defining those criteria. For a French jurist it is striking, for

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70 406 U.S. 759 (1972).

71 *Id.* at 790-92 (Brennan, J., dissenting).

72 *See Dunhill*, 425 U.S. at 695.

instance, that at no time does the Supreme Court really try to analyze what a "commercial obligation" is or what "commercial entities" could be.[73] In the American system, the definition of terms is left to the discretion of each decisionmaker.

On the other hand, the Supreme Court sets forth in great detail what one could call its "judicial policy," i.e., the reason for its decision—it wants to avoid embarrassing the executive branch—as well as the other factors which it takes into consideration: namely, increasing participation of states in international trade, potential injury to private businessmen, adoption of the same theory by courts of other countries, smaller risks of affronting foreign governments in the market place[74], etc. On all these points, the Cour de Cassation would remain completely silent, not so much because it does not take them into consideration, but because they are not part of the official judicial decision process.

Any discussions or dissenting views concerning a Cour de Cassation decision will not be disclosed. All these considerations make us understand why the Supreme Court can end its discussion by stating that one "label"[75] is not better than the other. "Act of state" is a "label," perhaps a "doctrine," but certainly not a legal concept in the European acceptance of the term.

C. Conclusion

The differences between both systems can be characterized in the following terms: the Continental model is centripetal[76] in terms of decision-making and structural in terms of legal thinking, whereas the American model is centrifugal[77] and functional. At a higher level of abstraction, one can note that the contrast is not in the different values furthered by both systems but in the priorities they attribute to each of these values. All legal orders present common features, precisely because they are "systems." But, a legal system is not immune from the cultural context in which it operates. Even if cultural differences between the United States and Continental Europe are obvious and explain different value hierarchies, there remains a common core of

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73 *Id.*

74 *Id.* at 697-705.

75 *Id.* at 705. *Compare id.* at 725-26 (Marshall, J., dissenting) (act of state and sovereign immunity doctrines fundamentally different) *with id.* at 705-06 n.18 (same conclusion reachable in both sovereign immunity and act of state contexts).

76 *See* Damaška, *supra* note 4, at 487.

77 *Id.* at 511.

myths and beliefs, which are managed in different ways in the framework of the particular system.

III. Legal Education in the United States and in Western Europe

Legal education is a dynamic process. Each legal system has certain goals that various participants, acting in different arenas and through various procedures, try to achieve.

A. *Goals*

The system of legal education is a subsystem of the legal order itself. The paradigmatic values promoted by the legal system will also be furthered by the educational system, which will derive its own goals from the demands expressed by the legal system. Conversely, it will reinforce these demands and perpetuate them. Apart from its function of social selection and classification, which is one of the main functions of the educational system at large, the official function of legal education is to nourish and to supply the legal system. Basically, this is so even if, actually, most of the students exposed to the system of legal education will not operate within the legal system itself. What is involved here is a "law of systemic consistency". The sub-system has to be consistent with the system within which it operates.

A systemic approach to legal education discloses that the views expressed by some comparatists on the same topic may be quite beside the point. In his article entitled *Legal Education Here and There: A Comparison*,[78] Professor Merryman of Stanford University writes that he considers legal education in the United States to be superior to that of most civil law universities "because its conception of the work of the professional lawyer — and accordingly of the mission of legal education to prepare persons for that profession—is a much richer, more demanding and more realistic one."[79] This is typically a value judgment, that is, a judgment about the values which each system favors, not a judgment about legal education. Thus, the objectives of legal education are not the same everywhere. Different legal orders call for different lawyers. When lay administration of justice is important, it is understandable that there will be lawyers whose minds will be more open to human considerations. Maintaining consistency implies that an American lawyer be trained to convince a jury. In

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[78] Merryman, *supra* note 1.

[79] *Id.* at 877.

the Continental system, on the other hand, law will be more technical, more immune from social and moral considerations.[80] Education to inculcate these paradigms in the minds of lawyers—and other people—in order to make the system work and to perpetuate it. In other words, if one wants to judge the effectiveness of a given system of legal education, one has to compare the objectives it espouses with the immediate results and long-term outcomes it achieves, not with respect to the goals of one's own system.

Since the purpose of each educational system is to maintain conformity between individual behavior and the basic features of the American or Continental model, the ideal output a given legal system will be asking for will be that corresponding best to the principles on which it is built. On the Continental side, the proposed image will be that of a technical decisionmaker, specializing in operating abstract concepts and easily accepting superior authority. On the American side, it will be that of a creative decisionmaker.[81] Both representations are only images, because each legal system preserves a certain degree of autonomy with respect to social processes. Each legal system has its technicians, but techniques are different. Convincing a jury is as technical as interpreting a legal rule. Giving many contradictory policy reasons to justify the result is as hermetic as delivering a completely abstract and esoteric decision. Too much information can be as detrimental as too little and acts as a subterfuge for the real reasons.

It is true that both systems will favor two different creativity processes. In the Continental model, individual creativity will be constrained within certain limits. Principles of reasoning and logic have to be respected. The sphere of legal reasoning will be

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[80] In the United States, in the case where evidence has been obtained illegally in criminal matters, guilty persons have to be released where their convictions rest upon that illegally gathered evidence. This is not the case in Continental Europe, nor is it the case in England, where such evidence will be accepted, although the offense constituted by the illegal gathering of evidence will be punished. This stresses the autonomy of the American legal system: objective guilt is not equal to judicial guilt. Furthermore, the justification of such a position is deeply rooted in American ideology: man and woman is considered as good and innocent; the legal system has to protect the individual against the state and its police; value considerations are introduced in official processes. These values are not affirmed to the same degree in Europe, and this is reflected in the procedural system. Law cannot be separated from culture.

