The “Juristes Inquiets”: Legal Classicism and Criticism in Early Twentieth-Century France

Marie-Claire Belleau

“La douleur est la rançon du formalisme.”
Louise Bourgeois

This Essay challenges the widely held assumption that French civil law is and always has been a purely formal and positivist legal system. French civil law is the predecessor of, and still serves as an authority for, Québec civil law. Both systems are generally viewed by those inside the systems as coherent, complete, and autonomous—characterized by an objective, neutral, and rational form of legal reasoning. The terms “legal classicism” and the French “École de l’exégèse” are used to designate this point of view.

There is in fact a vibrant critical tradition in French legal scholarship. This Essay examines and attempts to rehabilitate one

* Professor of Law, Université Laval, Québec. I would like to thank professors Duncan Kennedy and Nathaniel Berman for their helpful comments on this paper and Thomas Copeland for his editorial work. All translations appear in brackets and are mine.

1. [“Pain is the ransom of formalism.”] Sculpture entitled “Cell 1,” 1991, exhibited at the Musée d’art contemporain de Montréal, April 26, 1996 to September 27, 1996.

strand of this critical tradition, the school of what I call the “juristes inquiets” (the worried or anxious jurists), that existed in French legal academia at the end of the nineteenth century. These scholars led a movement that shared a common objective to overthrow legal classicism and renew French legal thought.

This analysis will concentrate on the critiques of the traditional legal system and reasoning that were put forward by two “juristes inquiets”: Raymond Saleilles\(^3\) and François Gény.\(^4\) Their work is typical of that produced by many jurists who were part of this school of private law theory at the turn of the century.

I will present their argument in four parts: first, an internal critique of the descriptive and prescriptive claims of classicism; second, a descriptive counterview of how the French legal system of the time really worked; third, a critique of the negative consequences of the classicist method; and fourth, a program to improve legal method by abandoning some classicist claims and norms and modifying others. It is important to note that this is my reconstruction of the “juristes inquiets” views and not their own. Before setting forth their critique, I will draw a brief overview of the social and historical context in which the “juristes inquiets” worked.

I. THE SOCIAL AND ECONOMIC TRANSFORMATIONS OF THE ERA

The canvas for this Essay is the turbulent period of time begin-

---

34 CAHIERS DE DROIT 153 (1993).

3. Raymond Saleilles (1855–1912) taught at the universities of Grenoble (1884), Dijon (1885–1895), and Paris (1895–1912). He was also one of the founding members of the influential Revue Trimestrielle de Droit Civil and of the Société d'Études Législatives. He published more than 228 works. These were mostly studies of legal doctrines and institutions. His most important publications are: Étude sur la théorie générale de l'obligation d'après le premier Code civil pour l'Empire Allemand (1889), De la déclaration de volonté: Contribution à l'étude de l'acte juridique dans le Code civil allemand (1901), and De la personnalité juridique: Histoire et théorie (1910).

4. François Gény (1861–1959) described Raymond Saleilles as being his main predecessor in the critique and reform of legal classicism. He first taught in Algeria. He subsequently worked at the universities of Dijon (1889, 1914–1918) and Nancy (1901). His works have had an enormous influence in the Western legal world. Gény's Méthode d'interprétation et sources en droit privé positif: essai critique, published in 1899 with a preface written by Raymond Saleilles, was a vigorous critique of legal classicism. I FRANÇOIS GÉNY, MéTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE (2d ed. 1919) [hereinafter MéTHODE D'INTERPRÉTATION]. It is best remembered, however, not for its critique, but rather for a reconstructive scheme it proposed to replace legal classicism. Gény named his system “Libre Recherche Scientifique.” 2 id. at 74–234. In addition to a large number of articles, Gény published four volumes of Science et technique en droit privé positif: Nouvelle contribution à la critique de la méthode juridique between 1914 and 1924. This treatise elaborated on his reconstructive project.
ning in 1880 and ending in 1920. The end of the nineteenth century was marked by social riots and political unrest. Industrial developments emerged and were affected by scientific and technological advances. The world market grew rapidly. Large scale factories mushroomed. Rapid and cheap means of distribution and communication became available. As a result, society struggled to come to terms with problems that ensued from the unequal distribution of wealth and taxation and the emergence of corporate cartels, labor conflicts, unemployment, economic depression, and urbanization.

In this context of rapid social transformation, many jurists believed that the established legal order served as an obstacle to the "progress" of life. The traditional legal system was no longer credible. "Natural rights" were perceived as arbitrary, as perpetrating injustice under the cover of free enterprise. The traditional legal system was blind to the changing social reality. It could no longer serve to justify the exercise of force. The advent of the First World War shattered the naive illusions of these visionaries. As the defining event of this period, the Great War constituted the occasion to apply new social doctrines. However, the consequences of the war destroyed the critical impulse that had grown out of the fin-de-siècle atmosphere.

