

## Quebec and Her Sisters in the Third Legal Family

Vernon Valentine Palmer

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### Résumé de l'article

Le paysage juridique global est peuplé d'au moins trois familles juridiques : de droit civil, de *common law* et de droit mixte. Cette troisième famille, ainsi que la place qu'y occupe le Québec, constitue le sujet de la Conférence Wainwright 2008. Le professeur Vernon Palmer avance que même si les juridictions de cette famille partagent parfois certaines caractéristiques, il n'existe pas de modèle unique de juridiction mixte. Un système juridique florissant comme celui du Québec s'appuie inévitablement sur son propre contexte social, culturel et institutionnel distinctif.

La Conférence se déploie à travers une exploration en cinq parties du concept de «juridictions mixtes» :

1. Un survol des travaux des juristes fondateurs, tels que F.P. Walton, Robert Warden Lee et T.B. Smith, afin de retracer les origines du concept jusqu'à ses fondements égyptiens pour ensuite le ramener vers sa réception doctrinale actuelle ;
2. Une appréciation du pluralisme juridique. Le professeur Palmer suggère que le pluralisme fournit un outil critique pour identifier et étudier les systèmes hybrides, mais que sa nature libérale et inclusive ne parvient pas à établir une taxonomie utile des systèmes juridiques ;
3. Une définition provisoire de juridiction mixte classique, basée sur ses caractéristiques ou composantes typiquement partagées, soulignant le rôle de la conscience subjective dans l'identification et la détermination des juridictions mixtes ;
4. Une explication du concept de famille juridique et de la classification des juridictions mixtes en tant que troisième famille juridique distincte ;
5. Une discussion des multiples façons par lesquelles deux traditions juridiques peuvent se métisser. Le professeur Palmer conclut la Conférence en argumentant qu'il n'existe pas de juridiction mixte paradigmatique. L'expérience unique du Québec lui permet d'illustrer cette proposition.

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# Quebec and Her Sisters in the Third Legal Family

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Vernon Valentine Palmer\*

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The global legal landscape is populated with at least three legal families: civil, common, and mixed. This third family, and Quebec's place within it, forms the subject of the 2008 Wainwright Lecture. Professor Vernon Palmer proposes that although jurisdictions in this family may share certain features, there is no single model of a mixed jurisdiction. A thriving legal system, like that in Quebec, inevitably draws support from its own distinctive social, cultural, and institutional context.

The lecture proceeds by means of a five-fold exploration of the concept of "mixed jurisdictions":

(1) An overview of the work of earlier legal scholars such as F.P. Walton, Robert Warden Lee, and T.B. Smith, tracing the origins of the concept back to its Egyptian roots, and then forward to its current academic reception;

(2) An examination of legal pluralism. Professor Palmer suggests that although pluralism provides a critical tool for recognizing and examining hybrid systems, its liberal and inclusive nature fails to produce a useful taxonomy of legal systems;

(3) A provisional definition of a classical mixed jurisdiction based on its typical shared features or components, highlighting the role that subjective awareness plays in identifying and shaping mixed jurisdictions;

(4) An explanation of the concept of a legal family and of the classification of mixed jurisdictions as a distinctive, third legal family;

(5) A discussion of the many ways in which two legal traditions may mix. Professor Palmer concludes the lecture by arguing that there is no single paradigm of a mixed jurisdiction. Quebec's own unique experience helps illustrate this proposition.

Le paysage juridique global est peuplé d'au moins trois familles juridiques : de droit civil, de *common law* et de droit mixte. Cette troisième famille, ainsi que la place qu'y occupe le Québec, constitue le sujet de la Conférence Wainwright 2008. Le professeur Vernon Palmer avance que même si les juridictions de cette famille partagent parfois certaines caractéristiques, il n'existe pas de modèle unique de juridiction mixte. Un système juridique florissant comme celui du Québec s'appuie inévitablement sur son propre contexte social, culturel et institutionnel distinctif.

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(1) Un survol des travaux des juristes fondateurs, tels que F.P. Walton, Robert Warden Lee et T.B. Smith, afin de retracer les origines du concept jusqu'à ses fondements égyptiens pour ensuite le ramener vers sa réception doctrinale actuelle ;

(2) Une appréciation du pluralisme juridique. Le professeur Palmer suggère que le pluralisme fournit un outil critique pour identifier et étudier les systèmes hybrides, mais que sa nature libérale et inclusive ne parvient pas à établir une taxonomie utile des systèmes juridiques ;

(3) Une définition provisoire de juridiction mixte classique, basée sur ses caractéristiques ou composantes typiquement partagées, soulignant le rôle de la conscience subjective dans l'identification et la détermination des juridictions mixtes ;

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[T]he law we live under is as compound as the atmosphere in which we breathe.

Edward Wynne<sup>1</sup>

## Introduction

*Dean Kasirer, members of the faculty, distinguished guests, mesdames et messieurs:*

In 2008, we have several milestones to celebrate. This is the four-hundredth year since the founding of the city of Quebec in 1608 and the arrival of the first traces of French law in Canada. This year also marks the two-hundredth anniversary of the first European-style code in the Americas, the *Louisiana Civil Code* of 1808, which was celebrated by an international colloquium at Tulane University in November 2008. There is another milestone that we might celebrate as well: 2008 is approximately the three-hundredth anniversary of the intertwined relationship between Quebec and Louisiana in *l'Amérique septentrionale*.

Our histories are quite connected and parallel. The original founders of Louisiana were two brothers born in Quebec; our language, culture, mores, and laws were French as well. Quebec's and Louisiana's first laws were the *Coutume de Paris* and the royal ordinances. Our first governmental institution was the *Conseil supérieur*. We each owe vast intellectual debts to the *Code Napoléon* and to the great institutional writers of France, such as Domat, Pothier, and Dumoulin. Yet these ties run deeper than reverence for a common civilian heritage. It is perhaps more impressive to find that our original legal systems sustained fundamental transformations, and yet our modern laws are still mutually intelligible and still bear basic resemblance. More than two centuries ago, when the British army prevailed on the Plains of Abraham, New France became British and Louisiana was passed to Spain and thereafter it was sold to the United States. In the inevitable legal adjustment to Anglo-American rule, we both acquired mixed laws for reasons that were neither accidental nor gratuitous on anyone's part. Throughout the subsequent years we have independently struggled to accommodate these mixed laws in our own ways, living the singularity of the mixed-jurisdiction experience at a distance. To be sure, we have periodically cast a glance at each other, north and south, to see how the other has been faring and coping over the years. Louisiana's legal evolution has not always been seen a positive example, but it has certainly been an example for Quebec. As Justice Mignault famously said in 1922: "*N'oublions pas le cas de la*

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<sup>1</sup> Edward Wynne, *Eunomus: Or, Dialogues Concerning the Law and Constitution of England. With an Essay on Dialogue* (London: n.p., 1768) vol. 1 at 186, cited in Seán Patrick Donlan, "Our Laws Are as Mixed as Our Language": Commentaries on the Laws of England and Ireland", online: (2008) 12:1 E.J.C.L. 6 <[www.ejcl.org/121/art121-6.pdf](http://www.ejcl.org/121/art121-6.pdf)>.

*Louisiane*.”<sup>2</sup> One might say our experience and our fortunes as mixed systems are different yet kindred, and our relationship as sister systems has been *comme un voyage ensemble dans tous ces aspects amicaux culturels et juridiques*.

I hope you will agree that my subject has an appropriate ring in these halls, and not simply because this faculty has an abiding interest in comparative law, or because Quebec is indeed one of the systems I shall be speaking about. Rather, I hope to show that my subject is intimately connected to the history of this law school. As an intellectual matter, mixed jurisdictions were conceived and baptized at McGill before they were presented to the world.

Tonight I am honoured to have this opportunity to speak discursively about mixed jurisdictions, and I hope to offer a series of reflections with some special reference to Quebec. I plan to cover five aspects of the subject. Firstly, I wish to explore the historical origins, sources of inspiration, and precise meaning of the peculiar expression “mixed jurisdictions”. This history reveals the prominent role played by two cosmopolitan deans of your faculty about a century ago who had broad interest and experience in the mixed laws of Scotland, Quebec, Ceylon, and Egypt. In particular, the writings of Robert Warden Lee indicate that the expression is derived from the international mixed courts of Egypt, which were once called mixed jurisdictions. Secondly, I would like to discuss and compare a rival theory of mixed legal systems that is far broader than the classical theory developed by these early comparatists. This contrasting theory uses a factual test to identify mixed systems, and has been influenced by legal pluralism. I will explain why the rival theory should not be discounted, but rather should be regarded as a highly relevant and useful addition to mixed jurisdiction studies. Thirdly, I will attempt to describe some of the salient characteristics of the mixed jurisdictions, particularly the effects that flow from fundamental bijurality. Fourthly, I will consider whether the mixed jurisdictions may be described as a third legal family and what commonalities and traits may lead to that conclusion. Fifthly and finally, I will consider the “ways and styles” of being mixed, arguing that there is no single paradigm even within the restricted group. I argue that Quebec’s concern for the purity of its sources of law, its reverence for French law, and its strong institutional arrangements are not, in the final analysis, the preconditions of surviving as a mixed jurisdiction. They are factors that have created an exceptional personality and style, setting her apart from her sisters within the third legal family.

## I. A Brief History of an Idea: The Age of Discovery

I would like to begin with the puzzling words “mixed jurisdictions”. It would be interesting to know where this expression originated and what it actually means. The words certainly sound arbitrary and vague, perhaps even pejorative in tone. Would

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<sup>2</sup> P.-B. Mignault, “L’avenir de notre droit civil” (1922) 1 R. du D. 104 at 116.

most people not, if they were asked, prefer to say they live in a “pure jurisdiction”? The label means absolutely nothing to the average man or woman in the street or, for that matter, the vast majority of lawyers. Of course, lawyers know there is nothing new in arbitrary words. Is the “common law” not one of the strangest and most confusing terms of all? I am told that even the Common law’s gender is ambiguous and vigorously disputed! Yet I suggest that there is a precise historical reality behind the origin and meaning of the expression “mixed jurisdictions”. Only by reviving the historical context can we explain how words that usually referred to the power of a court (its jurisdiction or right to speak) became a tool of classification and the designation of a group of legal systems dispersed around the world. This requires us to go back about one hundred years.

The discovery and promotion of the classical mixed systems must be credited to the work of four or five scholars.<sup>3</sup> These were F.P. Walton,<sup>4</sup> R.W. Lee,<sup>5</sup> M.S. Amos,<sup>6</sup> F.H. Lawson,<sup>7</sup> and somewhat later T. B. Smith, all of whom were remarkable comparative law scholars. As early as 1900, Walton was at work bringing to the world’s attention the existence of a group of systems whose private law was a Western hybrid of common law and civil law elements. He was soon to be followed by Lee and the others. Their contribution, which was novel at the time, was to survey, analyze, and, to some extent, extol those legal systems that straddled or combined the two laws. From the beginning, Quebec was viewed as a prime example of this phenomenon.