[81] These creative decisionmakers have been described by many American authors through various images (social engineers or problem solvers), which seem to reveal an evident bias of these authors in favor of their own system.

strictly delimited. But one reaches on a smaller surface a higher degree of abstraction. In the American model, such limits do not exist or are very flexible. In other words, one cannot be wrong. Individual creativity is less restricted and the frontiers of the law are less precisely defined and more open to other fields of knowledge. Although this contradicts certain clichés, there is no less creativity in one system than there is in the other. Both systems are formed by, and *pari passu* form, the decisionmaker, but the optimization of decision is conceived in different terms. The making of a decision in the American system does not correspond to the same step in the Continental system. If one wants the comparison to be fair, one has to take into account the Continental pre-decisional step, which consists in the pre-elaboration of the legal principles. Less creativity in day-to-day application can only be obtained because it has been preceded by a very intense creative phase. The comparison of the operations performed by final decisionmakers results in a false perception of reality. Taking into account the greatest possible number of variables corresponds to two steps in Continental decision-making: the rationalization of complexity and the application of the general principles so obtained.

A final misinterpretation, often encountered when dealing with the goals of legal education, is the view that the objectives of Continental legal systems could differ from the goals of forming behavior or creating attitudes toward the law. Even on the Continent, where law is a kind of postulate, a primary goal is to achieve social conformity to the legal order, public and private. It is an oversimplification to oppose a lawyer who "thinks" with a lawyer who "knows." It is not more essential for a Continental lawyer than for an American lawyer to know "what the book contains." What is important is to know that "the book exists." It is essential to see the "effort of memorizing," which is very often described as typical of the Continental system, in this context. This educational technique has not been introduced because of this supposed result, which in fact it rarely achieves. It has been developed in Continental legal education because it has been considered to be the best way to further the values and to respond to the demands imposed by the legal system. Its purpose is to transmit basic ways of reasoning and to obtain conformity to authority because these are the demands of the system. In the American system, one uses different techniques (for example, the case method) to achieve the same results, that is, to realize behavioral consistency.

B. *Participants*

1. Law Teachers

Maintaining the unity of the law and the centripetal organization of its teaching are requirements posed by the Continental model. In order to become a professor of law in France, for instance, you have to write a dissertation and obtain the title *Doctorat d' Etat* — in order to take the *Agrégation*.[82] The organization of this entrance examination is symptomatic of the Continental conception of law. The main division of law is reproduced: there is an *Agrégation* in private law and one in public law. The *Agrégation* is a national examination, that is to say, law schools cannot hire their teachers directly. After having passed the national examination, they are appointed by the government to each school. All law professors come from the same source, have to pass the same exam, and are formed in the same mold.

In the United States, the situation is quite different. Law schools are very decentralized. Each law school hires its own teachers through a series of less formal procedures, mainly based on interviews with candidates. There exists a real job market as exemplified by the annual Faculty Recruitment Conference in Chicago and the Placement Bulletin of the Association of American Law Schools. As a result, the quality and focus of the faculties of the different law schools are very diverse and can be used as a criterion to obtain a ranking of the schools. Such an operation would be much more difficult to undertake in France, except perhaps for some Parisian universities, but for reasons which are largely external to the working of the educational system itself.[83] American law schools look for specialists who can teach in certain fields. Definition of competence is very factual and recalls delimitation of authority in the American judiciary. In France, the situation is different. Faculty members are considered capable of teaching any subject within the scope of *either* public law, *or* private law, as applicable.

In France, a doctoral dissertation can take five years or more. This dissertation is very important for the *Agrégation* itself, which will partially cover the topic and the content of the thesis. This

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[82] The French Ministry of Education is presently trying to substitute another kind of recruitment system to the *Agrégation*. But it has not yet announced its intentions.

[83] Centralization of education corresponds to the centralization of the whole societal structure in France.

doctoral dissertation is a good illustration of the Continental way of thinking. Candidates will work during a very long time on very narrow topics, chosen among concepts and categories. They will produce highly abstract work. Professors have to be scholars, and ability for research is a basic quality of the Continental teacher. In the United States, on the other hand, very few professors hold a J.S.D,[84] which in most cases is not even comparable with a European dissertation. The ordinary curriculum allows spending some time clerking with a judge or in practice, in order to gain some practical experience before going into teaching. In France, not only does the hiring system not require contact with practice, but in a way discourages it from occurring, thus broadening the gap between practicing lawyers and professors. Professors will hold a prestigious degree which other lawyers usually will not have because it is of no immediate use in practice.[85] This feature has something to do with the authority which is accorded to professors and with their tasks within the Continental system.[86]

In the Continental model, professors have a very important function. They elaborate and maintain what one could call the "legal science."[87] They order the system. It is, for instance, only by applying a conversion formula that French law can be considered to contain areas of case law, in the American sense of the word. This assertion is very often made in regard to the law of torts, which is presented as a creation of the courts through a very broad interpretation of Articles 1382 and 1384 of the *Code civil*, or with respect to public law, which has been excluded from codification and which is at present mainly the result of the *jurisprudence du Conseil d' Etat*.[88] Actually, these areas of the law have since their creation been completely organized by professors. If one opens a book on administrative law, for instance, he or she will find the same categories, concepts, and definitions as in civil

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84 At Yale Law School, for example, only five faculty members of 67 held a J.S.D. degree in the 1981-82 academic year. [This has remained constant into 1985. eds.]

85 However, a doctorate can be useful to attract a clientele.

86 In Continental countries, the prestige of professors is higher than that of judges. The situation is reversed in the United States with respect to the superior courts. The importance of their function is perceived differently and accords to the different needs of each system.

87 On Continental legal science, see M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, THE ITALIAN LEGAL SYSTEM 170-75, 229-39 (1967).

88 The *Conseil d'Etat* is the highest administrative court in France. Administrative courts have jurisdiction for "public-law disputes." *See* R. SCHLESINGER, *supra* note 42, at 462-83.

law. The only reminiscence of case law is that the permissible level of indetermination, which differs from one system to another but which is also absolutely necessary to its operation, remains greater in these areas than it normally does in the Continental model.

In the United States, the task of scholars is different. There is no legal science to preserve, and legal scholarship can be more innovative. If one adds to this that a very strict categorization of fields does not exist, one can conclude that, generally speaking, scholars have more opportunities to carry out experiments. One would never find courses entitled "Tragic Choices" or "Mass Disasters and their Procedural Idiosyncracies" in the curriculum of a Continental law school.[89] These characteristics can serve as an explanation for the strong differences one observes in the internal administration of law schools. In the American system, the greater independence of teachers in their work implies a need for their strict coordination through the institution of a powerful dean. In Europe, deans' powers are more symbolic. There is not so much need for coordination because centripetal elements are built into the system itself. Furthermore, one can link the appearance of so many independent institutes[90] within the Contintental law schools to the emergence of new fields of law, for example, European law, comparative law, and so forth, which do not readily fit into one of the existing categories.