It is in this historical context that the school of the "juristes inquiets" came into existence.5 This was an expression used by Paul Cuche, a law professor of Grenoble, who in 1929 meditated on the "état d'âme"—the soul searching—of his contemporaries. He stated that the "inquiétude" of the jurists of his time was due to the undeniable discordance or clash between the absolute concepts of law held by the preceding generation and the actual state of society. Cuche described the "inquiétude" of his era as being a conflict between the individualism of the old regime and the emerging interest in solidarity which stemmed from a changing social reality:

Et d'abord essayons de comprendre l'état d'âme de ces juristes inquiets. Depuis près d'un siècle, les générations qui les ont

---

5. The expression "juristes inquiets" refers to a broad group of scholars. It unites people who had been divided into legal romantics and legal neoclassicists. It also encompasses individuals with diverse political motivations ranging from the progressive to the conservative and even to the odd reactionary. Notwithstanding their many differences, they all shared an "inquiétude" about what they perceived as the increasing discrepancy between the rigid and dogmatic legal classicism and the changing social reality. However, they differed on many issues. These included how to define this gap, how important it was, and how to go about bridging the gap. The "juristes inquiets" included jurists such as Julien Bonnecase, René Demogue, Édouard Lambert, and Emmanuel Lévy in private law and Maurice Hauriou and Léon Duguit in public law.
precedés ont admis sans discussion que tout l'ordre juridique avait à sa base les droits absolus et imprescriptibles de l'individu, que l'harmonie sociale était réalisée quand tous ces droits pouvaient s'épanouir sans se heurter à ceux du voisin et qu'enfin le Droit—avec un grand D—n'avait pas d'autre mission que d'assurer leur paisible coexistence.

Mais voici qu'à la fin du siècle dernier et au début de celui-ci, s'accuse une indéniable discordance entre ces conceptions et les réalités auxquelles elles devraient s'adapter, discordance produite par la prodigieuse intensification de la solidarité sociale sous toutes ses formes, politique, économique et morale.

... [Les juristes dont je parle ont cru devoir se mettre en quête d'une conception de l'ordre juridique qui répondit aux besoins et aux aspirations de leur temps.]

Fear of socialism was the driving force behind both the "juristes inquiets" critique and their projects of reform. By offering suffi-

6. [Let us first try to understand the mood of these juristes inquiets. For almost a century, their predecessors had accepted without discussion that the whole legal order was based on the individual's absolute and inalienable rights; that social harmony was realized when these rights could flourish without conflicting with the rights of one's neighbor; and most of all that Law—with a capital L—had no other purpose than ensuring their peaceful coexistence.

However, at the end of the last century and at the beginning of this one, an undeniable conflict emerged between these concepts and the realities to which they should adapt, a conflict produced by the prodigious intensification of social solidarity in all its forms: political, economical, and moral.

... [The jurists of whom I speak believed it necessary to search for a conception of the legal order which responded to the needs and aspirations of their own time.] Paul Cuche, À la recherche du fondement du droit: y a-t-il un romantisme juridique?, 28 REVUE TRIMESTRIELLE DE DROIT CIVIL 57, 65–66 (1929).

7. I agree with André-Jean Arnaud, who wrote:

Que Gény ait formulé la plus précise attaque contre le positivisme de l'exégèse et son réseau d'abstractions, cela n'est pas douteux. Mais il fallait ne pas aller trop loin. S'il avait exposé magistralement ses théories d'ailleurs, en raison de son talent, il n'aurait pas été amené à le faire en l'absence d'un climat intellectuel favorable au développement d'idées qui étaient plus que latentes, déjà exprimées par nombre d'auteurs. Et ce courant d'opinion était né de la crainte d'un danger "socialiste". Il était patent que les principes fondamentaux des codes en vigueur ne correspondaient plus aux aspirations sociales; en conséquence, les plus talentueux des juristes mirent leur plume au service de la sauvegarde de l'édifice juridique, dont l'écrasement leur paraissait devoir menacer la paix intérieure (leur paix à l'intérieur) tout en s'ouvrant aux réalités socio-économiques. Les préoccupations des Beudant, Labbé, Bufnoir, Salleilles, Hauriou, Duguit, Gény (pour ne citer que les très grands) avaient pour but de devancer ou contre-carrer les "socialismes". ...

Gény undoubtedly has formulated the most precise attack against positivism and its network of abstractions. But one could not go too far. Indeed, if he
cient change, they sought to salvage a rapidly deteriorating situation and to keep social peace. In so doing, they hoped to prevent a social rebellion. In short, they aimed to preserve the existing social equilibrium by adapting, and in some cases abandoning, legal classicism.

Saleilles rejected socialism, which he equated with the desire to replace the individual with the state. While he recognized that both freedom and regulation constituted forms of state intervention, he advocated solutions which preserved a minimum of individualism while still promoting social reforms that were based on mutual collective assistance. In so doing, he embarked on a search for an equilibrium between the members of the collectivity. Well aware

had masterfully elaborated his theories elsewhere, due to his talent, he could not have done so in the absence of an intellectual climate favorable to ideas that were more than latent, but rather, had already been expressed by a number of authors. And this current of opinion was born of the fear of a "socialist" danger. It was clear that the fundamental principles of the codes in force no longer corresponded to social aspirations. Consequently, the most talented jurists put their pens in the service of safeguarding the legal edifice, whose collapse appeared to them to threaten social peace (their peace inside the legal community), while opening itself to socio-economic realities. The preoccupations of Beudant, Labbé, Bufnoir, Saleilles, Hauriou, Duguit, Gény (to cite only the most important) aimed at preempting or thwarting the "socialisms"...