Frederick Parker Walton was born in England in 1858, studied classics at Oxford and then Scots law at Edinburgh, where he received an LL.B. before being called to the bar in 1886. He thereafter lectured in Glasgow on Roman law, wrote several treatises on Scots matrimonial law, and in 1897 accepted a call from McGill to become the dean and professor of Roman law. He was the dean for seventeen years, publishing a considerable number of books and articles in which he showed a deep interest in the Quebec legal system.<sup>8</sup> From McGill he moved to Cairo to become the

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<sup>3</sup> The history of this subject was first traced in Kenneth G.C. Reid’s Eason-Weinmann Lecture: “The Idea of Mixed Legal Systems” (2003) 78 Tul. L. Rev. 5. My remarks are greatly indebted to his lecture.

<sup>4</sup> H.C.G. Matthew & Brian Harrison, eds., *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004), vol. 57, s.v. “Walton, Frederick Parker (1858–1948)”.

<sup>5</sup> *Ibid.* vol. 33, s.v. “Lee, Robert Warden (1868–1958)”.

<sup>6</sup> *Ibid.* vol. 2, s.v. “Amos, Sir (Percy) Maurice McLardie Sheldon (1872–1940)”.

<sup>7</sup> *Ibid.* vol. 32, s.v. “Lawson, Frederick Henry [Harry] (1897–1983)”.

<sup>8</sup> Walton’s most important works were: *Historical Introduction to the Roman Law*, 3d ed. (Edinburgh: W. Green & Son, 1916); *The Scope and Interpretation of the Civil Code of Lower Canada* (Toronto: Butterworths, 1980); *Introduction to French Law* (with Amos, *infra* note 29); *The Egyptian Law of Obligations: A Comparative Study with Special Reference to the French and English Law*, 2d ed. (London: Stevens and Sons, 1923) [Walton, *The Egyptian Law of Obligations*]; “The Civil Law and the Common Law in Canada” (1899) 11 Jurid. Rev. 282; “The Legal System of Quebec” (1913) 13 Colum. L. Rev. 213; “The Law of Torts in the Province of Quebec” (1938) 20 J.

director of the Khedivian School of Law (1915–1923), publishing in 1920 a treatise on the Egyptian law of obligations.<sup>9</sup> He returned in retirement to England, living in Oxford and continuing to publish. In 1932 he moved to Edinburgh, where he died in 1948.<sup>10</sup>

In his earliest article on the subject, Walton compared Quebec to Louisiana and Scotland and concluded that these jurisdictions “occup[y] a position midway between the Common law and the Civil law.”<sup>11</sup> He estimated that Scotland could no longer be classified as a civil law country, though it may have been in earlier centuries. It had accepted English mercantile law, the doctrine of *stare decisis*, and a mass of legislation applicable to both England and Scotland. He pictured Quebec in much the same position as Scotland: Quebec displayed a strong tendency to accept the doctrine of *stare decisis*, its mercantile law was almost wholly English,<sup>12</sup> half of its rules of procedure were English, and the provincial courts administering French law possessed the inherent (non-delegated) powers of an English court. These juxtaposed English elements made Quebec “a peculiar and separate legal system.”<sup>13</sup>

Robert Warden Lee held to similar ideas and disseminated them in leading journals. He was born in Wales in 1868, studied classics at Oxford (1889–91), and thereafter served three years in Ceylon as a local magistrate. The Ceylonese experience awakened a lifelong interest in Roman-Dutch law, of which he became the acknowledged master. Returning to London for health reasons, he assumed the chair of Roman-Dutch law at London University. In 1914 he received a call from McGill, stepping directly into Walton’s shoes as dean and professor of Roman law. Much as his predecessor had done, he wrote articles about the nature of Quebec civil law and its place among world legal systems. He stayed seven years at McGill before taking up the chair of Roman-Dutch law at Oxford, which he did not relinquish until shortly before his death in 1958.<sup>14</sup>

In his first year at McGill, Lee published an article in the *Michigan Law Review* entitled “The Civil Law and the Common Law—A World Survey”.<sup>15</sup> On the first page

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Comp. Leg. & Int. Law (3d) 296; Quebec (Province), *The Workmen’s Compensation Act, 1909, of the Province of Quebec*, with a commentary by Frederick Parker Walton (Montreal: J. Lowell, 1910); *The New Laws of Employers’ Liability in England and France and Their Bearing on the Law of the Province of Quebec* (Lecture delivered to the Junior Bar Association of Montreal, 1900) (Montreal: C. Thoret, 1900).

<sup>9</sup> Walton, *The Egyptian Law of Obligations*, *ibid.*

<sup>10</sup> See *supra* note 4.

<sup>11</sup> Walton, “The Civil Law and the Common Law in Canada”, *supra* note 8 at 291.

<sup>12</sup> Walton stated that “In commercial matters ... it is safe to affirm that a gradual assimilation of the law of Quebec to that of the rest of Canada has long been going on and is now fairly complete” (“The Legal System of Quebec”, *supra* note 8 at 225). However, he prefaced his opinion with heavy qualification.

<sup>13</sup> Walton, “The Legal System of Quebec”, *supra* note 8 at 215.

<sup>14</sup> For further details, see Matthew & Harrison, *supra* note 5.

<sup>15</sup> (1915) 14 Mich. L. Rev. 89.

of his work he displayed a rather primitive map of the world which was brought to my attention by Kenneth Reid in his Eason-Weinmann Lecture at Tulane.<sup>16</sup> Dean Lee explained its purpose:

We have seen maps of the world constructed from every point of view. There are geological maps, ethnographical maps, missionary maps. But I have not, to my recollection, seen a legal map. I should like to have a *Mappa Mundi* which would show what legal systems prevail and where. It would be a valuable aid to the study of Comparative Law.<sup>17</sup>

Below is his map, partly written in his own hand, with his initials showing in the right hand corner.

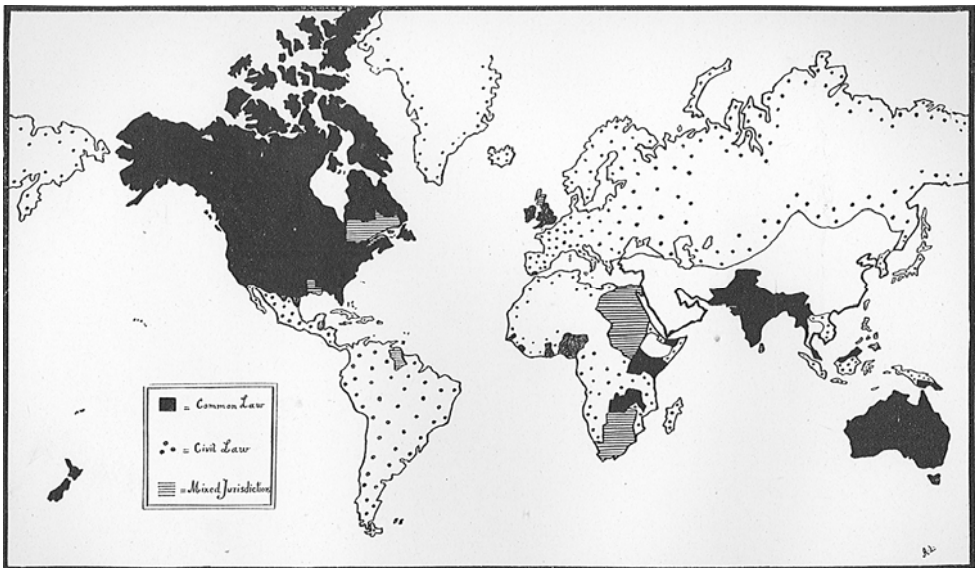


Figure 1: The Civil Law and the Common Law—A World Survey

Of course, the focus of the map is entirely Eurocentric and heady of empire. The solid black areas denote the domains of the common law while the dotted white areas denote the kingdoms of the civil law. There are only two other things left for the eye to take in: (1) the horizontally striped “mixed jurisdictions”, and (2) the vast, blank expanses—white spaces with no designation whatsoever—which include places such as Saudi Arabia, China, Iraq, and Iran.

<sup>16</sup> Reid, “The Idea of Mixed Legal Systems”, *supra* note 3.

<sup>17</sup> *Supra* note 15 at 90-91.



This map was intended to present something dramatically new to the reader and that novelty was surely not that most of Canada and the United States employs the common law. Its real purpose, as the whole article demonstrates, was to give a survey of the points of interaction between the civil and the common law worlds. It was the first graphic representation of the dispersed fields of this interaction. It included jurisdictions from North America (Quebec and Louisiana); South America (British Guiana); Europe (Scotland); Africa (South Africa, Egypt, and Sudan); and Asia (Ceylon). Lee said that his purpose was to assess on a worldwide basis how the civil law had been affected by the “ceaseless intrusions” of the common law.<sup>18</sup> “For more than a century past,” he wrote, “the Civil Law has been on the defensive. It is the Common Law that has been the active aggressor. I shall speak principally of the struggle between the two systems in some of the British Colonies. But the same tendencies, I believe, may be detected in other Civil Law jurisdictions, such as the State of Louisiana and the Philippines.”<sup>19</sup> Thus he regarded the mixed jurisdictions as the battlegrounds of far-reaching struggle. The experience and the evolution of those jurisdictions would serve as the barometer of war. Every example he used, whether it showed assimilation, capitulation, or resistance, came from the mixed jurisdictions. Quebec was referred to no fewer than nine times, South Africa no fewer than seven times, and Guiana and Ceylon were repeatedly cited as well.<sup>20</sup>

It is well to remember that this outlook represents a *British* comparatist’s viewpoint on the world. We have no alternative or competing map by a civilian comparatist from this time period to tell us what he or she might have considered a mixed jurisdiction or what barometer of the struggle should have been employed.

Let me now come to a curious fact. The words “mixed jurisdiction” appear only in the legend of his map, never in the text of the article. So there is this mystery: where did Lee obtain this unusual expression? The answer is unclear, but my research at least permits this conjecture. As mentioned, he was a classics scholar and a Roman law professor. Since ancient times, there was a very old type of tribunal that decided disputes between citizens and aliens. Both ancient Greece and classical Rome had special tribunals sometimes referred to as “mixed jurisdictions” to regulate controversies between parties with different personal laws.<sup>21</sup> Lee would not only have known his ancient law, but he would also have been aware that Egypt had a world-famous international court performing the same function in his own day. And this court frequently described itself as a “mixed jurisdiction”.<sup>22</sup>

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* [references omitted].