2. Students

The main difference between American and Continental law schools is that the selection and classification processes do not take place at the same stage. In America, the selection process operates before one enters law school. The main factor for admission is academic excellence. It consists of the score obtained on the Law School Admission Test (LSAT) and the grades received during the applicant's undergraduate university education. Selection is already combined with social classification. The whole system is decentralized, that is, the best students will go to the best law schools where they will also find the best teachers. At the law school, the classification function continues

89 These course titles were taken from the 1981-1982 Yale curriculum. *See infra* appendix III. Perhaps the example furnished by the Yale curriculum does not give a fair representation of the ordinary reality of American law schools. But the important fact is that such courses would never appear in the curriculum of any French law school.

90 *See* Merryman, *supra* note 1, at 869.

through the attribution of grades or responsibilities (for example, service on the law journal) but the selection function is almost terminated. In France, on the other hand, there is no selection before entering law school, which would have to be organized by the law school itself. The only requirement is the attainment of the *Baccalauréat*, which opens the way to all Universities and which cannot be considered as a serious obstacle anymore.[91] Furthermore, social classification does not operate at that stage. All law schools reproducing the centripetal tendencies of the legal system will have the same admission requirements, that is to say, the *Baccalauréat*, without taking grades into account, and thus admit the same categories of students. The whole selection and classification process will take place during the time spent by the student at the school, and will actually constitute a heavy burden for Continental law schools.

The student body has been affected quantitatively and qualitatively by this largely open Continental admission process. On the one hand, it has led to the "mass university." Law schools have been gradually inundated with students, without any possibility for the schools to adapt their resources adequately.[92] Thus, the management of selection (i.e., reducing numbers) became a primary objective in French law schools. From a qualitative perspective, one should note that students in French law schools are much younger and much less experienced than students in American law schools. In France, there are no pre-law college students. This affects students' attitudes toward the law. Professor Merryman is indeed correct in pointing out that Continental law schools are not exclusively devoted to preparing persons for the legal professions.[93] Furthermore, the social objectives of law schools in the two legal orders actually reflect two different conceptions of what the field of law is or should be. Today, law in a technical sense permeates all spheres of social life, and the ideally restrictive Continental perception does, perhaps, not really fit with this reality. On the other hand, Continental law schools find it more and more difficult to reproduce a paradigmatic ideal, which, consequently, is more and more contested by some of the participants in the process.

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91 Of the students who take the *Baccalauréat*, 60 to 70% pass it. However, some universities try to take into account the grades obtained.

92 *See* Merryman, *supra* note 1, at 861 ("The Faculty of Law at the University of Rome has 12,000 to 15,000 students, while the Stanford Law School has a student body of 450.").

93 Merryman, *supra* note 1, at 861.

C. *Arenas*

Professor Merryman observes that "universities in the civil law world lean in the democratic direction, while meritocracy is the dominant ideal in American universities."[94] Without discussing the merits of an opposition between meritocracy and democracy, which is in itself questionable, one has to recognize that this is a non-contextual appreciation. With respect to social selection and classification, one has to admit that economic and social barriers to university education have been largely suppressed—the costs of legal education on the Continent are not comparable to the fees one has to pay to American law schools.[95] But, meritocracy remains the basic selective principle in all Western societies. What one can actually observe in France is that barriers have not really been suppressed but have rather been moved to other places. This phenomenon could be called a "systemic shift." The *Grandes Écoles* prepare graduates for high echelon jobs both within and outside the legal world. The reason for their success is, of course, that they reproduce pure, meritocratic models with a highly selective admission process and permanent evaluation. A good example of this phenomenon is that furnished by the "*École Nationale d'Administration*,"[96] which leads to the elite jobs throughout French society. This *Grande École* now has a virtual monopoly on all high-level positions in the area of public law. The law school graduate seeking a high ranking civil service job must be admitted to this school after graduation or must satisfy himself or herself with a lower position. Finally, if one takes into account the existence of these "meritocratic" schools, it is not at all sure that the French legal educational system leans in the "democratic" direction in the sense in which Professor Merryman uses that term.

Nor is it fair from a technical point of view to compare law schools of American universities with those of Continental universities. This is true even in countries where "big schools" do not exist. Universities in the Continental legal world form only a small part of the legal educational system. For most legal professions it serves only as a preparatory step. This observation is an answer to the reproach of "non-professionalism," which some

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94 *Id.*

95 Tuition in a French law school is less than $100 a year.

96 The *École Nationale d'Administration* is typically a French elite school. The top students enter the *Grands Corps*, which means not only that they are appointed to some high administrative position but also that they will possess a title which will open doors at all levels of French society.

address to Continental law schools when comparing them with American law schools. It is true that in Europe there is very little practical training organized within the law school itself, whereas in America clinical training may be a requirement. These situations perfectly characterize the American and Continental paradigm. In Europe, law is "pure" and abstract; in the United States it is instrumental.

But such a representation remains too simplistic to provide a true picture of reality. It omits the fact that legal education in Europe also takes place in other arenas. In other words, the assimilation between law schools and legal education does not work on the Continent. In Europe, professional training is provided outside the university and after graduation. In France, there is a special school for judges, which is also one of the *Grandes Écoles*—the *École Nationale de la Magistrature*; recently, special schools for lawyers have been organized. In addition, the new lawyer will have to complete a two-year probationary period during which he or she will attend practical and theoretical courses. Once more, in order to make adequate comparison, one has to adopt a contextual approach and look at the larger picture. Such a perspective brings out the real differences between both systems. These differences are relative. If one considers a paradigm as given, one can affirm that the differences essentially concern the localization of functions performed by a specific system, but not the functions themselves.