ANDRÉ-JEAN ARNAUD, LES JURISTES FACE À LA SOCIÉTÉ DU XIXE SIÈCLE À NOS JOURS 122 (1975).

8. For example, Gény showed how Saleilles had skillfully limited the respective domains of influence in the opposition between liberal individualism and sociological authoritarianism which covered up the conflict between legal classicism and the historical method:

Celle [tendance doctrinaires] qui formule les principes et place en tête la liberté de l'individu nous donne le fondement du droit en général. L'autre [la méthode historique], qui s'attache plus aux faits et constate l'importance des rapports établis par l'état social, peut seule[e] assurer le développement ultérieur, se traduisant dans le détail des droits particuliers.

[One [legal classicism] that formulates the principles, according primacy to individual freedom, gives us the foundation of law in general. The other [historical method], more attached to facts and cognizant of the importance of social relations, can alone assure further development, translating itself into the detail of particular rights.]

François Gény, La Conception Générale du Droit, de ses Sources, de sa Méthode dans l'Oeuvre de Raymond Saleilles, in L'ŒUVRE JURIDIQUE DE RAYMOND SALEILLES 15 (A. Rousseau 1914).

9. Saleilles wrote:

[Il y a un minimum d'individualisme qui doit rester la part de la liberté et de l'initiative personnelle... Il ne s'agit donc, ni de privilèges à rebours, ni de fausse sentimentalité, et encore moins de chimérique égalité. Il s'agit d'un équilibre social à établir, d'une harmonie indispensable à réaliser entre les différents éléments qui composent la collectivité, et dont la fonction
that his social vision required profound transformations of the traditional individualist system, Saleilles advocated a middle ground between nineteenth-century legal classicism and socialism.

sociale doit être en raison directe de l'expansion individuelle elle-même. . . . Liberté et intervention, non seulement ne sont pas en contradiction, mais nous apparaissent comme les deux faces d’un même système, tellement que l’une appelle l’autre. A l’Etat supprimant l’individu, ce qui est le rêve de certains socialistes, opposons le principe de la collectivité prêtant aide et assistance mutuelle aux fidèles de la liberté, pour la défendre par en haut contre ceux qui en abusent et la développer par en bas chez ceux qui n’ont pas assez de ressources pour en user.

[IA] minimum of individualism must remain for freedom and personal initiative . . . . It is neither a matter of counter-privileges nor of false sentimentality, and still less of an illusory equality. It is a matter of establishing a social equilibrium, and indispensable harmony between the different elements which constitute the collectivity, whose social function is directly due to the expansion of the individual. . . . Freedom and intervention do not contradict each other; rather, each calls for the other to such an extent that they appear to us as two faces of the same system. To the State that suppresses the individual, the dream of certain socialists, let us oppose the principle of the collectivity giving aid and mutual assistance to the partisans of liberty—to defend liberty from above against those who abuse it, and to develop it from below among those who do not have enough resources to make use of it.]


10. Saleilles wrote:
Mais il faut bien reconnaître aussi que c’est toute une transformation profonde du système individualiste traditionnel; c’est une conception réciproque, et non plus unilatérale, qui, à côté des droits, oppose les devoirs, et qui, au lieu d’accorder tout aux uns, et rien aux autres, ne garantit la victoire aux plus forts qu’à la condition qu’ils viennent en aide aux plus faibles.

[However, one must also recognize that it is a complete, deep transformation of the traditional individualist system; it is a reciprocal, and no longer a unilateral, conception, which opposes duties to rights. Rather than giving everything to some and nothing to others, it only guarantees victory to the strong on condition that they come to aid the weak.]

11. In the preface to *Méthode d’interprétation*, Saleilles described the evolutionary school’s perception that was criticized by Gény for its exaggerated emphasis on legislation. See Raymond Saleilles, *Preface to 1 MÉTHODE D’INTERPRÉTATION*, supra note 4, at xxi. With the historical method, legal progress was produced by the incessant action and reaction between the legal text and the outside contributions which came from the economic world and social life. This legal progress was achieved through the intervention of the case law without profound jolts, jerks, or abrupt revolutions. The function of case law was to bend the legal text to new necessities of social life, to unearth unknown principles, and to meld the disparate parts into a harmonious ensemble. The logic of this system ensured certainty and avoided arbitrariness. Saleilles wrote:

Entre la conception vivante qu’enserre le texte et les appoints qui lui
Like Saleilles, Gény’s direct references to the transformation in social reality that gave rise to his critique revealed his fear of socialism. Very timidly—in contrast with the sharp tone of his negative critique of legal classicism—Gény introduced the fashionable notion of social solidarity as justification for a more equitable distribution of wealth. If in 1899 Gény had mentioned the “temerity” of disregarding social demands, in 1919 he emphasized the “danger” of ignoring them.