<sup>20</sup> Lee employed a wealth of examples from each jurisdiction because he systematically reviewed five areas of private law: Persons, Property, Obligations (Contract and Delict), Successions, and Procedure. I note here that Egypt is only mentioned in passing, and no example is taken from its law.

<sup>21</sup> See e.g. Pan. J. Zepos, “Mixed Jurisdiction in Greece” (1974) 22 *Am. J. Comp. L.* 221.

<sup>22</sup> See e.g. *Bencini and Quistas v. The Egyptian Government and the Government of Soudan*, (1910) 4 *Am. J. Int’l L.* 745 at 746.

Thus Lee's inspiration may lie in the centre of the map, in Egypt and Sudan, which he depicted as mixed jurisdictions. It is not clear, however, on what basis Lee made that judgment. Egypt had been under British occupation since 1882, and upon the outbreak of World War I, it formally became a protectorate of the British Empire.<sup>23</sup> Arguably, some anglicization of the Egyptian legal system was taking place, but it would have been occurring rather subtly and in small doses, as in the British-led reform of the penal system, or in the influence of British judges serving on the Egyptian bench.<sup>24</sup> Egypt does not at first glance, however, appear to have been a battleground in the struggle between the two traditions. Of course, the presence of British governance alone may have contributed to the impression of an existing process of anglicization, or one that would exist if that governance extended for generations into the future. It was then a form of indirect rule, with the controlling institutions in British hands and moulded on English lines. Aside from that dimension, however, there was no clear strategy, nor any particular attempt to replace French law with English law, nor any sign of a desire to replace the Islamic law administered in the religious courts.<sup>25</sup>

Shortly before the advent of British rule, Egypt had adopted a panoply of six codes based on French models, including a civil code and a commercial code. By this bold stroke, Egypt entered into the extended family of French legal systems.<sup>26</sup> The French-based national codes applied in the national courts in suits between Egyptian citizens, though not in the personal law areas governed by sharia (family law and successions).<sup>27</sup> These codes were also applied to Egyptians and non-citizens in the international mixed tribunals in Cairo and Alexandria. The international courts resolved disputes of a civil or commercial nature arising between Egyptian nationals and foreign nationals, and those between foreign nationals. Henry Goudy explicitly compared their function to the court of the Peregrine Praetor in ancient Rome.<sup>28</sup> The court's composition was a combination of Egyptian and foreign judges, including American and British appointees.<sup>29</sup> I have already noted that the Mixed Court was frequently called the "mixed jurisdiction" (a conflation of the court's competence and the institution itself). It appears likely to me, though I have no direct evidence, that

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<sup>23</sup> Lord Milner described Egypt in earlier years of occupation as a "veiled protectorate" (Alfred Milner, *England in Egypt*, 6th ed. (London: Edward Arnold, 1899) at 24ff.).

<sup>24</sup> Jan Goldberg argues that penal reform was an area where the British did succeed in conforming the Egyptian system to their own ("Réception du droit français sous les britanniques en Égypte : un paradoxe?", trans. by Natalie Bernard-Maugiron (1998) 34 *Égypte/Monde arabe* 67 at para. 7).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> See Sir Maurice Amos, "The Code Napoléon and the Modern World" (1928) 10 *J. Comp. Leg. & Int. Law* (3d) 222 at 235.

<sup>28</sup> H. Goudy, "Administration of Justice in Egypt" (1907) 23 *Law Q. Rev.* 409 at 417-418.

<sup>29</sup> Goudy mentions that two English judges were members of the Court of Appeal in 1907 and that the *Procureur général* was English as well (*ibid.*).

Lee seized upon this name as a means of describing any system where common law and civil law coexisted.

This theory is in part persuasive to me because Egypt was a rendezvous point for the personalities involved in this story. Walton and a third English scholar now entering the scene, Sir Maurice Sheldon Amos, were deeply involved in Egypt's French/Islamic/British legal system. And Lee was keeping track of events there from afar.<sup>30</sup> Called to the English bar in 1897 (Inner Temple), Amos went to Cairo to serve as a local magistrate in the ordinary courts in 1903.<sup>31</sup> Fluent in Arabic and French, he was soon elevated to the Egyptian Court of Appeal (1906–1912). Amos then became director of the Khedival School of Law from 1913 to 1915 (Walton was his successor), and later became the judicial adviser (essentially minister of justice) to the Egyptian government from 1917 to 1925. Thus for over a quarter century Amos worked within the main institutions of justice in that country. He returned to England to practise law, and in 1932 he was appointed professor of comparative law and historical jurisprudence at University College London. His close association with Walton in Cairo bore fruit in a notable book in 1935: *Introduction to French Law*.<sup>32</sup> In 1936, Amos published an article in the *Harvard Law Review* that surveyed all British possessions in which the common law and the civil law were combined. It was actually a panoramic account of the mixed jurisdictions, though that term was not used in the text.<sup>33</sup>

It is relatively clear that these cosmopolitan scholars, with their feet diversely planted in Montreal, Cairo, Edinburgh, and Colombo, led the pre-campaign for wider recognition of these interesting systems. They were the intellectual predecessors of Sir Thomas Smith, the Scottish-born, Oxford-trained figure who popularized the study of mixed jurisdictions. I should quickly add one other figure to this list: F.H. Lawson, Smith's mentor at Oxford. Lawson had a deep knowledge of Scots law and saw value in the study of mixed systems.<sup>34</sup> In his inaugural address as holder of the chair of comparative law at Oxford, Lawson called attention to "a most interesting group of laws, which, because they display the influence of English law on a body of doctrine already profoundly romanized, stand between the common and the civil law systems."<sup>35</sup> He concluded his remarks about the mixed jurisdictions by saying, "I

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<sup>30</sup> In 1918, for example, Lee began his article in the *Yale Law Journal* with a quote from the judicial adviser to the sultan of Egypt: R.W. Lee, "Torts and Delicts" (1917–1918) 27 *Yale L.J.* 721.

<sup>31</sup> See *supra* note 6.

<sup>32</sup> Sir Maurice Sheldon Amos and Frederick Parker Walton, *Introduction to French Law* (Oxford: Oxford University Press, 1935).

<sup>33</sup> Maurice Sheldon Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations" (1936–37) 50 *Harv. L. Rev.* 1249.

<sup>34</sup> Lawson had certain ties to Scotland. His wife was Scottish, and he had once sought a chair at Edinburgh. Smith rated him as first among a mere handful of English jurists who had attained a deep knowledge of Scots law. See Matthew & Harrison, *supra* note 4, vol. 32, s.v. "Lawson, Frederick Henry [Harry] (1897–1983)".

<sup>35</sup> F.H. Lawson, "The Field of Comparative Law" (1949) 61 *Jurid. Rev.* 16 at 26.

have spoken at length about these hybrid laws because I regard them as peculiarly favourable fields for comparative work in an English university.”<sup>36</sup>

In 1963, Smith picked up the rather empty term “mixed jurisdictions” and employed it in a historically restricted sense to signify legal systems in which common law and civil law elements in the private law interacted and vied for supremacy. He introduced the term into the title of an essay, the first author ever to do so, and he ventured a fairly weak definition. He deemed a mixed jurisdiction to be “a basically civilian system [that] has been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.”<sup>37</sup> Obviously he regarded his native Scotland as a paradigm of a mixed jurisdiction, but he never mentioned Egypt as being in the group.<sup>38</sup> At first he carefully placed the term in quotation marks, and for literary variation he occasionally substituted the words “mixed system”, but this did not change the countries to which he was referring. This step occurred during an extensive international campaign in which Smith wrote a great deal on the subject and made extended visits to Louisiana, South Africa, and Quebec. He invited colleagues from those places back to Edinburgh on teaching visits.

Within a few years, scholars from Quebec, Louisiana, and Scotland, such as Jean-Louis Baudouin, Joseph Dainow, Judge Albert Tate, and David Walker, had embraced this terminology and apparently subscribed to Smith’s basic definition. In the Bailey Lecture at Louisiana State University in 1972, Professor Baudouin entitled his remarks “The Future of Civil Law in a Mixed Jurisdiction”; and Professor Dainow, a transplanted Canadian on the LSU Faculty of Law, edited a 1974 collection entitled “The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions”, which licensed the contributors to that volume to use the term repeatedly.<sup>39</sup>

The term firmly became part of comparative law grammar only after Smith published in the *International Encyclopedia of Comparative Law* an entry straightforwardly entitled “Mixed Jurisdictions”. The entry opens with these words:

The “mixed” or “hybrid” jurisdictions with which this subchapter is concerned are those in which civil law and common law doctrines have been received and indeed contend for supremacy. Other hybrid systems where, for

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<sup>36</sup> *Ibid.* at 29.

<sup>37</sup> T.B. Smith, “The Preservation of the Civilian Tradition in ‘Mixed Jurisdictions’” in Athanassios N. Yiannopoulos, ed., *Civil Law in the Modern World* (Kingsport, Tenn.: Louisiana State University Press, 1965) 3 at 5. This section of my paper relies heavily on an earlier paper that was presented in Edinburgh at the Second Worldwide Congress on Mixed Jurisdictions in June 2007: Vernon Valentine Palmer, “Two Rival Theories of Mixed Legal Systems”, online: (2008) 12:1 E.J.C.L. <<http://www.ejcl.org/121/art121-16.pdf>>.

<sup>38</sup> As to why Smith did not include Egypt, see *infra* notes 47 and 48 and accompanying text.

<sup>39</sup> Joseph Dainow, ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Baton Rouge: Louisiana State University Press, 1974).

example, customary law or religious law coexists with Western type law are not considered.<sup>40</sup>

The meaning Smith assigned to the term was historically determined. It was transparent to only a coterie of comparative lawyers (perhaps only to those in the Anglo-American wing of comparative law) and its future could easily be contested, as it is today. It was vulnerable to a more inclusive theory of mixed legal systems offered by different comparatists, such as the French, and more particularly by the theory fostered by legal pluralism. It is to this theory I will now turn.

## II. The Classical Mixed Systems

### A. The Relevance of Pluralism

Increasingly, comparative law has been influenced by the insights of legal pluralism. Pluralists tend to study post-colonial societies in Africa and Asia in which various personal laws coexist and interact with Western law as continuing effects of legal history.<sup>41</sup> I have commented elsewhere that “A more liberal conception of the mixed legal system necessarily follows from [the pluralist’s] broader pursuit of legal phenomena, as when they study not only customary law, tribal law, and religious law recognized by the state, but also the unrecognized and unofficial laws which escape state control and constitute the living law.”<sup>42</sup> One contribution of this research is the empirical emphasis it brings to the subject of mixed systems.