Finally, if one focuses on the law schools themselves, one can notice that in many ways their organization typically reproduces the basic features of the procedural models presented above. American decentralization contrasts with Continental centralization. The contrast is reinforced by the fact that on the Continent, there are very few private universities, and no private law schools. All the law schools are based in the universities. In France, the whole university system, which is public, is directed by the Ministry of Education. One of its main tasks is to establish unified educational programs. During the four years reqiured to earn the *Maîtrise*, which is the basic law degree, students will attend the same basic courses once they have chosen their specialization. In the United States, on the other hand, each law school organizes its own curriculum, and confers its own degrees. All American law schools prepare candidates for the basic law degree—*Juris Doctor*—which takes three years, but the organization of graduate programs differs from one university to another. Maintaining the unity of the law is the main purpose of the Euro-

pean organization. This goal is not part of the American paradigm, where there are so many different laws (for example, the laws of the fifty states and Federal law) and the law is not assigned a very delimited field.

D. *Procedures*

Here I would like to examine procedures through which the legal educational system will shape behaviors to conform with the legal model. That is to say, I intend to show how the content as well as the educational methods are employed in order to reach this goal. Both the content of legal education as well as the educational methods developed by each system will perfectly correspond to the paradigmatic vision of the law which each system maintains. In the Continental model, as we know, law is conceived as a complete body of norms which is structured in a logical order. Some authors[97] describe these features by referring to the existence of a "legal science" or a "grammar of the law."[98] In the American model, on the other hand, such a grammar does not exist. There are no generalized conceptual patterns, and the field of law is not delimited and defined in a very precise fashion.

In regard to the content of legal education, an empirical study comparing the curriculum of a French with that of an American law school points up the different possibilities in the choice of courses. In other words, the way this choice is managed by each school directly reflects the differences in the organization of legal minds, i.e., in the patterns of legal reasoning which both models have developed. The French curriculum can be read in the following way. One can distinguish the first two years which lead to a "Diploma of General Studies"—*Diplôme d'Etudes Universitaires Générales*.[99]

During the first year, and the first semester in particular, courses are mainly introductory (i.e., dealing with questions common to whole areas of the law or describing the operation of enforcement institutions). Thus, students will be required to take Constitutional Law, a general Introduction to Civil Law, Criminal Law, Organization of the Judiciary, and so forth. One could describe these courses as "general part" courses, because they con-

97 *See* M. CAPPALLETTI, J. MERRYMAN & J. PERILLO, *supra* note 87.

98 F. Von Savigny first used this image in his work, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 26 (1975) (reprint of 1831 ed.).

99 The curriculum discussed here is based on courses offered at the University of Paris-II School of Law in 1980-81. Minor differences may occur from year to year and from one university to another.

cern issues that would be dealt with in the general part of a Code. In terms of Continental legal reasoning, they correspond to the factorizing process,[100] which consists of extracting some common principles and treating them independently in order to simplify legal rules and to solve "equations" obtained by logical derivations. The other type of courses could be called "background" courses, such as history, economics, political science, or international relations. Continental categorization exercises its influence on the way these non-legal courses are taught, that is, without being integrated with the basic law courses.

During the second year, courses which are compulsory are clearly presented as the next step in the student's curriculum. New complementary categories will appear, for example, commercial law, and students will start to progress logically in the fields they were introduced to during their first year. In civil law, for instance, after having started with general principles in a static perspective, students will have to apply these principles in a relational context (to concrete factual situations, such as contracts and torts). Background courses also become more specialized and technical.

During the third year of studies leading to the degree of *Licenciate in Law*, the topics of courses become more and more specialized. In civil law, not only are students required to attend a course in family law but they can also choose to study matrimonial systems and inheritance or successions. Finally, during the last year leading to the Master of Laws—*Maîtrise en Droit*—the main division of Continental law clearly appears.[101] The law student must specialize in a given field of study, for instance, private law or public law. The organization of the last year of studies brings out the underlying principles which govern legal education in the Continental model. At the University of Paris II, for example, three formulas are offered to students. Students who have not yet attended the basic civil law courses are required to do so. Students who only attended some of them are required to take those they did not yet attend. Only those students who attended all the basic civil law courses are free to choose other courses. Law is conceived as a systematic whole, and the content of legal education is intended to be uniform for all the products of the system. Required courses are numerous and choice is very

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100 *See* Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1366 (1968).

101 *See infra* appendix II.

limited. Even when it can be exercised, it will take place within the pre-existing categories and the system will always have the last say. All these characteristics recall the basic features of the Continental creative process.

The curriculum offered by an American law school appears quite different. At Yale, for instance, [102] apart from the requirement to take the four basic first-year courses during the first term—Constitutional Law, Contracts, Procedure, and Torts; and, in addition, Criminal Law, sometime before graduation—there is practically no imposed order over time.[103] Where such an order exists, it is grounded on the criterion of greater complexity. In a given field a student may be required to take a basic course (for example, Antitrust I) before the more advanced course treating the same topic (for example, Antitrust II). But, the criterion will not be one of greater specialization in terms of the scope of the law, and in the cases where such a criterion could exist, specialization would never reach the degree it reaches in Continental law schools. Basic courses are not conceived as "general part" courses. Factorizing is not the American way of thinking about law and general concepts are not available. A preexisting ordering of the field, dividing it over the whole time spent at the law school, does not exist. The American curriculum looks like a shopping list. Even when some groupings are suggested to students, as is the case at Yale, they remain very factual. Background courses such as Anthropology of Law, Economic Analysis of Legal Problems, or Anglo-American Legal History are conceived in more functional terms than they are in a Continental law school. They are actually applied to the legal field. Law is not strictly separated from other disciplines. The topic of many courses is at the intersection of legal and other technical areas such as health law and policy, law and the visual arts, and so forth. Legal studies are concerned with the social and political process itself. There are courses about bureaucracy, law and the political process, and so forth. Policy questions are not excluded from the field of law, and strategies of decision-making are examined at micro-levels (in a course like Strategies of Public Management) as well as on a global scale (in a course on Public Order of the World Community: A Contemporary International Law).

The American curriculum also provides for professional training inside the law school, and offers many research opportu-

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102 *See supra* note 89; *see also infra* appendix III.

103 *See infra* appendix III.

nities through the institution of research seminars and independent research. This constitutes quite a distinctive feature with respect to the Continental model where the function of the law school is defined more restrictively. In Europe professional training is organized in other arenas. Research is reserved for doctoral candidates and does not take place in the ordinary curriculum. Finally, one should stress the great flexibility of the American curriculum which favors a real tendency for innovation. New courses are created every year, sometimes on very specific subjects, in order to take into account the interests and research of particular teachers or the currency of some new legal issue.