viennent du dehors, de la vie économique et du milieu social, se fait un échange incessant d’actions et de réactions, par où se réalise le progrès social; sans secousse profonde, sans à coup et sans révolutions brusques, par la seule intervention de la jurisprudence, non plus chargée de s’asservir à un texte mort, mais seul pouvoir effectif qui ait pour fonction de développer un texte incessamment vivant. C’est à elle de ramener au texte les germinations spontanées que lui offre la pratique des affaires, et en même temps de plier le texte aux nécessités nouvelles qui le sollicitent, d’en assouplir la formule, d’en dégager les principes inconnus et de fondre le tout dans une harmonie d’ensemble, dont la logique crée la certitude pour les intérêts privés, en même temps qu’elle défie l’arbitraire, qui est la menace incessante de toute méthode subjective.

[An incessant exchange of action and reaction takes place between the living conception confined within the text and the contributions which come to the text from outside, from the economy and society; this process realizes social progress, without profound upheavals, jolts, or abrupt revolutions, through the sole intervention of case law—no longer subservient to a dead text, but rather, the only effective power which has as its function to develop an always living text. It is up to it to bring to the text the spontaneous germinations which business practice offers it. At the same time, it must bend the text to the new necessities that make claims on it, to soften its formulations, to draw from it unknown principles and to meld everything into a total harmony, whose logic creates certainty for private interests—while at the same time guarding against arbitrariness, the constant danger of every subjective method.]

1 id. at xx.

12. Gény wrote:
A l’heure actuelle, par exemple, le besoin paraît se faire sentir, d’introduire, en notre organisation positive, plus de fraternité profonde, ou, comme on dit volontiers aujourd’hui de solidarité sociale, c’est-à-dire, tout simplement, ce me semble, de mieux égaliser les conditions de la lutte entre les activités rivales, d’assurer une répartition des profits plus exactement proportionnée aux efforts et aux besoins de chacun, d’atténuer les rigueurs excessives du droit individuel, en considération de l’intérêt social et commun.

[At the present time, for example, there seems to be a felt need to introduce more deep fraternity, or, as one readily says today, social solidarity, in our positive legal organization: in other words, it seems to me, quite simply to equalize the conditions of struggle among rival activities, to assure a distribution of profits more exactly proportioned to the efforts and needs of each person, to attenuate the excessive rigors of individual right in favor of the social and common interest.]

2 Méthode d’interprétation, supra note 4, at 226.

13. Gény wrote:
To accomplish their goal, the "juristes inquiets" constructed their own interpretation of how jurists of the nineteenth century approached the law. They invented the concept of French legal classicism or the École de l'exégèse. Ironically, the nineteenth-century jurists often grouped under this term never believed that they shared a common methodology or ideology. Thus, the École de l'exégèse, which remains an integral part of the accepted interpretation of nineteenth century French legal culture, was a creation of its critics, the "juristes inquiets." For the purpose of this Essay, I will focus on their critique and take for granted their depiction of legal classicism or Exégèse. I will return to the implications of this hypothesis of the invention of the "École de l'exégèse" by its critics at the end of this Essay.

II. INTERNAL CRITIQUE

The "juristes inquiets" internal critique entailed the identification of the main characteristics of legal classicism and development of the tools to expose its failure to live up to its explicit or implicit aspirations. To meet these critical objectives, the "juristes inquiets" first described the characteristics to which legal classicism aspired. Their next step was to prove that the existing legal order did not possess these features. Through their internal critique, the "juristes inquiets" demonstrated that legal classicism did not accomplish the goals that it had set for itself.

For the purpose of this analysis, the internal critique of the "juristes inquiets" has been divided into two parts: (a) the critique of literalism and (b) the critique of conceptualism or of the method of legal constructs. Legal classicists claimed that the French civil law system was both complete and coherent. The completeness claim was that, at least from the proclamation of the Code civil in 1804, solutions for all cases coming before the courts were provided by positive written legislation. The coherence claim was essential to

On peut différer d'avis, sur l'importance, qu'il convient d'attribuer à ces aspirations, et, surtout, sur les moyens d'y satisfaire. Mais leur existence n'est pas, je crois contestable, et il serait plus que téméraire, [il serait dangereux] de passer outre, en semblant les ignorer.

[One can hold different views about the importance to be attributed to these aspirations and, above all, to the means of satisfying them. But their existence is, I believe indisputable; it would be more than daring, [it would be dangerous,] to carry on while feigning to ignore them.]

2 id. Gény used square brackets to distinguish the 1919 additions from the 1899 original text. See 1 id. at VII n.3 (avertissement pour la seconde édition).

the completeness claim because it meant that apparent gaps, conflicts, and ambiguities\textsuperscript{15} in the legal order could be correctly resolved by application of the exegetic method. The method was based on the belief that mutually consistent “legal constructs” could be inferred from enacted rules and principles. The legal “scientist” could employ these constructs to deduce a new rule to resolve the gaps, conflicts, or ambiguities, and then apply it deductively to the facts of the case at hand.