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<sup>40</sup> T.B. Smith, “Mixed Jurisdictions” in K. Zweigert and K. Drobnič, eds., *International Encyclopedia of Comparative Law* (The Hague: Martinus Nijhoff, 1976) vol. 6 at para. 2-228.

<sup>41</sup> For purposes of this discussion, “personal law” may be regarded as a subset of private law, a restricted list of topics (perhaps the most culturally determined legal areas) within the larger area of private law. In this sense personal law may signify an ethnic enclave or niche in the midst of official law. For example, the topics of Jewish personal law recognized in India only relate to successions and marriage/divorce, whereas Hindu personal law in India has a somewhat broader coverage (successions, marriage/divorce, guardianship, adoption, joint family and partition, and religious institutions) thought it by no means fills the entire field of private law. The topics of Muslim personal law in India have similar scope. See Christa Rautenbach, “Phenomenon of Personal Laws in India: Some Lessons for South Africa” (2006) 39 *Comp. & Int’l L.J.S. Afr.* 241 at 244.

<sup>42</sup> Vernon Valentine Palmer, “Two Rival Theories of Mixed Legal Systems”, *supra* note 37. For an account of the methods and goals of legal pluralism, see John Griffiths, “What is Legal Pluralism?” (1986) 24 *J. Legal Pluralism* 1; Masaji Chiba, *Legal Cultures in Human Society* (Tokyo: Shinzansha International, 2002) at 182; Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2d ed. (Cambridge: Cambridge University Press, 2006) at 115-116; M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford: Clarendon Press, 1975); T.W. Bennett, “Comparative Law and African Customary Law” in Mathias Reimann and Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 641 at 666-671; G.J. van Niekerk, “Legal Pluralism” in J.C. Bekker, C. Rautenbach and N.M.I. Goolam, eds., *Introduction to Legal Pluralism in South Africa*, 2d ed. (Durban: LexisNexis Butterworths, 2006) at 5-14.

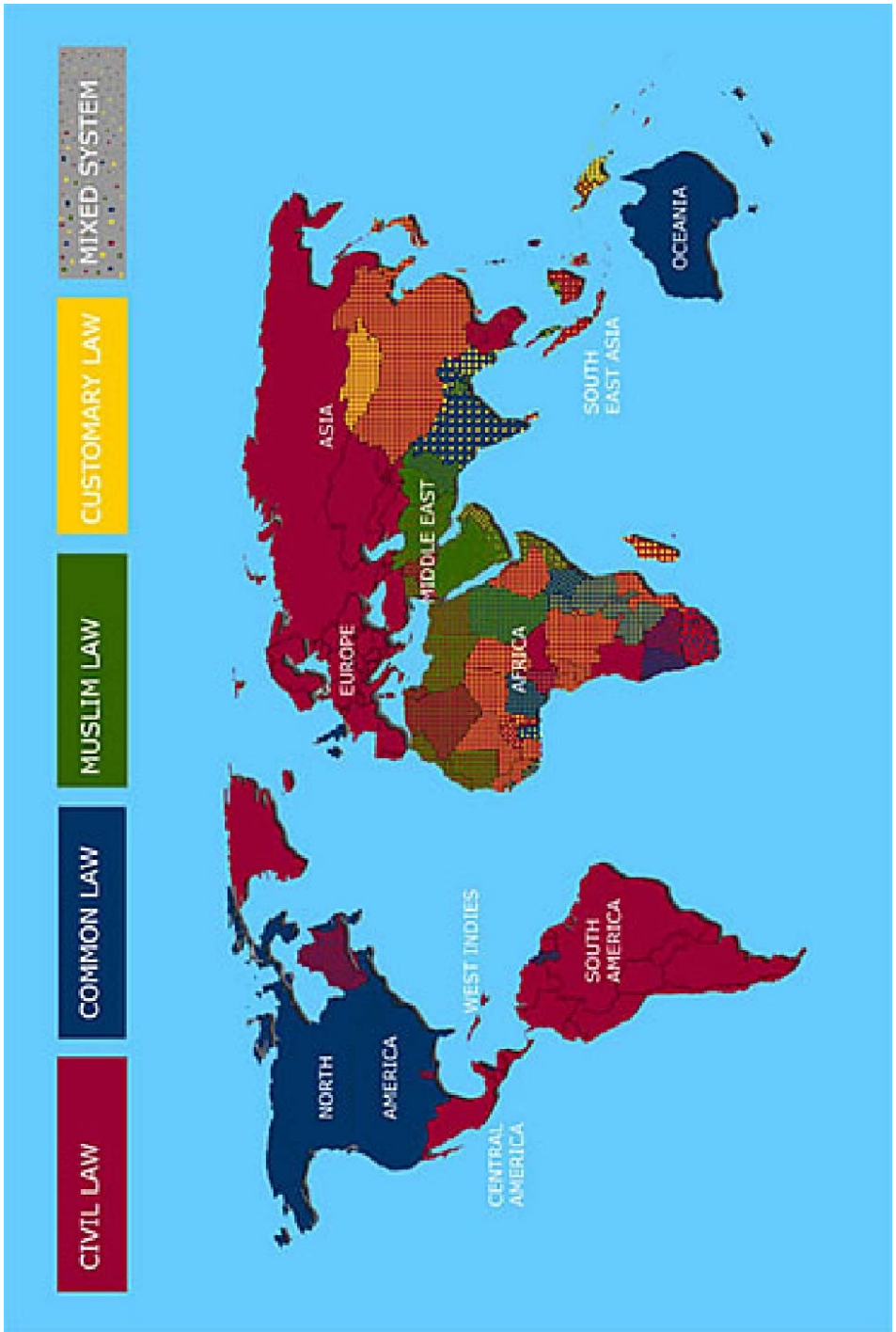
By any factual test, nearly all the peoples of the world could be regarded as having mixed legal systems. It is nearly impossible to find a system, in today's world at least, that could claim to be purely indigenous and endowed entirely of original laws. To legal anthropologists and legal pluralists, the principal criterion of a mixed system is simply the presence or interaction of two or more kinds of laws or legal traditions within the same social field. The mixed nature of a legal order can be discovered and confirmed in an objective manner by research and observation. Any interaction between laws of a different type or source—indigenous with received, religious with customary, Western with non-Western—is sufficient to constitute a mixed legal system. The extremely inclusive nature of this definition has not posed a deterrent to its growing use. The characterization “mixed” does not restrict itself to any specific kind of mixture (it may be customary/religious/Eastern/Western). It does not depend upon an analysis of legal styles within a mix, nor does it require subjective judgments regarding the predominance of one tradition over another within the mixture, for example.<sup>43</sup> Neither does this characterization depend upon the perception of legal actors, nor upon endogenous descriptions of the nature of the legal system. A mixture is just a verifiable fact, independent of all other considerations.

Pluralist methodologies tend to undercut facile assumptions about “pure” common law or civil law systems and they certainly mount a challenge to the conventional taxonomy of comparative law. The map prepared by the University of Ottawa, shown below, has been clearly influenced by pluralism.<sup>44</sup>

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<sup>43</sup> Under the influence of pluralism, it is not at all uncommon to find it said that Iran, Syria, and Indonesia are mixed systems. Örucü, Attwooll and Coyle present an eclectic list of systems they regard as mixed, including Australia, Algeria, and the European Union (Esin Örucü, Elspeth Attwooll & Sean Coyle, eds., *Studies in Legal Systems: Mixed and Mixing* (The Hague: Kluwer Law International, 1996)).

<sup>44</sup> The map is found at University of Ottawa, Faculty of law (Civil law section), *JuriGlobe—Groupe de recherche sur les systèmes juridiques dans le monde*, online: <<http://www.juriglobe.ca/>>.



It will be noticed that the map's pluralist perspective allows more hybrids than usual, and yet it still omits many. The map makes a partial bow to the hybrids but an even deeper bow to the common law/civil law axis, which is its central organizing principle. To be sure, the map-maker had a dilemma. Pluralism has yet to present a taxonomy that differentiates and arranges the hybrids into useful groupings. Pluralism emphasizes the need to reshuffle the cards of classification, but has not said how, or if, they can be reorganized in a coherent way.

Now debates about classification are said to be a good cure for insomnia, but ultimately this issue of taxonomy is an important scientific question. The mixed jurisdictions must be particularly alive to this issue since they have always languished in what Jacques du Plessis describes as "classificatory limbo".<sup>45</sup> We might well recall the words of our late colleague Peter Birks, who said, "Darwin would have achieved nothing if he had neglected taxonomy. In the same way poor classification disfigures the law and delays the progress of legal science."<sup>46</sup> In my view, the rational classification of hybrids is the next daunting task of comparative law. If it is not too much to claim, the cross-comparative study of mixed jurisdictions such as Quebec and her siblings has been a step that illustrates the way forward. Just as the mixed jurisdictions were not discovered in an armchair, so too the rational grouping of hybrids will depend upon detailed studies of commonalities and differences, traits and tendencies. With that end in mind, let me mention three reasons why the value of a pluralist/factual approach can scarcely be doubted.

Firstly, a pluralist approach provides an objective means of identifying comparable objects of study. As we saw earlier in the case of Egypt, a fact-sensitive approach is vital in uncovering otherwise-overlooked examples of common law/civil law mixing. In the first quarter of the twentieth century, Walton and Lee perceived that British-administered Egypt was a country in which English, French, and Islamic law were interacting on the ground.<sup>47</sup> However, by the 1960s, an entirely different

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<sup>45</sup> Jacques du Plessis, "Mixed Legal Systems, Especially the South African Legal System, and the Study of Comparative Law", Editorial, online: (2005) 9:3 E.J.C.L. <[www.ejcl.org/93/editor93.html](http://www.ejcl.org/93/editor93.html)>.

<sup>46</sup> Peter B.H. Birks, "More Logic and Less Experience: The Difference between Scots Law and English Law" in David L. Carey Miller & Reinhard Zimmermann, eds., *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin: Duncker & Humblot, 1997) 167 at 171.