With regard to educational methods, one often opposes the American so-called "Socratic method" and "case method," originally introduced by Professor Langdell[104] at Harvard, to the more traditional European *lectures*. In the first method, which presents many variants, students are required to participate in class discussions and to study case materials before class. The teacher plays more or less the role of an umpire, orienting discussions by asking or answering questions. On the Continent, on the other hand, students are normally not expected to participate. The teacher communicates his "wisdom." Students listen passively.[105] These images correspond perfectly to the paradigms developed by both models on the procedural as well as on the substantive level.

On a second level, one could try to characterize how these images actually hide the operational functions of the educational system. Indeed both systems have identical systemic needs, that is to say, needs dictated by the structure and the function of the system itself. Both need to be accepted by participants and both need to communicate some knowledge. Acceptance of the system can be obtained by participation or by exercising unilateral authority. In the past, the French system was mostly based on unilateral authority. This feature has been attenuated since the institution after 1968 of *travaux dirigés*, which are small tutorials conducted by lecturers where the teaching method employed looks very much like the case method in terms of participation and preparation. On the other hand, the American system also

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104 Langdell introduced the case method at Harvard in the 1870's. Strangely enough, he justified this introduction in Continental terms: he intended to produce a general theory of law.

105 *See* Merryman, *supra* note 1, at 871.

organizes a process of unilateral communication of knowledge. Class discussions are perhaps more stimulating and facilitate the discovery of the policy reasons which underlie decisions. But this does not prevent the conveyance of information, even if this information is different from that communicated in a Continental law school. I compared course notes of different years taken by different students in the same class directed by the same teachers. They had almost the same content. From this perspective, the fact that a teacher is perceived as an umpire appears as an artifact intended to obtain a better acceptance of authority and to provide for better communication, albeit unilateral, of information.

In the American system, unilateral communication will principally result from the contextual conditioning to which the students are subjected. Very general (the values recognized in the system, the dominant legal thinking, etc.) or specific (the point of view of teachers, the choice of cases reproduced in the case book or materials, etc.) factors will induce students to have opinions taking similar directions and develop common attitudes to specific legal issues.

E. *Conclusion*

Once one admits that different legal educational systems have to be judged in reference to the different values they further, the actual effectiveness of each of these systems can be measured by comparing the results they achieve with the objectives they have.

IV. Conclusions

The initial conclusion is methodological. An observer must begin by defining his observational standpoint. He must be clear about his own objectives and make appropiate allowance for the preferences and biases inherent in his own culture. In other words, it is unfair—and to a large extent irrelevant—to judge a foreign educational system by reference to the values of one's own legal system. The establishment of an observational standpoint is particularly important in the field of comparative studies because one has to find a basis for conversion, a common denominator, in order to make one system understandable in terms of another. Adopting an independent standpoint is the only way to make the complexities of reality come out. The social system is composed of a multitude of interacting dynamic processes. In

each system, specific values are hierarchized; paradigms provide a framework for action; and social images regulate behavior. The observer is under an obligation to clearly delimit his focus of inquiry. This essay points out the importance of the role of paradigms in the operation of law in society and the need for explicit conversion formulas.[106]

The second conclusion goes beyond methodological considerations. For the student of comparative law, an anthropological or sociological approach should prove to be appropriate and productive.[107] Such an approach should allow the scholar to break the shackles imposed by his own legal background and enable him to identify equivalent legal functions as they have arisen in the systems under observation. It is certainly worthwhile to establish conversion formulas and to describe one system in terms of another. While the conversion method provides a basis for description, it cannot be used to explain why, or how, a given function is performed through different legal (or societal) instruments in two different legal systems (or societies). The scope of law varies from one society to another; the only way in which we may hope to grasp the inherent features of any legal system is to examine it not only in its institutionalized form but also as the product of social processes. This is true of each legal system; it applies *a fortiori* to comparative law. Indeed, this method was used by a distinguished eighteenth century French jurist who laid the foundations for a modern theory of comparative law.[108]

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106 On the opposition between myth system and operational code, see W. REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 15-36 (1979).

107 In his doctoral dissertation published in 1958, *Kapauku Papuans And Their Law*, Professor Leopold Pospisil affirms, in line with Malinowski's genius, that every functioning subgroup of a society has its own legal system which is necessarily different from those of other subgroups. *See* L. POSPISIL, KAPAUKU PAPUANS AND THEIR LAW (1958) (Yale University Publication in Anthropology No. 54); B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); *see also* L. POSPISIL, *supra* note 53, at 9. *See generally* J. COMAROFF & S. ROBERTS, RULES AND PROCESSES (1981) (anthropological dimensions of the processual paradigm of law as contrasted with the rule-centered paradigm).

108 MONTESQUIEU, DE L'ESPRIT DE LOIS (1748). *See* F. HAYEK, LAW, LEGISLATION AND LIBERTY (1973). Professor Hayek distinguishes between a "spontaneous legal order" and a "directed social order, . . . an organization." *Id.* at 37. It is worth noting that the copyright page in Professor Hayek's book bears a quotation from Montequieu.

Appendix I (English)

June 16, 1965 Cassation

With regard to the first part of the first argument: Looking into Article 2265 of the *Code civil*;

As it follows from the terms of its text, the title which transfers the ownership of the immoveable property acquired "*a non domino*," constitutes, in regard to prescription, a good title vis-à-vis the real owner;

having established that Rebeyre had acquired, by notarized title, dated January 8, 1936, three plots of land from Dame veuve Chevalier, who was only in possession of these plots, the Cour d'appel delivered a judgment that did not recognize that the buyer, who acquired *bona fide*, may exercise his right to prescription after the expiration of a period of ten years, on the ground that his vicious title, passed by a non-owner, prevented him "from invoking a ten year *bona fide* prescription instead of a thirty year prescription as it is required by law";

in deciding so, the judgment of the *Cour d'appel* was at variance with the text of Article 2265:

> FOR THESE REASONS, and without taking any further standing neither with regard to the second part of the first argument, nor with regard to the second or third argument:

THE COURT HAS DECIDED TO REVERSE the decision of the *Cour d'appel* of Limoges dated December 16, 1963; accordingly, the court puts the parties in the position they were before the said judgment and requires them to vindicate their rights before the *Cour d'appel* of Poitiers.