Thus, the legal classical claim was that legislation supplied both the institutional mechanisms and the substantive norms that were necessary to “discover” the “right answer” and the “right way” to arrive at the “correct” solution for any legal problem. Legislation was the incarnation of the state which could foresee and produce all possible legal solutions in order to meet all potential needs. In this context, the Code civil constituted the ultimate and most perfect expression of legislative plenitude. Legal classical theorists refused to accept that contradictory results could potentially be attained by applying a logical and objective method of deduction. Recognition of this possibility raised the risk of indeterminacy within the legal order.

A. The Critique of Literalism

The “juristes inquiets” attacked the notion that jurists could solve any legal problem simply by literally applying the language of the Code civil to the facts of the case on three grounds: (1) the limitations of language; (2) the foreseeability of future situations; and (3) the consequences of legislative void.

1. The Limitations of Language

It was inherent in the nature of language in general and legislative language in particular that it would often be unclear or ambiguous.\textsuperscript{16} More specifically, Gény argued that a legal formula could only be an imperfect incarnation of the legislator’s intent:

Le législateur exprime sa volonté, dont il fait la loi, en une formule. Consacrée, suivant les détails de la procédure parlementaire, cette formule apparaît, seule, comme la traduction de la pensée législative. Seule, elle livre, à ceux qui subissent comme à ceux qui appliquent le droit, le contenu de la prescription souveraine. Il faut donc que le législateur vise un double objectif: d’une part, qu’il se

\textsuperscript{15} DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIECLE] 133–79 (1997).

\textsuperscript{16} See 1 MÉTHODE D’INTERPRÉTATION, supra note 4, at 119.
représente exactement la portée de la règle, qu'il entend ériger en loi; d'autre part, qu'il sache faire entrer tout son vouloir législatif dans la formule qu'il adopte.\textsuperscript{17}

Legislative indeterminacy stemmed from the necessity of imputing legislative intent when faced with a defective legal formula. It also resulted from the fact that the legislative will was often expressed in general, abstract categories and in elastic formulas, instead of concrete prescriptions.\textsuperscript{18} As a matter of fact, French law contained many general "standards" that could not possibly be self-applying. References to the general and vague idea of freedom used by certain legal institutions, including freedom of contract, serves as a good example. This broad concept was not equipped with any subsidiary rules or aids to guide jurists. Further problems were caused by the rational limitations of any formulation, be it in legislation or in solemn acts such as wills. François Gény wrote:

\begin{quote}
Et, tout ceci encore reste indépendant d'une volonté contraire, manifestée par l'auteur de la loi, en ce sens que, si, par certaines définitions ou par d'autres éléments techniques, il peut assigner à son langage un caractère conventionnel, du moins, et quel qu'il en ait, se voit-il toujours imposer les limites rationnelles, que comporte toute volonté intelligente, traduite en une formule.\textsuperscript{19}
\end{quote}

No legislator could wish for strict literal application for even its best defined formulas when such an application would fly in the face of his reasons for adopting the formulas in the first place.

2. The Foreseeability of Future Situations

The \textit{Code civil} was simply not meant to apply to many situations because it could not foresee all possible events or all possible future changes in "reality." Legislation could thus neither be universal nor timeless. Gény explained: "Si affiné qu'on le suppose, l'esprit de l'homme n'est pas capable d'embrasser, dans son entier, la

\textsuperscript{17} [The legislator expresses his will, of which he makes the law, in a formula. This formula, once consecrated in accordance with parliamentary procedure, appears as the sole translation of legislative thought. It alone transmits the content of the sovereign's command, both to those who are subject to the law, as well as to those who apply it. It is, therefore, necessary for the legislator to pursue a double objective: on one hand, he must determine exactly the scope of the rule he intends to establish as law; on the other hand, he must be able to embody his full legislative will in the formula he adopts.] 1 id.; see also 1 id. at 277.

\textsuperscript{18} See 1 id. at 119.

\textsuperscript{19} [Yet, the author of the law always finds limits imposed on his attempts to fix his will in a formula; rational [interpretation] may always go contrary to his intent, even if he tries to assign to his language a conventional character, through definitions or other technical elements.] 1 id. at 120.
synthèse du monde où il se meut."20 Unable to comprehend all of the different facets of contemporary life, it was impossible to legislatively deal with the future. Gény wrote:

Et, cette infirmité irremédiable est particulièrement sensible dans l’ordre juridique, qui, pour être saisi en totalité, supposerait connus, à l’avance, tous les rapports, pouvant susciter, entre les hommes, des conflits d’aspirations ou d’intérêts. Imaginons, par impossible, un législateur assez perspicace pour pénétrer, d’un large et profond coup d’œil, l’ensemble de l’ordre juridique de son époque, encore faudrait-il reconnaître qu’il ne saurait prévoir, pour les régler à l’avance, tous les rapports futurs.21

For this reason, Gény argued that the search for legislative intent, like any other type of interpretation, relied “sur la fiction d’une volonté, que le législateur a négligé d’exprimer.”22

By itself, legislation could never be complete and would never be able to respond to all situations. Thus, the fundamental postulate of the classical myth, that all legal solutions could be derived solely from written legislation, had to be rejected.