<sup>47</sup> Thus Amos' description:

Egypt offers an example of the reception of French law by a people totally alien to Europe in language, religion, and social and political traditions. When, fifty years ago, Nubar Pasha secured the consent of the Powers to the institution of the International Courts, it was agreed without debate that the only possible law with which to equip them was that of the French Codes. Eight years later, the year after the British Occupation, the French Codes were extended to the newly reorganized native jurisdictions, and this became the law governing all civil causes in Egypt excepting those relating to the family and personal status. The inevitable consequences followed; and after forty years of the British Occupation, British officials were administering



picture presented itself to the later comparatists. As of 1937, all British troops were gone and the mixed tribunals were closed. Certainly by the time of the proclamation of the republic in 1953, British influence over Egyptian affairs had decreased drastically. The earlier classification of Egypt as a mixed jurisdiction (in the restricted, classical sense) was revised, and it was not insisted upon again by Smith or other British comparatists of his generation. This revised assessment demonstrates the value of an inductive approach to mixed jurisdiction studies. Even today, we must not simply assume that we have uncovered all of the jurisdictions of this genre. The list may change as we continue to assess evolving circumstances.<sup>48</sup>

Secondly, a pluralist approach to the study of hybrid systems provides an important safeguard against an ethnocentric account of comparative law. It tends to respect all the legal elements in a social field, including non-Western subsystems that some investigations might omit or downplay. Even a researcher primarily interested in the interaction of the common law and the civil law will gain new insight from studying the interaction of Western law with customary laws, personal statutes, and Aboriginal laws. In some mixed jurisdictions these subsystems are, demographically speaking, more important than the Western elements, whereas in others they may represent a small percentage of the population. Quebec, for example, has eleven distinct nations of Aboriginal peoples within its borders. Their laws might be called Canada and Quebec's "third legal tradition".<sup>49</sup> The vast territory of Nunavik, which is one of four regions in *Inuit Nunaat* ("Inuit homeland") and which is home to about ten thousand Inuit, comprises about one-third of Quebec's territory.<sup>50</sup> Yet research and reference to these laws, though they undoubtedly constitute part of Quebec's legal system, has only recently appeared in the legal literature.<sup>51</sup>

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French law in Arabic, teaching French law in English, and arguing French law in French (Sir Maurice Amos, "The Code Napoléon and the Modern World", *supra* note 27 at 235).

<sup>48</sup> Thailand is an interesting and lesser known example. See Noppramart Prasitmonthon, "A Comparative Legal Study Between the Common Law and the Civil Legal Tradition of Thailand" online: <[www.geocities.com/elaw\\_edu/papers/comparative\\_law.pdf](http://www.geocities.com/elaw_edu/papers/comparative_law.pdf)>. Cyprus is another overlooked example. See Symeon C. Symeonides, "The Mixed Legal System of the Republic of Cyprus" (2003) 78 Tul. L. Rev. 441. Kenneth Reid has pointed out that the Channel Islands, Malta, and Cyprus are mixed jurisdictions (*supra* note 3 at 7, n.1).

<sup>49</sup> Aline Grenon, "Setting the Stage: Comparative Law in Canada at the Dawn of the 21st Century" in Aline Grenon & Louise Bélanger-Hardy, eds., *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) 1 at 13, n. 29.

<sup>50</sup> Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census* (Ottawa: Minister of Industry, 2008) at 21-22.

<sup>51</sup> See e.g. Andrée Lajoie *et al.*, *Le statut juridique des peuples autochtones au Québec et le pluralisme* (Cowansville, Qc.: Yvon Blais, 1996); Ghislain Otis, "Les sources des droits ancestraux des peuples autochtones" (1999) 40 C. de D. 591; John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629; H. Patrick Glenn, *Legal Traditions of the World*, 3d ed. (Oxford: Oxford University Press, 2000); Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: University of British Columbia Press, 2007); Bjarne Melkevik & Ghislain

Thirdly, pluralist methodology guides us to the common denominator of most hybrid systems: the internal struggle to maintain personal law. The urgent efforts of eighteenth-century French Canadians to keep their civil law rather than accept an imposed, foreign law is well known—a subject to which I shall return—but so are the efforts by the peoples of Africa and Asia to retain their indigenous laws and customs. They have usually done so by accepting mixed Western and personal law systems. Any investigation of the Roman, Ottoman, and later European empires would reveal that, both in their construction and collapse, they systematically spawned mixed “personal law/public law” systems.<sup>52</sup> Indeed, in a pluralist sense, those empires themselves might be characterized as mixed systems.

### **B. Founding Moments: Begetting the Mixed Jurisdictions**

I would now like to turn your attention more particularly to the classical mixed jurisdictions and the circumstances of their birth. This group consists of roughly fifteen or sixteen political entities, which, apart from Louisiana and Quebec, include Scotland, South Africa, the Philippines, Puerto Rico, and Israel.<sup>53</sup> The majority of these entities became mixed jurisdictions during the colonial era. A continental power like France or Spain would first found a colony and implant its own civil law system, but in a second stage of history, this “civilian” colony was conquered, sold, or ceded to a common law power, which proceeded to superimpose its own criminal law, judicial institutions, procedural laws, and often commercial laws upon the existing civil law. In South Africa, the British superimposed this common law layer not only upon the Roman-Dutch law of the Dutch settlers, but also upon the laws and customs of the various indigenous African nations that inhabited the land. This was the colonial pattern, but certainly not all mixed jurisdictions were created in this way. Scotland, for example, the oldest in the family, was never a colony. While an independent country, it received Romanist civil law from the Continent during the sixteenth and seventeenth centuries. But at the same time (or even before), it received much common law influence through close contact with its large neighbour, England, and finally signed the *Treaty of Union* with England in 1707, which opened new avenues for further common law influence. Israel, for a contrary example, arrived at bijurality quite differently. After World War II, Israel was considered mainly a common law system, but a legal elite dominated by Jewish immigrants trained in central Europe successfully superimposed civil law and displaced private common

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Otis, eds., *Peuples autochtones et normes internationales : analyse et textes relatifs au régime de protection identitaire des peuples autochtones*, (Cowansville, Qc.: Yvon Blais, 1996).

<sup>52</sup> For treatment of the Roman and Ottoman empires as mixed systems, see Palmer, “Two Rival Theories of Mixed Legal Systems”, *supra* note 37.

<sup>53</sup> Seven more mixed jurisdictions—Botswana, Lesotho, Swaziland, Sri Lanka, Mauritius, Seychelles, and Saint Lucia—are briefly discussed in Vernon Valentine Palmer, “Appendix B” in Vernon Valentine Palmer, ed., *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001) 471 at 479-84 [Palmer, *Mixed Jurisdictions Worldwide*]. As already discussed, this list cannot be considered closed (*supra* note 48 and accompanying text).

law, thus circumventing the order as well as the means by which mixed jurisdictions have historically been founded.

Quebec's own history is a rich illustration of the collision of forces that may occur at the founding of a mixed jurisdiction. In 1763, the population of Quebec was about sixty-five thousand people, nearly all French speaking, Roman Catholic, and deeply attached to French law.<sup>54</sup> The English settlers comprised probably not more than 5 per cent of the population, but this minority continually clamoured for the prevalence of the English laws and English language.<sup>55</sup> The British at first decided to replace French law entirely (theoretically Parliament or the Crown had the unlimited authority to impose British law in Quebec), or as Governor Murray's ordinance put it, to render justice "as near as may be agreeable to the Laws of England."<sup>56</sup> But as this audience knows better than I, for various reasons the complete implantation of English common law failed to take root.

Firstly, there was apparently *la fronde* of the Québécois—an opposition at ground level. The British experienced non-cooperation, formal petitions, remonstrances, boycotts of the courts, the use of private arbitration, and, above all, a spontaneous resort to the old *Coutume officiellement abolie*, particularly with reference to matters of successions, mortgages, dowry rights, and contracts of marriage.<sup>57</sup> Secondly, during this period British officials continually mentioned the practical obstacles which this caused and advised the Crown to restore French law as a matter of Britain's own self-interest. Thirdly, an important military and geopolitical reason for accepting this advice was at hand. Britain badly needed the loyalty and support of its French Canadian subjects in case of invasion by the Americans and French. "The opposite policy," Walton wrote, "would very likely have driven the Canadians into the arms of the American revolutionaries."<sup>58</sup> Thus a visceral attachment to French law was eventually gratified by a relatively low-cost gesture. Governor Carleton wrote in

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<sup>54</sup> Hon. Jean-Louis Baudouin, "Quebec (Report 2)" in Palmer, ed., *Mixed Jurisdictions Worldwide*, *ibid.*, 347 at 348. Governor Murray reported that the 1765 census revealed some 69 000 inhabitants of Quebec, a figure which did not include the Aboriginal population. Governor Murray claimed that the Aboriginal inhabitants of the province numbered 7400 and that all were Roman Catholic. In all likelihood, a number of Aboriginals who were not Roman Catholic were not included in the census (Governor James Murray to Lord Shelburne, (20 August 1766), cited in Yves Landry, "Étude critique du recensement du Canada de 1765" (1975) 29 *Revue d'histoire de l'Amérique française* 323 at 325-37).

<sup>55</sup> See F.P. Walton, Book Review of *Justice Under the Quebec Act, 1774* by Hilda M. Neatby, (1938) 20 *J. Comp. Leg. & Int. Law* (3d) 294.

<sup>56</sup> André Morel, "La réaction des Canadiens devant l'administration de la justice de 1764 à 1774 : Une forme de résistance passive" (1960) 20 *R. du B.* 53 at 55.

<sup>57</sup> See *ibid.* at 56. Morel found a conspicuous absence of court actions concerning "*affaires de famille*" (*ibid.* at 60).

<sup>58</sup> Walton, *supra* note 50 at 295.

1768, “I have found in Canada what I believe may be found everywhere, the People fond of the Laws and Form of Government they have been educated under ...”<sup>59</sup>

The circumstances in which the other mixed jurisdictions were founded may be less suspenseful than Quebec’s narrow escape from the full grip of English law, yet the operative process of resistance, remonstrance, and political calculation is fairly common among hybrid systems. No people that I am aware of has ever willingly given up its personal law and accepted a different personal law than its own. Historically the struggle is quite old, and if it came to be expressed as a rule of international law that “the laws of a conquered country continue in force, until they are altered by the conqueror,”<sup>60</sup> it was because international law recognized, indeed was founded upon, political realism. Cultural tenacity and the sensible use of power were the reality behind the rule. Esmein observed long ago that the policy of allowing a subjugated people to retain their personal law is often not a matter of choice but a kind of necessity to which the conqueror must submit: “*C’est, en effet, une nécessité qui s’impose au vainqueur de laisser aux vaincus leurs lois, toutes les fois que la conquête juxtapose deux races trop différentes par ... la forme de la civilisation.*”<sup>61</sup> Quebec’s experience testifies to the accuracy of this insight.

### C. Typical Features of Classical Mixed Jurisdictions

Given the civilian tradition in this province, the speaker may be expected to give a rigorous definition of the subject under discussion. I am afraid I may have to disappoint you. In truth, there has never been a canonical definition of a mixed jurisdiction or a mixed legal system. To this day, I do not think we fully understand them, and for the reasons already explained, it might be quite difficult to come up with a definition that all can agree to.<sup>62</sup> Mixed jurisdiction studies are still in their

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<sup>59</sup> Morel, *supra* note 51 at 57. Cf. Lord Granville’s statement: “*On a appelé préjugé l’attachement des Canadiens à leurs anciennes Coutumes qu’ils préféreraient aux lois anglaises. Je crois qu’un pareil attachement mérite un autre nom car à mes yeux, il est fondé sur la raison ou même encore sur les sentiments les plus nobles du coeur humain*” (Louis Baudouin, *Le Droit civil de la Province de Québec: Modèle vivant de Droit comparé* (Montreal: Wilson et Lafleur, 1953) at 64).