Thirty Year Prescription

Art. 2262—All actions, real as well as personal, are prescribed by thirty years, without the one who alleges such prescription being obliged to show a legal title thereto or to oppose an exception of bad faith being raised against him.

Prescription by Ten and Twenty Years

Art. 2265—He who acquires immovable property both in good faith and by a proper title prescribes ownership of it in ten years if the true owner lives in the jurisdiction of the *Cour d' appel* within whose perimeters the property is situated, and in twenty years if he is domiciled outside of the said jurisdiction.

APPENDIX I (FRENCH)

16 juin 1965 Cassation

Sur le premier moyen pris en sa première branche:

Vu L'article 2265 du Code civil;

Attendu qu'aux termes de ce texte, l'acte transférant la propriété d'un immeuble acquis *a non domino* constitue, au point de vue de la prescription, un juste titre au regard du véritable propriétaire;

Attendu qu'ayant constaté que Rebeyre avait acquis, par acte notarié du 8 janvier 1936, trois parcelles de terre d'une dame veuve Chevalier, qui n'en était que détentrice précaire, l'arrêt infirmatif attaqué a refusé de reonnaître que l'acquéreur, dont ila admis la bonne foi, était en droit de se prévaloir de la prescription abrégée de dix ans, aux motifs que le vice de son titre, passé avec un non propriétaire, l'empêchait "à défaut de la prescription trentenaire, de se rattraper en invoquant l'usucapion";

Attendu qu'en statuant ainsi, la Cour d'appel a violé le texte visé au moyen:

PAR CES MOTIFS, sans qu'il soit besoin de statuer sur la seconde branche du moyen et sur les deuxième et troisième moyens:

CASSE ET ANNULE L'ARRÊT rendu entre les parties par la Court d'appel de Limoges le 16 décembre 1963; remet, en conséquence, la cause et les parties au même et semblable état où elles etaient avant le dit arrêt et pour être fait droit les renvoie devant la Cour d'appel de Poitiers;

De la prescription trentenaire

Art. 2262—Toutes les actions, tant réelles que personnelles, sont prescrites par trente ans, sans que celui qui allégue cette prescription soit obligé d'en rapporter un titre, ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi.

De la prescription par dix et vingt ans.

Art. 2265—Celui qui acquiert de bonne foi et par juste titre un immeuble, en prescrit la propriété par dix ans, si le véritable propriétaire habite dans le ressort de la Cour dans l'étendue de laquelle l'immeuble est situé; et par vingt ans, s'il est domicilié hors dudit ressort.

APPENDIX II (ENGLISH)

SYLLABUS OF THE MASTER OF LAWS[1] IN PRIVATE LAW AT THE UNIVERSITY OF PARIS II FOURTH YEAR

A — LECTURES

FIRST PART: *The student attends six courses during two terms and has to choose among one of the following combinations:*

Combination 1: For the student who did not attend the courses of Civil Law II (Matrimonial Regimes) and Civil Law III (Succession).

Six Compulsory Courses:

Financial Aspects of Business Enterprises	1 semester
Civil Law II (Matrimonial Regimes)	1 semester
Civil Law III (Succession)	1 semester
Secured Transactions	1 semester
Special Contracts	1 semester
Bankruptcy Law	1 semester

Combination 2: For the student who already either attended courses in Civil Law II or III.

One Compulsory Course:

The Civil Law course he did not attend (Civil Law II or III)	1 semester

Four Compulsory Courses:

Financial Aspects of Business Enterprises	1 semester
Secured Transactions	1 semester
Special Contracts	1 semester
Bankruptcy Law	1 semester

One course chosen from the following provided that the student did not attend the course before:

Business Law II (course is given in the third year)	1 semester
Building and Urban Property Law	1 semester
Private International Law II	1 semester
European Community Institutions	1 semester
Civil Procedure (course is given in the third year)	1 semester
History of Property	1 semester

Combination 3: For the student who attended the courses in Civil Law II (Matrimonial Regimes) and Civil Law III (Successions).

Four Compulsory Courses:

Financial Aspects of Business Enterprises	1 semester
Secured Transactions	1 semester
Special Contracts	1 semester
Bankruptcy Law	1 semester

Two courses chosen from the following provided that the student did not attend these before:

[1] This is the name given to both the French law degree one earns after four years of study and the last year of studies which lead to this degree.

SECOND PART: The student chooses four courses among those listed provided he did not take those courses before.

Business Law II (course given in third year)	1 semester
Insurance Law	1 semester
Building and Urban Property Law	1 semester
Banking Law and Economics	1 semester
European Community Law	1 semester
Private International Law II	1 semester
Civil Procedure (course given in third year)	1 semester
Maritime Law	1 semester
Criminal Aspects of Business Law I	1 semester
Criminal Aspects of Business Law II	1 semester
Transportation Law	1 semester
Major Legal Systems in the World Today (couse given in third year)	1 semester
History of the Family	1 semester
History of Obligations	1 semester
History of Property	1 semester
Jurisprudence and Legal Logic	1 semester
Literary, Industrial and Artistic Property	1 semester
Historical Sociology of Law (course given in the DEA history of law)	1 semester
Law of Execution	1 semester

The student who holds one of the following diplomas is exempted from part two.

— The Diploma of the Center of Notarial Studies of Paris

— The Diploma of the Institute of Comparative Law

B — SEMINARS

The subject matters given in the seminars constitute those of the first examination which leads to the final examination. All other subject matters constitute those of the final examination.

The student attends four seminars:

Financial Aspects of Business Enterprises	1 semester
Secured Transactions	1 semester
Special Contracts	1 semester
Bankruptcy	1 semester

APPENDIX II (FRENCH)
MAITRISE EN DROIT PRIVÉ†

A — ENSEIGNEMENT MAGISTRAL

PREMIERE PARTIE: L'étudiant suit 6 semestres d'enseignement à déterminer selon l'une des formules ci-dessous.