3. The Consequences of Legislative Void

The “juristes inquiets” argued the classical claim that the intent of the legislator was that whatever the Code failed to prohibit it meant to permit was nonsensical and circular. Gény wrote:

En réalité, dire qu’én semblables hypothèses, le silence de la loi écrite laisse place à l’indépendance des hommes, c’est ne fournir aucune règle saisissable à l’interprète. Et, la seule solution générale, vraiment pratique, serait plutôt celle, que formulent certains interprètes de notre code civil, quand ils décident avec une netteté brutale: à défaut d’un appui positif au texte légal, la demande doit, purement et simplement, être rejetée par le juge. Mais, il est clair que pareille solution est, pour le cas prévu, l’aveu d’une absence complète de règlement juridique. . . Bref, on rentre dans le cercle, qui consiste à affirmer la plénitude d’une œuvre, qu’on sait pertinemment être foncièrement incomplète. Par là

20. ["As refined as we assume it to be, the human spirit is incapable of embracing in its entirety, the synthesis of the World where it lives."] 1 id. at 117.

21. [And this irremediable weakness is particularly acute in the legal order: a full comprehension of this order would presuppose prior knowledge of all human relations that might give rise to conflicts of aspiration or interest. Even if one could imagine the impossible, a legislator perspicacious enough to penetrate the totality of his epoch’s legal order with a wide and deep glance, one would still have to recognize that such a legislator could not possibly foresee all future relations in order to regulate them in advance.] 1 id.

22. ["on a fictive will that the legislator had neglected to express."] 1 id. at 35.
mème, on méconnaît la liberté, que la loi a voulu conférer au juge. 23

Far from confirming the logic of the classical system, the abstract notion of freedom undermined it. Rejecting a claim on the ground of absence of positive text amounted to the recognition of a legislative gap. The abstract notion of freedom hid a logical vicious circle by assuming the gaplessness of a legislative text known to be fundamentally incomplete.

Legislation was intrinsically incomplete and thus, could not, by itself, dictate solutions for all legal situations occurring within the domain of positive law. Gény stated:

[N]ous sommes conduits à écarter ce que j’ai appelé le postulat essentiel de la méthode courante: l’idée que toute solution positive doit avoir sa base, au moins virtuelle, dans la loi écrite. 24

On all these bases, the “juristes inquiets” denied the “completeness” of the legal system.

B. The Critique of Conceptualism or of the Method of Legal Constructs

According to legal classical ideology, the Code civil constituted a coherent masterpiece. The “juristes inquiets” attacked the classical claim that what appeared to be gaps, conflicts, and ambiguities in the legal order could in every single case be resolved with logical precision through the exegetical method of induction and deduction. According to the “juristes inquiets,” the exégètes maintained the illusions of completeness and coherence through the abuse of the logic of the reasoning method. In this section, I will briefly discuss (1) the classical method; (2) the “juristes inquiets” critique of its coherence; and (3) their allegation of abuse.

23. [In reality, saying that the law’s silence gives way to men’s independence in such cases provides no comprehensible rule to the interpreter. And, the only general, truly practical solution would rather be that which is formulated by certain interpreters of our Civil Code who decide with brutal clarity that a legal claim must be purely and simply dismissed by the judge when positive support from the legal text is lacking. However, it is clear that such a solution amounts to an admission of a complete lack of legal regulation for the case in question. . . . In short, we enter a circle that consists in asserting the completeness of a system (œuvre) which we know full well is incomplete. In this way, one ignores the freedom that the law wishes to confer on the judge.] 1 id. at 197.

24. [If]We are led to set aside what I have called the essential postulate of the current method: the idea that all positive solutions must be based upon the written law, at least to all intents and purposes.] 1 id. at 121.
1. The Method

Legal classicists contended that the exegetical method consisted of making inductions and deductions of rationally necessary consequences from existing legal rules and principles. The classicists asserted that this constituted a superior process of legal reasoning because it guaranteed predictable and certain results that were also faithful to legislative intent. Classicists solved particular legal problems by deducing legal consequences from general ideas. However, French legislation generally expressed only concrete rules. Their founding principles were excluded from the actual text. A twofold operation was therefore necessary to resolve a gap, conflict, or ambiguity. The first step consisted of extracting an unstated legal principle or distinction, called a “construct,” from the legislative text. The second step was to deduce legal consequences from the construct. Gény wrote:

De sorte que, le plus souvent, le droit ne peut être fécondé par la logique, qu'au moyen d'une double opération en sens inverse. Il faut, d'abord, de la loi, ou des règles de droit qui s'en dégagent, monter au principe supérieur, et de celui-ci ensuite déduire les conséquences.26

The critique of this method, or the anti-conceptualist stance, was a primary element in the “juristes inquiets” criticism of the classicist abuse of legal reasoning.