<sup>60</sup> *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 at 1047 (K.B.).

<sup>61</sup> A. Esmein, *Cours élémentaire d’histoire du droit français : à l’usage des étudiants de première année* (Paris: Librairie de la société du recueil Sirey, 1925) at 50. This explained for Esmein why Germanic tribes, after the collapse of Rome, allowed the Romans to keep their own law. Similarly, Guterman points out that “Since the laws of the barbarians were tribal and, therefore, personal laws, it would have been difficult to apply them to the conquered people without transforming the latter into Germans” (Simeon L. Guterman, *The Principle of the Personality of Law in the Germanic Kingdoms of Western Europe from the Fifth to the Eleventh Century* (New York: Peter Lang, 1990) at 34-35).

<sup>62</sup> Ignazio Castellucci has well posed the difficulty, that we need to decide whether a definition will “have the only surviving function of a name tag for a fixed list of *items* (however variable their actual features might be in the future), rather than a category related to a fixed list of *features*, characterizing a (variable) number of items” (“How Mixed Must a Mixed System Be?”, online: (2008) 12:1 E.J.C.L. 4 at 3 <<http://www.ejcl.org/121/art121-4.pdf>>).

infancy, and perhaps best efforts should be directed to descriptive analysis of the principal features and processes of these systems. Nevertheless, if asked for a descriptive formulation, though recognizing it is unlikely to command assent, I would say something as follows. A mixed jurisdiction, at least in the classical sense under discussion, is a pluralist legal order consisting of two large collections of legal materials which are joined at a porous seam: a private law drawn from civilian tradition (but subject to infiltration by common law) and a public law drawn from the common law tradition. The divergent components continuously interact at the level of substantive rules, methodology, and ideology. This provisional and no doubt incomplete<sup>63</sup> description at least provides a framework within which we may discuss the main traits and commonalities of this type of system.

Now, there are two broad implications in this formulation that I wish to bring forward. The first is the special architecture of the legal edifice, and the second is the notion of fundamental bijurality. As to the edifice, a kind of cultural divide runs down the centre between private Continental law (possibly infiltrated) on the one hand, and public Anglo-American/Canadian law on the other. This bifurcation is invariable in the family of mixed jurisdictions. As to fundamental bijurality, I intend to say that the confrontation between civil and common law is grand in scale, glaring, and fairly balanced, creating a cultural impact that is frequently felt by legal actors and observers inside the system (and not just its legal historians). Bijurality can be felt by any number of the abrupt transitions experienced in daily legal life, whether it be a mundane shift in classrooms at the faculty; a shift in cases before the court; the necessity of changing from one language to another; or when we move from one interpretative mode or drafting style under the *Civil Code* to that of an ordinary statute.<sup>64</sup> This condition came about not as the result of legal transplants, at least not in the usual sense of that term in comparative law. Quebec's highly compartmentalized bijurality, for example, cannot be achieved by some gradual process of minor borrowing or even a series of legal exchanges between a dominant and a servient tradition. There is something in the coherent magnitude of this juxtaposition that makes it a characteristic unto itself. Bijurality is the prevailing stamp of such systems, and its presence is obvious to any practitioner, teacher, law dean, merchant, or ordinary observer. It can foster factions, jar legal sensibilities, divide faculties, create double identities, and stir up a self-regarding polemical

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<sup>63</sup> For the common law's impact upon commercial law, procedure, *stare decisis*, and the alignment of jurists, see *infra* Part III; for a discussion of the second reception of common law, see *infra* Part IV.

<sup>64</sup> These transitions are perhaps less apparent in Quebec in recent years because legislative drafting of ordinary statutes at the provincial level has to some extent embraced the civilian method, and federal legislation has moved away from the English tradition and has been influenced by the civilian tradition (Sylvio Normand, "An Introduction to Quebec Civil Law" in Grenon & Bélanger-Hardy, eds., *supra* note 49 at 66).

literature.<sup>65</sup> Unlike small legal borrowings, bijurality in a mixed jurisdiction cannot be concealed and can scarcely recede from view.

I have already mentioned that there is an important psychological aspect to the process of recognizing a mixed jurisdiction, but some have argued that the psychological aspects are beside the point: if, after all, there are mixed laws, why would it matter whether the mixture goes recognized or unrecognized?<sup>66</sup> To speak of a subjective element in the equation seems to go against the fundamentals of a historical-critical approach based on actual observation, according to which a fact is a fact, irrespective of what locals may think.<sup>67</sup>

Jacques du Plessis has asked, “If it is established that a system has been influenced fundamentally by the civil law and common law, even though observers have not traditionally appreciated that it displayed this characteristic, why should it not be included in the list?”<sup>68</sup> Because, I would answer, comparative law classifications and lists of one kind or another are not based strictly upon factual data. If they were, all the world would be recognized as a series of mixed systems, and faith-based traditions would have to be questioned. Many subjective elements are structured into what we call a legal tradition. To some extent, a legal tradition contains a belief system about the past. Many beliefs that cannot be scientifically demonstrated can be found at the core of certain legal traditions, and this is most evident in religious traditions like the Talmudic and the Islamic. But traditions also embody sets of historically conditioned attitudes of mind.<sup>69</sup>

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<sup>65</sup> We might remember William Tetley’s Voltairian remark that “one might ... define a mixed jurisdiction as a place where debate over the subject takes place” (“Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified) (Part I)” (1999) 4 Unif. L. Rev. 591 at 593). This is not without insight because a mixed jurisdiction resembles a permanent town hall discussion of the nature of the system and its legal *mentalités*.

<sup>66</sup> See Jacques du Plessis, “Comparative Law and the Study of Mixed Legal Systems” in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) at 477, 484. Kenneth Reid rightly notes that perceptions are unreliable and often disputed, as in the famous debate between Gordon Ireland and his critics about the civilian character of the Louisiana private law. Reid suggests that perceptions about the provenance of rules may not actually matter, where, as in Scotland, “no purpose is served by distinguishing between rules derived from Rome and rules derived from England. Regardless of provenance, the rules today work in the same way and rely on the same types of sources” (“The Idea of Mixed Legal Systems”, *supra* note 3 at 24). Yet it also seems right to say that the feeling in the 1960s that Scots law had reached the point of no return (“the eleventh hour has probably struck” (T.B. Smith, “Legal Imperialism and Legal Parochialism” (1965) 10 *Jurid. Rev.* 39 at 50)) was a perception that many did not share, but rightly or wrongly it was consequential for the fortunes of Scots law. In the same way, Gordon Ireland’s perception in the 1930s that Louisiana had ceased to be a civil law state, though perhaps completely mistaken, sparked an impressive program of reform.

<sup>67</sup> See Castellucci, *supra* note 62.

<sup>68</sup> *Supra* note 66 at 484-85.

<sup>69</sup> See John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3d ed. (Stanford: Stanford University Press, 2007).

The prevailing perceptions of lawyers and judges, for example, help to explain why today Texas and California are not regarded as mixed jurisdictions in the classical sense. They are called common law states, yet they were once Spanish possessions in which Spanish law fully applied. Even now, they still retain important parts of this civilian heritage in their trial procedure, property and land titles, water law, matrimonial systems, and so forth.<sup>70</sup> There is *métissage* in their makeup, yet for a variety of reasons we are unequivocally told that these are common law states. Maybe this is so because the quantity of civil law is not striking enough. Perhaps the civil law component does not seem to be a separate “system” in and of itself. Or perhaps the civilian element does not induce its own methodology, or, just as likely, it has been forgotten by lawyers who increasingly know no history. Whatever the reasons, this de facto mixture is ignored de jure.<sup>71</sup>

Prevailing states of mind, then, play a substantial role. Indeed, we are to a large extent the playthings of our perceptions about this subject. Normally, national pride, natural chauvinism, stealthy borrowing, and the simple passage of time all combine in an irresistible way to patriate laws that actually originated elsewhere. They manage to create a feeling of ownership out of borrowings. But in the mixed jurisdictions, amnesia is not so easily induced. Something unassimilated and unforgettable rests, as it were, in the frontal lobe of the legal consciousness.

### III. Is There a Family of Mixed Systems?

By speaking of a third legal family, I do not wish to imply that there are no other families beyond common law, civil law, and mixed jurisdictions. To the contrary, I believe that only the limits of our present knowledge and our basic Eurocentric lack of curiosity have kept us from discovering many more. Jaakko Husa has said that

the legal family approach is a historically determined macro-comparison, holding that there are some interrelations between systems; otherwise the whole attempt to compare entire systems would be futile. The legal families approach is also an innate part of the very language of law of today.<sup>72</sup>

The systems or traditions grouped into families have something important in common even though there is undisputable diversity among them. It is not an exact, empirical description of a group, but rather, “an analytical structure which provides a rough

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<sup>70</sup> See e.g. Joseph Webb McKnight, “The Spanish Influence on the Texas Law of Civil Procedure” (1959) 38 Tex. L. Rev. 24; Joseph W. McKnight, “Spanish Law for the Protection of Surviving Spouses in North America” (1987) 57 Anuario de historia del derecho español 365.

<sup>71</sup> The point was well expressed by Joseph McKnight: “To characterise a system as mixed is to recognise a prevailing state of the legal mind. However mixed his system is in fact the English lawyer does not think of it as such” (“Some Historical Observations on Mixed Systems of Law” (1977) 22 Jurid. Rev. 177 at 178).

<sup>72</sup> “Legal Families” in Jan M. Smits, ed., *Elgar Encyclopedia of Comparative Law* (Northampton, Mass.: Edward Elgar, 2006) 382 at 384.

first-step approach for more detailed comparative studies. As such, ‘legal family’ contains both empirical and analytical features.”<sup>73</sup> Grouping the mixed jurisdictions into a third legal family has been called a “novel epistemic move”,<sup>74</sup> yet it is the aspect of my writings that has been the most criticized.

The notion of a legal family is only offered for convenience, utility, and explanatory power. There is no danger in misleading anyone, provided we remember the words of René David:

*La notion de «famille de droit» ne correspond pas à une réalité biologique ; on y recourt seulement à une fin didactique, pour mettre en valeur les ressemblances et les différences qui existent entre les différents droits. Cela étant, toutes les classifications ont leur mérite et aucune n'est sans critique. Tout dépend du cadre dans lequel on se place et de la préoccupation qui, pour les uns et les autres, est dominante.*<sup>75</sup>

Thus I offer the concept of the third legal family as a way of highlighting the common traits, shared issues, and basic resemblance of this collection of systems. The existence of the following commonalities, which at the same time constitute individualities from a group standpoint, form the empirical core of my claim.