Formule 1

pour l'étudiant qui n'a pas suivi en licence les cours de droit civil II (régimes matrimoniaux et de droit civil III (successions)

6 semestres portant obligatoirement sur:
Activité financière des entreprises
Droit civil II (rég. matrimoniaux)
Droit civil III (successions)
Droit civil du crédit.
Droit des contrats spèciaux.
Sanction des difficultés financières des entreprises

Formule 2

pour l'ètudiant qui a suivi en licence soit le cours de droit civil II (régimes matrimoniaux) soit le court de droit civil III (successions)

1 semestre portant obligatoirement sur le cours non suivi en licence
Droit civil II (rég. matrimoniaux)
ou
Droit civil III (successions)

4 semestres portant obligatoirement sur:
Activité financière des entreprises
Droit civil du crédit
Droit des contrats spéciaux
Sanction des difficultés financières des entreprises

1 semestre à choisir parmi les matières cidessous à condition que ces matières n'aient pas ètè suivies au cours de la scolarité antèrieure.

Droit des affaires II, (cours de licence)
Droit de la construction et de la propriété urbaine
Droit international privé II
Droit des institutions communautaires
Droit judiciaire privé, (cours de licence)
Histoire de la propriété

Formule 3

pour l'étudiant qui a suivi en licence les cours de droit civil II (régimes matrimoniaux) de droit civil III (successions)

4 semestres portant obligatoirement sur:
Activité financière des entreprises
Droit civil du crédit
Droit des contrats spéciaux
Sanction des difficultés financières des entreprises

2 semestres à choisir parmi les matières ci-dessous à condition que ces matières n'aient pas été suivies au cours de la scolarité antérieure.

† The *Seton Hall Law Review* would like to thank the registrar's office of the University of Paris II for providing the information contained in this appendix.

DEUXIÈME PARTIE: L'étudiant doit suivre 4 semestres d'enseignement qu'il choisit parmi les matières indiquées ci-dessous, à condition que ces matières n'aient pas été suivies au cours de la scolarité antérieure ou au titre de la première partie.

Droit des affaires II (cours de licence)	1 semestre
Droit des assurances	1 semestre
Droit de la construction et de la propriété urbaine	1 semestre
Droit et économie bancaires	1 semestre
Droit des institutions communautaires	1 semestre
Droit international privé II	1 semestre
Droit judiciaire privé (cours de licence)	1 semestre
Droit maritime	1 semestre
Droit pénal des affaires et des entreprises I	1 semestre
Droit pénal des affaires et des entreprises II	1 semestre
Droit des transports	1 semestre
Grands systèmes de droit contemporains (cours de licence)	1 semestre
Histoire de la famille (cours de licence)	1 semestre
Histoire des obligations (cours de licence)	1 semestre
Histoire de la propriété	1 semestre
Philosophie du droit et logique juridique	1 semestre
Propriété littéraire, artistique et industrielle	1 semestre
Sociologie historique du droit (cours du DEA d'histoire du droit)	1 semestre
Voies d'exécution	1 semestre

La dispense de la deuxième partie est accordée à l'étudiant titulaire de l'un des diplômes suivants:

— le Diplôme du Centre Supérieur de'Etudes Notariales de Paris

— le Diplôme de l'Institut de Droit Comparé.

B — TRAVAUX DIRIGÉS

Les matières de travaux dirigés constituent les matières d'admissibilité. Toutes les autres matières d'enseignement sont des matières d'admission.

L'étudiant suit obligatoirement les 4 semestres de travaux dirigés ci-dessous:

Activité financière des entreprises	1 semestre
Droit civil du crédit	1 semestre
Droit des contrats spéciaux	1 semestre
Sanction des difficultés des financiéres entreprises	1 semestre

APPENDIX III

The following course of study was offered at Yale Law School for the academic year 1981-1982.*

First-Term Required Courses

	Units
Constitutional Law I	4
Contracts I	4
Procedure I	3
Torts I	4

Advanced Courses

BUSINESS ORGANIZATIONS AND FINANCE

Fall	Units	Spring	Units
Taxation of Income	4	Business Organization and Activity	4
Concept of Corporate Responsibility	4	Taxation: Corporations and Shareholders	2
Corporate Mergers and Acquisitions	2	Taxation of Income	4
Corporate Law Workshop	3	Non-Profit Institutions	3
Corporate Reorganization	2	Regulating Corporate Behavior	2 or 3
Financial Accounting	3	Retirement Plans and Deferred Compensation	2
Intermediaries	2 or 3	Political Analysis for Management	
Taxation of Foreign Income and Foreign Taxpayers	2	Corporate Law Workshop	TBA

COMMERCIAL LAW

Fall	Units	Spring	Units
Admiralty	2	Commercial Law: Individual Research	TBA
Secured Transactions	3		

PUBLIC LAW

Fall	Units	Spring	Units
Administrative Process	3	Bureaucracy	3
Civil Rights Seminar	2 or 3	Common Law Courts in the Age of Statutes	3
Directed Research: Due Process — The Constitution of the Administrative State	2 to 5	Directed Research: Due Process — The Constitution of the Administrative State	2 to 5

* The *Seton Hall Law Review* would like to thank the Registrar's Office of the Yale Law School for providing the information contained in this appendix.

Higher Education and Law	2 or 3	Employment Discrimination	2
Indian Law	2	First Amendment Tradition	3
Labor Law Seminar II: Selected Problems	2	Law and the Electronic Media	2
Law and the Political Process	2	Political and Civil Rights: Personal Freedoms	3
Law and the Visual Arts	3	Slavery, the Constitution, and the Supreme Court	2
Political and Civil Rights: Antidiscrimination Law	4	Antidiscrimination Law: Research Seminar	2 or 3
Research Seminar: The Legal Profession	3		
Strategies of Public Management	3		

THEORIES OF LAW

Fall	Units	Spring	Units
Jurisprudence	2 or 3	Conflicts of Law	3
Anthropology of Law	3	Constitutional Theory Seminar	6
Constitutional Theory	3	Sociology of Law: Introduction	2 or 3
Ethical Theories of Aristotle and Kant	2	Constitutional Law II	3
Sentencing Theory and Sentencing Practice	3	Social Justice	3
Theories of the Common Law	2		