2. The Problem of Coherence

The “juristes inquiets” demonstrated that in many cases even the most careful application of the method would yield either no solution or contradictory solutions, and that the claim of the classicists to have resolved the gaps, conflicts, and ambiguities by logically necessary induction of “constructs” was false. The process of constructing “constructs” was “subjective,” meaning that there was choice involved: more than one potential construct was available, and the choice as to which to use to deduce a subrule had therefore to be guided by “extra-juristic” considerations.

Often, the reason for the indeterminacy of the exegetical method was that the system, contrary to the claims of the classicists, was

25. See 1 id. at 45.
26. [In this way, law most often can only be enriched by logic through a double operation moving in reverse direction. First, from the law and its derivative rules, one must ascend to a superior principle; then, from that principle, one must deduce the consequences.] 1 id.
not "coherent." Time and again, the critics demonstrated that the variety of specific code provisions within given areas of law had to be understood as stemming from inconsistent or contradictory general principles. No higher, overarching meta-principle explained why the legislator favored one principle in choosing one rule, but another when choosing a second rule, and a compromise in a third. The legal researcher was required to make a choice between competing rational concepts. Different choices had the potential to lead to differing or conflicting results.

Legal constructs were helpful conceptual tools that served to rationalize the existing provisions of positive law. The "juristes inquiets" did not have a problem with the subjective character of legal constructs. They denounced the fact that the subjective choices, made during the development of abstract legal concepts, were concealed. In most cases the response to a legal problem was suggested, if not imposed, by legal instinct or tradition, rather than by "logic." Gény, for example, recognized the significant unconscious constraint that legal education and legal culture generally placed on the classical method.27

To maintain the appearance of coherence, legal classicists created specific circumstantial requirements for using one construct or another. In contract law, for example, consent required the meeting of minds. This principle was interpreted in ways that diverged or were even contradictory. The requirement changed depending upon the particular circumstances of a case. For instance, different solutions existed with regard to contracts between absent parties or where there were stipulations in favor of a third person or where a unilateral contract existed.28 Gény discarded these theoretical constructs as fictive creations based on vague tradition or pure imagination. Their legitimacy was based on the fact that they were devel-

27. Gény wrote:
Au fond, elle se traduit toujours en une conception subjective, qui ne pourrait s’obtenir que par tâtonnements, si elle n’était, dans la plupart des cas, suggérée, par ne pas dire imposée, par l’instinct juridique ou par la tradition.—On sent, d’ailleurs, que son adoption ou son choix exigent infiniment de tact et de sens pratique; car c’est d’elle avant tout, que dépendent les résultats du procédé.

[Basically, it is always expressed in a subjective conception, which one could not obtain through trial and error, if it weren’t, in the majority of cases, imposed by legal instinct or by tradition.—One feels, in addition, that its adoption or choice requires infinite tact and practical sense, since the results of the procedure depend, above all, on it.]

1 id.
28. See 1 id. at 48.
oped under the pretense of being purely logical interpretations.29 Both the abstract concept, meeting of minds, and the consequences that were derived from it were better understood as choices.

The conceptual distinction that was made between “real rights” (droits réels) and “rights based on credit” (droits de créance) provided another illustration of the shortcomings of legal classical conceptualism. Classical doctrine required direct contact with an object in order for a real right to exist. A right based on credit was exercised through the mediation of another person.30 Gény believed that this distinction was useful as long as its subjective character was not lost from view.31 Problems arose when jurists perceived this distinction as objectively necessary. Gény explained about the “real rights” and “rights based on credit” distinction:

[Je prétends que c'est faire fausse route que vouloir les conclure a priori de la notion abstraite des deux sortes de droits; qu'en réalité, elles ne s'imposeraient pas sur un terrain strictement rationnel; que la logique pure ne saurait, sans l'intervention prépondérante du point de vue téléologique, ni les suggérer ni les justifier; que, par suite elles n'ont, en elles-mêmes, qu'une valeur toute subjective, comme les conclusions d'une pure hypothèse scientifique, devant rester prêtes à céder sur une plus profonde intuition des besoins de la vie juridique.32

These judicial institutions, “real rights” and “rights based on credit,” created different rights for the holder. A person who had a real right over an object could take advantage of a “right to follow” (droit de suite)—which is the right to take the object from a third party—as well as a preferential right (droit de préférence) conferring a preferred rank among creditors.33 These prerogatives did not exist with regards to a right based on credit. Legal traditionalists explained that these distinctions stemmed from the logic on which the two rights were based.34 Gény rejected this line of thinking. He

29. See 1 id. at 126.
30. See 1 id. at 139.
31. See 1 id. at 140, 142–44.
32. [Jurists were on the wrong track to want to conclude a priori that there were two types of law based on legal constructs; in reality, it is unnecessary from a strictly rational point of view; pure logic cannot put forth or justify a concept without the preponderant intervention of the teleologic interpretation; these concepts in and of themselves only have a subjective value, just like the conclusions of a purely scientific hypothesis, they always have to be ready to yield to the deeper intuition of judicial needs.] 1 id. at 139.
33. See 1 id. at 140.
34. See 1 id.
criticized traditionalists who elevated these legal constructs to the level of an objective reality.\textsuperscript{35}