(1) In each situation, a civil law that was shaped by Roman and canon law was implanted in a far-flung province of the old *jus commune*, a tide of common law influence later ensued, and a neo-civilian reaction to that influence occurred in the twentieth century. In what other series of countries has such a pattern occurred?

(2) In each system, prototypical Anglo-American judicial institutions were in charge of applying the civil law, meaning that judges with more creative mindsets and greater inherent powers at their disposal interpreted the civil law. In the process of judicial interpretation, the substance of the law was insensibly reshaped by actors and institutions which did not pretend to be neutral conduits. Where else has this kind of institutional disparity occurred?

(3) Everywhere in the mixed jurisdiction world, civil procedure is adversarial along Anglo-American lines. The emphasis of that procedure is upon the remedy rather than the right, and this has left a visible imprint on substantive civil law, which emphasizes the right rather than the remedy.

(4) Whether the mixed system was codified or not, court decisions in mixed jurisdictions are accorded more precedential value than in traditional civilian jurisdictions. Indeed, in three mixed systems, court decisions are openly accepted as an official source of law, second only to legislation.

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* at 390.

<sup>75</sup> René David, *Les grands systèmes de droit contemporains*, 11th ed. by Camille Jauffret-Spinozi (Paris: Dalloz, 2002) at 16.



(5) Quebec aside, common law influence on the civil law follows a discernable and predictable pattern, penetrating the most porous points of entry, such as general clauses in the law of delict, while leaving resistant institutions like property law relatively unaffected. The whole phenomenon of the second reception of common law and its higher forms of creativity (original or autonomous law) is restricted to this group. Where else is it even discussed?

(6) Commercial law follows market dynamics. Anglo-American commercial law has everywhere replaced the law of merchants originally in place, partly because of relatively weaker cultural attachment to commercial rules, but more decisively because of pressure to conform to the dominant surrounding economy.

(7) Special cultural factors shape the jurists and the legal literature they produce. Categories of jurists called purists, pollutionists, and pragmatists are, or once were, apparent. The orientations are closely tied to national descent, maternal tongue, and legal education. Internal legal history and historical periods are delineated by the fortunes and fervour of these cultural alignments.

(8) Mixed systems resemble each other in the circumstances of their birth and in the ultimate reasons for their existence.

#### **IV. The Many Ways and Styles of Being Mixed**

There is no single stylistic paradigm for mixed jurisdictions. Their styles result from their different ages, different mother countries, the strength of source languages, and so forth. Some are codified, others uncoded; some are French, others are Spanish or Dutch; some were colonial possessions, others were not. A scholar of mixed jurisdictions might note, however, that some systems seem in near equipoise—little mixing or blending of the two laws appears to be happening—while others appear to be continually in motion. It is this last perspective that I believe may reveal much about the style of mixed jurisdictions, and I would like to explore it with special reference to Quebec.

Mixedness occurs at different levels and can be viewed as the product of a distinct process within each level. The process is typically described as one of penetration, merger, or interaction between the two laws, and the evidence lies in the mutual modifications that result. Legal material is blended and modified in the process of being “borrowed”, but borrowing is a most inexact term. It is more a taking since no one pretends to be lending and no one has an intention of returning anything.

This blending may occur at the level of: (1) the substantive rules; (2) the methodology of the law; (3) public law; and (4) the metalegal level, where the general culture intersects with the legal culture. These four levels can be discussed separately, but they are so entangled and interrelated that isolated treatment is artificial. I may not have time or space to discuss all four points properly, so I will only discuss the first level and attempt to illustrate its interrelationship with the others. How mixing

happens (or conversely, why it does not happen) provides an insight into the “style” and ethos of the system. These styles are very individual within the family.

As I have just mentioned, a blending process usually takes place in the substantive rules and principles *within* the private law sphere—intramurally, if you will—and this is the source of *métissage* in key parts of the civil law. The judges, the writers, and of course the legislator(s) may play a creative role in this new normative activity. This ongoing phenomenon could be called the second reception of common law in the mixed jurisdictions, as opposed to the massive reception that occurred when mixed systems were first created. The second reception represents the amount of common law stirred into the private law sphere. It is essentially an unplanned, evolutionary process, typically slow and often carried out by judges who have no express mandate (legislative or otherwise) to anglicize the law.<sup>76</sup>

Now, each of the classical mixed systems can be measured and compared by the size *and* depth of this second reception. They can also be compared by the degree to which they use stereotypical justifications as excuses for common law mixing, namely the five *fantasias* or excuses described by the late Puerto Rican Chief Justice José Trías Monge.<sup>77</sup> It is very interesting to compare the classical mixed systems in these respects and to try to account for their differences. For instance, the second reception in Louisiana and Scotland has been extensive, far greater than the reception in Quebec. While certainly a mixed jurisdiction, Quebec is a distinguishable personality. This reception in other systems was usually led by the judges, largely unaided and unresisted by doctrinal writers who, in any event, appeared late on the scene. The process in Quebec was different: the Quebec judges, assisted by a far stronger doctrinal literature, were more prophylactic-minded in their function and were inclined to maintain the purity of the two streams of law. The rule in Quebec appears to be that when any appreciable amount of mixing is to occur, it should be initiated and approved by the legislator.<sup>78</sup>

To test the accuracy of this rule it would be instructive to compare specific sectors of the law. It is well known that the extent of the common law reception varies by sector and the variations follow a somewhat predictable pattern, irrespective of

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<sup>76</sup> See Vernon Valentine Palmer, “A Descriptive and Comparative Overview” in Palmer, ed., *Mixed Jurisdictions Worldwide*, *supra* note 53, 17 at 53, n. 117.

<sup>77</sup> The arguments of sameness, superiority, universal law, unification, and wise mixture. See *ibid.* at 54.

<sup>78</sup> The Supreme Court of Canada articulated this rule very clearly in the context of civil procedure: *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. (“A Quebec court may not create a positive rule of civil procedure simply because it considers it appropriate to do so. In this respect, a Quebec court does not have the same creative power in relation to civil procedure as a common law court, although intelligent and creative judicial interpretation is often able to ensure that procedure remains flexible and adaptable. Although Quebec civil procedure is mixed, it is nonetheless codified, written law, governed by a tradition of civil law interpretation” at para 39).

whether the private law is codified or uncodified.<sup>79</sup> For example, it is generally true that the field of obligations has been the area of private law that usually receives the greatest amount of common law influence. Within obligations, the law of tort (delict) predictably absorbs the greatest amount while contract absorbs a lesser but still substantial amount. Quasi-contractual obligations may be the least influenced of the three. Property law (and perhaps succession law), unlike obligations, is usually an unassailable stronghold of civilian jurisprudence. Thus in the Philippines, Scotland, and South Africa, we find a heavy infiltration of common law in the law of tort. At some point in the past, each jurisdiction accepted critical common law tort doctrines, including a duty of care requirement in negligence, proximate causation analysis, the defence of contributory negligence together with the palliative of last clear chance (now abandoned), and some English nominate torts like nuisance, trespass, and defamation. A glance at contract law may also show the reception of English imports, including the principle of estoppel, the mailbox rule, the doctrines of discharge by breach and anticipatory breach, and other English doctrines as well.<sup>80</sup> This is why the Quebec picture in regard to the second reception is so striking to the comparative lawyer. Quebec courts did not specifically receive contract doctrines like estoppel, nor specific tort doctrines and nominate torts. I suggested a moment ago that on a vertical scale, tort law is the most susceptible, and perhaps it could be a proxy or litmus for judging the extent of common law influence in private law as a whole. The tort law of Quebec is remarkably free of the earmarks of the common law.

The treatment of pure economic loss is, to me, a convincing illustration of Quebec's uniqueness. Generally speaking, pure economic loss stands at the cutting edge of many fundamental questions as to how far tort liability can expand, what burdens upon individual activity are sustainable, and whether an open-ended, unitary general clause in the French tradition must receive special interpretation for pure economic loss questions in order to prevent excessive liability. In the case of Quebec, it speaks volumes about the system as a whole. In a masterful chapter contribution to a book on pure economic loss, Daniel Jutras leaves no doubt that Quebec deals with these questions in the liberal French tradition.<sup>81</sup> Quebec has no conceptual equivalent to the restrictive, relational concept of the duty of care in Anglo-American law; protected interests are not limitatively listed or defined as in German tort law; and the notion of injury in Quebec's general clause is taken broadly and not used to exclude any category of harm. In short, Quebec's approach to this complex issue is broadly liberal and free from formalistic constraints. With reliance upon the notion of

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<sup>79</sup> See the discussion of systemic patterns, *ibid.* at 57ff.

<sup>80</sup> The text may be slightly overinclusive for cases where a country has developed a variant or an adapted version of one of the English categories mentioned. See Paul Farlam & Reinhard Zimmermann, "South Africa (Report 1)" in Palmer, *supra* note 53 at 123-30; Elspeth Reid, "Scotland (Report 1)" in Palmer, *supra* note 53 at 229-31; Pacífico Agabin, "The Philippines" in Palmer, *supra* note 53 at 441-42.

<sup>81</sup> Daniel Jutras, "Quebec" in Vernon Valentine Palmer & Mauro Bussani, eds., *Pure Economic Loss: New Horizons in Comparative Law* (New York: Routledge-Cavendish, 2009) 114.

causation playing a key role in controlling the scope of liability, Quebec's approach is very much akin to modern treatment of liability in France. If I am correct that pure economic loss may serve as a leading indicator of the extent of the reception of common law principles, then it tends to confirm the impression of Quebec as a system in equipoise.

Of course, the legal climate of Quebec may not always have been as cool and calm as it appears today. The protagonists in mixed jurisdictions—the purists, pragmatists, and pollutionists—may have modified their roles over time.<sup>82</sup> On the one hand, Jean-Louis Baudouin has said that “[m]ost, if not all, of the Quebec jurists have been very critical of any encroachment of common-law rules and institutions in the area of civil law (and in that sense, they can reasonably be qualified as purists).” He continued, “[t]hus, I do not think one can say that a distinction ever existed in Quebec between purists, pollutionists, and pragmatists.”<sup>83</sup> On the other hand, John Brierley has argued that, in the past certainly, these divisions existed. He labelled the Judicial Committee of the Privy Council (up to 1949) and the Supreme Court of Canada (in its earlier pronouncements) as “pollutionists”.<sup>84</sup> He listed Pierre-Basile Mignault, J.-Emile Billette, and Louis Baudouin as exemplars of a purist approach, and thought that George Challies and F.P. Walton fit into the pragmatist mould.<sup>85</sup>

We should also bear in mind that mixing takes place in the legislature more than in the courtroom. The *Civil Code of Québec*, for instance, contains a number of particularly innovative mixtures, such as the “*hypothèque ouverte*” and the “patrimony of appropriation,” creations that I have elsewhere called original or autonomous law.<sup>86</sup> The question of whether these should be regarded as examples of

<sup>82</sup> See Palmer, “A Descriptive and Comparative Overview”, *supra* note 76 at 31-35. Purists in the mixed systems are generally those who seek to keep the civil law coherent, unsullied by encroachment and true to its sources. Examples of common law assimilation are perceived as a sign of decay and degeneration, a loss of cultural integrity. They can be slightly hostile to the term “mixed jurisdiction”, preferring to call it a civil law system.