URBAN LAW

Fall	Units	Spring	Units
Land Planning	2 or 3	Property I	4
Occupational Disease	2	Environmental Law: Theory and Practice	3
Property II	3	Urban Economic Development Seminar	2
		Environmental Litigation: Independent Research	2

LAW AND MEDICINE

Fall	Units	Spring	Units
Chronically Ill Patient	3	Disclosure and Consent	2 or 3
Dependency and the Law	2	Mental Hospital Legal Services	3
Health Law and Policy: Selected Issues	2	Tragic Choices	2 or 3

COURTS AND ADMINISTRATION OF JUSTICE

Fall	Units	Spring	Units
Evidence	3	Complex Civil Litigation	3 or 4
Federal Jurisdiction	3	Evidence	3
Procedure II	3	Federal Jurisdiction	3
Our Federalism	2 or 3	Civil Legal Assistance	3
Preventive Detention or Money Bail?	3	Legal Ethics	2
Role of the Prosecutor in the Criminal Process	2 or 3	Legislation	2 or 3
Sentencing Sanctions	3	Representing Clients	3
Supreme Court	3	Sentencing Process	3
Supreme Court in Action	2		
Trial Practice	3		

CRIMINAL LAW: DEVIANT BEHAVIOR

Fall	Units	Spring	Units
Criminal Law and Administration I	3	Criminal Law and Administration I	3
Criminal Procedure I	3	Criminal Procedure II	2
Criminal Law and Procedure: Individual Research	TBA	Federal Criminal Law	2
Criminal Law: Selected Problems	3	Prison Legal Services	3

ESTATES AND FAMILY RELATIONS

Fall	Units	Spring	Units
Estate Planning	2	Estates I	3
Child Advocacy	3	Taxation of Gifts and Estates	2

INTERNATIONAL AND FOREIGN LAW

Fall	Units	Spring	Units
Public Order of the World Community: A Contemporary International Law	4	International Law I	4
Comparative Law	3	International Business Transactions	2
Criminal Responsibility in International Law	2	International Human Rights and World Public Order	2

LAW AND THE ECONOMY

Fall	Units	Spring	Units
Antitrust and the Process of Change	2 or 3	Antitrust I	3
Economic Aspects of Torts	2	Labor Law I	3

Environmental Law: Theory and Practice	3	Economic Analysis of Legal Problems	2
Financial Markets and Regulatory Tensions	2 or 3	Elements of Economic Organizations	2
Independent Research in Law and Economics	2 or more	Antitrust II	3

LEGAL HISTORY

Fall	Units	Spring	Units
Research Seminar on the Taft Court	3	English Legal History	2

OTHER COURSES

Fall	Units	Spring	Units
Empirical Research Workshop	TBA	Empirical Research Workshop	TBA
National Security Issues: Communication, Command Control, and Intelligence	3	Bankruptcy	4
		Mass Disasters and their Procedural Idiosyncracies	2
		Military Law	2
		National Security and the Rule of Law	2
		Social Research Methods for Lawyers	1
		Truth, Justice and the American Way	2

Course Study for the Degree of Juris Doctor (J.D.)

BASIC REQUIREMENTS

First Term

Each student must take courses in Constitutional Law, Contracts, Procedure, and Torts. In one of these subjects, the student will be assigned to a small group of not more than twenty. This small group is the vehicle for elementary training in legal research and writing, which is integrated with the regular course work. During the first term, visits to the New Haven courts are arranged through the Dean's office.

A series of lectures on the history and organization of the legal profession, and on problems of legal ethics arising under the American Bar Association Code of Professional Responsibility, is offered during the first term. Attendance at these lectures is required.

Course and Degree Requirements after First Term

After the first term, students are free to select their own curriculum, with these exceptions: (a) Criminal Law and Administration I must be taken before graduation, (b) enrollment in one of several forensic or legal services programs (see p. 22) is required, and (c) six units of supervised analytic writing (see p. 25) must be completed. A student must register for *no fewer than 12 and no more than 16 units of work for credit in any term* unless approved by the Registrar. To qualify for the J.D. degree, students shall have completed a total of 81 units of satisfactory work, shall have spent at least six full terms of residence or the equivalent thereof, and shall be recommended for the degree by the faculty. Under special circumstances, however, students may obtain permission to complete the requirements in eight terms.

GRADUATE DEGREES: LL.M. and J.S.D.

The Law School admits a limited number of graduate students each year to pursue further studies in law. Admission is generally open only to those committed to teaching as a career and is subject to approval by the Dean pursuant to policies promulgated by the faculty of the School and the Corporation of Yale University. Graduate students are admitted for one year's study leading to the degree of LL.M. (Master of Laws).

No uniform course of study is prescribed for LL.M. candidates. Subject to meeting degree requirements and to the approval of the Graduate Committee, each LL.M. candidate is invited to utilize the resources of the School in whatever program of study will best prepare for a career in teaching. An elective program of study will consist of offerings from the J.D. curriculum as well as independent research for credit under the supervision of a faculty member. LL.M. candidates must carry a total of not less than 12 units of credit per term. At least two terms must be spent in residence. To qualify for the LL.M. degree a candidate must successfully complete 24 units of credit with a grade average of at least Pass, of which up to six units may (with the consent of the instructor) be taken *credit/fail*. Work taken *credit/fail* must be designated as such on the records of the Registrar at the time of registration and may not be so designated subsequent to registration without approval of the Dean's office.

Each LL.M. candidate, in consultation with a faculty adviser, will develop a program of study by the start of the academic year. Changes in that program may be arranged during the first two weeks of each term.

The J.S.D. (Doctor of the Science of Law) program is normally

open only to LL.M. graduates of the Yale Law School. An applicant for J.S.D. candidacy should submit with the application a satisfactory proposal for a thesis and any writings that indicate competence in research. Admission to candidacy will require the contingent approval of a member of the faculty who is willing to supervise the candidate, and the endorsement of the Graduate Committee.

To qualify for the J.S.D. degree, a candidate once admitted must submit a thesis which is a substantial contribution to legal scholarship. At least two terms of work must be spent in residence at the School — this requirement may be satisfied by residence as an LL.M. candidate — and at least one additional year, not necessarily in residence, must be devoted to the preparation and revision of the thesis. In the case of those whose original legal training was not in the United States, the Graduate Committee may require the additional year to be in residence.