Pollutionists favour reception of common law rules, advancing noncultural arguments toward that end, such as those based on efficiency, modernization or the virtues of uniform laws. They may dismiss purists as impractical romantics dwelling in the past.

Pragmatists have broader cross-cultural attachments, take a more detached view of the system, argue that judges and legislators should blend together the best features of both worlds and create better rules than either system could offer on its own. Pragmatists tend to accept the term “mixed jurisdiction” as a designation of the system.

<sup>83</sup> Baudouin, “Quebec (Report 2)”, *supra* note 54 at 358.

<sup>84</sup> John E.C. Brierley, “Quebec (Report 1)” in Palmer, *Mixed Jurisdictions Worldwide*, *supra* note 53, 329 at 344.

<sup>85</sup> *Ibid.* at 343-44. There is a mine of information on these attitudes in the years 1922–1939 in Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l'intégrité du droit civil” (1987) 32 McGill L.J. 559.

<sup>86</sup> Palmer, “A Descriptive and Comparative Overview”, *supra* note 76 at 59-62. Further examples would include the Scottish trust, the Mauritian concept of “legitimation by adoption” and the Scots law of unjustified enrichment, which Whitty and Visser describe as “a third way” between the English

autonomous law, however, is not without controversy. Kenneth Reid writes that when mixed jurisdictions create new norms, it never amounts to a legal third way.<sup>87</sup> It is simply the reconfiguration of common law and civil law components. There is no third element which is neither civil law nor common law.

This is not the place to attempt an extended discussion, but let me offer an interesting example that was the subject of a paper delivered by my colleague Jeanne Carriere last summer in Edinburgh.<sup>88</sup> In that paper, she outlined Louisiana's unique law of filiation, called dual paternity. According to her study, two late-twentieth century decisions on filiation created the possibility that a child could have three parents simultaneously: a mother and two legally recognized fathers. Although the nineteenth century civil code determined the parent-child relationship through the presumption *pater est quem nuptiae demonstrant*, the Louisiana Supreme Court, and later the legislature, created the biologically impossible concept of dual paternity.<sup>89</sup> This concept holds that a child may be found to have both a presumed father and a biological father at the same time, and the child may make claims against both in order to receive benefits. The court also invented an action of "avowal" that permitted the biological father to assert his rights as a father. Professor Carriere argues that this bold use of power by the courts in Louisiana, which function like common law courts in actively shaping the law, enabled this type of innovation. For reasons already mentioned, a parallel to this is not to be expected from the more restrained judicial function in Quebec, yet there is no lack of creative intermingling. However, the intermingling in Quebec seems to be taking place in the work of the legislature.

Let me now summarize by stating three traits of Quebec's mixed system as they appear to an outsider like myself.

(1) *A commitment to purity and perhaps a faith in purity.* This was already an element in Walton's understanding of the system when he wrote in 1908 that a provision derived from the French law is to be interpreted by reference to French authorities, and a provision derived from the English law, by reference to English authorities.<sup>90</sup> And Castel, in discussing Walton's statement, later said, "It is best to keep the French law pure, and the English pure and not to attempt to blend them."<sup>91</sup>

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and German taxonomies for unjustified enrichment (Niall R. Whitty & Daniel Visser, "Unjustified Enrichment" in Reinhard Zimmermann, Daniel Visser & Kenneth Reid, eds., *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford: Oxford University Press, 2004) 399 at 412).

<sup>87</sup> Kenneth G.C. Reid, *supra* note 3 at 25.

<sup>88</sup> See Jeanne Carriere, "Filiation and its Discontents: Mixité and Dual Paternity in Louisiana" (Paper presented to the Second World Congress of Mixed Jurisdiction Jurists, Edinburgh, 2007) [unpublished].

<sup>89</sup> See *T.D. v. M.M.M.*, 730 So.2d 873 (La. Sup. Ct. 1999).

<sup>90</sup> Frederick Parker Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Toronto: Butterworth, 1980).

<sup>91</sup> J.G. Castel, "The Civil Law of the Province of Quebec" (1960) [unpublished, archived at Tulane University Law Library].

This credo reached its apogee in Pierre-Basile Mignault's conception that Quebec civil law was a complete and closed system: "*Une cloison étanche et infranchissable sépare les deux grands systèmes juridiques. ... Il n'y a pas immixtion ou absorption de l'un au profit ou au détriment de l'autre.*"<sup>92</sup> There could be no mixing at all, for Quebec civil law was an ancestral heritage necessary to the survival of the nation. To be pure, it had to stay introverted and closed.<sup>93</sup> His admiration of the province's French legal heritage was vast: "*On peut dire, sans exagération, qu'aucun pays ne possède une littérature légale comparable à celle de la France. Les grands ouvrages de Dumoulin, de Domat et de Pothier ont reçu leur couronnement dans le code Napoléon qui est l'expression concise et officielle de leur doctrine.*"<sup>94</sup> Mignault viewed the law of other provinces as "*un droit étranger*" which might insensibly infiltrate and contaminate "*la pureté de notre droit.*"<sup>95</sup>

(2) *A commitment to legislative technique and codification*, coupled with a rule to the effect that if any appreciable amount of mixing, mingling, or innovating is contemplated, it must be initiated and approved by the legislator.

(3) *A commitment to the Civil Code of Québec as representing the jus commune of the province*. The *Code* has been given a commanding position in the hierarchy of private law sources. The preliminary provision of the *Code* accomplishes this in one of the more remarkable statements of modern civil law.<sup>96</sup>

William Tetley, a dear friend and respected colleague here at McGill and Tulane who has made a great contribution to this subject, has set forth a series of factors that he considers essential or very important for the long-term survival of a mixed jurisdiction.<sup>97</sup> Generally he thinks that these systems, to be viable, must have

<sup>92</sup> P.-B. Mignault, "Les rapports entre le droit civil et la 'common law' au Canada, spécialement dans la province de Québec" (1932) 11 R. du D. 201 at 206, 211.

<sup>93</sup> Howes argues that Mignault was extraordinarily effective in translating his purist conceptions into action while he sat on the Supreme Court of Canada. He describes the *modus operandi*: "first, deflect their attention from the past and focus it on the future; second, sensitize them to the bastardy of other traditions and convince them of the purity of their own; third, demonstrate a divergence in the common and civil law solutions to a problem wherever possible; and fourth, emphasize the hierarchy of sources" (David Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32 McGill L.J. 523 at 550). Lastly, never forget the case of Louisiana.

<sup>94</sup> P.-B. Mignault, *Le Droit civil canadien: Basé sur les "Répétitions écrites sur le Code Civil" de Frédéric Moulton, avec revue de la jurisprudence de nos tribunaux*, t. 1 (Montreal: Whiteford & Théoret, 1895) at v. Mignault's own legal treatise, said Howes, used the frame of Moulton's treatise "rather like a sieve, to isolate ... the contents of Quebec civil law" (Howes, *supra* note 93 at 548).

<sup>95</sup> P.-B. Mignault, "L'avenir de notre droit civil", *supra* note 2 at 60.

<sup>96</sup> "The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it" (Preliminary Provision, para. 2 C.C.Q.).

<sup>97</sup> William Tetley, "Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel, and Quebec/Canada)" (2003) 78 Tul. L. Rev. 175 at 186-190.

structures, institutions, and languages to support each of the two legal traditions respectively: a kind of legal diarchy. Thus he argues for two legislatures, two court systems, two languages, two cultures, two universities, and two nations existing together in a single state. This is indeed the present infrastructure of the Quebec legal system, and who can doubt its robustness? But I would add that in a comparative lens, these features are not as important to the survival of Quebec's *mixité*, or to the survival of her sisters, as they are to its individuality, its style, and its ethos. I am inclined to think these features undergird Quebec's exceptional personality, rather than to say they are prescriptions or preconditions of survival for mixed jurisdictions generally. Scotland, for example, the oldest of the mixed jurisdictions, shows no signs of senility, but it has only one language, not two; only one court structure, not two; and for three hundred years it had no parliament of its own. Yet the long-term prospects for Scots law today are far stronger than they were when T.B. Smith declared that the eleventh hour had already struck.<sup>98</sup> Louisiana and the Philippines are also missing key parts of this infrastructure (particularly the preservation of the French and Spanish languages), and surely they would have stronger or different civilian traditions were that not the case. In my view, however, the style of the systems would simply change. There is no single paradigm and no single style of being mixed.

## Conclusion

I would like to close this evening with this reflection. A mixed jurisdiction, one might well conclude, must be a difficult balancing act: a tightrope walker teetering between two traditions, with an abyss below. It is not an envious position to be in. Everything seems to be at stake, even national survival (of course, if you did fall, the danger is not that you would experience a shortage of law). But the situation is not as precarious as it may appear at first sight or as it is popularly portrayed. There are strong guide wires usually in place, particularly, I believe, here in Quebec—languages in the schools, supporting cultures, constitutional compartmentalization, a developed body of legal literature, well-trained judges, educational programs, translation projects, permanent law institutes, and great universities such as this one.

We know, of course, there is some peril of falling on either side because some jurisdictions, like Arkansas and Texas, fell almost immediately, never becoming known as mixed systems in the first place. Others, like British Guiana, began the journey but fell from grace along the way.<sup>99</sup> Guiana had no guide wires. The rest have continued on as funambulists to this day, and though some struggle to maintain their balance more than others, these interesting systems promise to be there tomorrow. A mixed past begets a mixed future. Lord Bacon knew this was a strength:

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<sup>98</sup> See *supra* note 66.

<sup>99</sup> M.C. Dalton, "The Passing of Roman-Dutch Law in British Guiana" (1919) 36 S.A.L.J. 4.

[T]he probability is ... that our laws are as mixed as our language, compounded of British, Roman, Saxon, Danish, and Norman customs; and as our language is so much the richer, so the Laws are the more compleat.<sup>100</sup>

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<sup>100</sup> Anonymous, *A Law Grammar; or, an Introduction to the Theory and Practice of English Jurisprudence*, 1791 at 17, cited in Donlan, *supra* note 1.