Gény cited numerous examples showing how these two notions contradicted each other. He also demonstrated how the law tended to blend the two constructs together. For example, in a commercial lease, the rights of a tenant were not the same in theory as in law. In theory, the lease gave the tenant a “right based on credit.” The \textit{Code civil} went further by granting the tenant a “right to follow” and even a possible preferential right.\textsuperscript{36} To those who dismissed this example as an anomaly justified by particular circumstances, Gény thundered, “La logique ne transige pas!”\textsuperscript{37}

\begin{flushright}
35. See 1 id.
36. See 1 id.
37. “[Logic cannot make compromises!”] 1 id. at 141. Patrimony, which was viewed as an independent entity and a \textit{sui generis} construct, provided Gény with yet another example of the subjective nature of legal classical constructs. See 1 id. This notion evolved from an \textit{a priori} and purely conceptual idea that “le patrimoine est une émanation de la personnalité” (“patrimony emanates from one’s personality”). 1 id. Starting with this abstract principle, legal classicists, including Aubry and Rau, deduced the following:

(1) que le patrimoine est un et indivisible, excluant, de sa nature, tout fractionnement en universalités juridiques distinctes; (2) qu’il est, comme inséparable de la personne, inaliénable par tous actes entre-vifs, même devant avoir effet seulement après décès du titulaire; (3) qu’il ne peut transmettre, à proprement parler, que grâce à une représentation parfaite du défunt, et au profit des seuls héritiers, qui continuent véritablement sa personne juridique.

(1) that patrimony is one and indivisible, it excludes by its very nature any division into distinct judicial universalities; (2) that it is inseparable from the person, is alienable in all inter vivos acts, even if the act were only to come into effect after the death of the holder; [and (3) that it cannot be transmitted, strictly speaking, except by perfect representation of the deceased, and only in favour of the heirs who truly carry on his judicial personality.]

1 id. at 142. Gény rebutted the idea that this theory represented the purest judicial truth. He felt that it had been created by borrowing a simple element from reality, which was deformed and made unnatural by the subjective work of interpreters. See 1 id. at 143. Nonetheless, Gény accepted the validity of the elementary notion of patrimony which embodied the rights and obligations of an individual. He wrote:

\begin{flushleft}
Assurément, il est naturel de se représenter l’ensemble des droits et obligations d’une personne, comme formant un tout complexe, indépendant des objets particuliers qui le composent, et soumis à un régime homogène répondant à l’idée d’universalité juridique.
\end{flushleft}

[Of course, it is natural to imagine the ensemble of a person’s rights and obligations as forming a complex whole, independent of the objects which compose it, and subject to a homogeneous regime conforming to the idea of legal universality.]

1 id. He objected to the fact that this subjective concept defined the essence of personality from which all other essential attributes were drawn. The notion of patrimony could not encompass all possible situations and solutions. The very attempt to do
According to legal classicists, the abstract legal concepts that they developed were founded in legislative intent. For this reason, the concepts represented an objective reality rather than a subjective choice.\textsuperscript{38} Classicists also believed that legal constructs were necessary limits to the arbitrary power of judges. Gény refused to accept these justifications. He felt that the classical method camouflaged the subjective choices that had been made according to policy considerations that constituted the real foundations of the legal order. The richness of the mechanism was derived from the shrewd and ingenious character of those who manipulated it.\textsuperscript{39} Under the

\textit{La reconnaissance de patrimoines d'affectation, constitués au moyen de fondations, et par l'intermédiaire des personnes morales publiques; l'interprétation restrictive des dispositions légales qui empêchent les pactes sur succession future; la séparation absolue des effets de la transmission héréditaire, particulièrement au point de vue passif, d'avec l'idée, quelque peu surannée, de la continuation de la personne du défunt par ses héritiers.}\textit{[The recognition of appropriated patrimony [property and debts affected to a determined goal or subjected to a particular legal regime such as the patrimony of corporations or trusts], constituted through foundations, by the intermediary of public corporations; the restrictive interpretation of legal provisions that prevent agreements about future succession; the absolute separation of hereditary transmission, particularly from the 'debts point of view, with the idea, a bit outdated, of the continuation of the deceased by his heirs.]}\textit{1 id.}

\textsuperscript{38} A primary classical fiction was the perception that case law and doctrine were extractions from necessary logical deductions which stemmed from the original legislative intent:

La fiction était de croire, non pas à proprement parler que la loi suffisait à tout—tout le monde sait qu'il n'est aucune loi codifiée qui puisse embrasser et prévoir tout l'ensemble des rapports juridiques—mais que la jurisprudence, et également la doctrine, en interprétant la loi, ne se plaçaient qu'au point de vue d'une recherche de volonté, et qu'elles ne faisaient que tirer les solutions logiques qu'ząd acceptées le législateur; non pas le législateur moderne, mais l'auteur même de la loi, quel que fût l'intervalle à jeter en bloc entre le passé et le présent.

[The fiction was not the belief, strictly speaking, that the law was all-encompassing, since everyone knows that no codified law can embrace and foresee the ensemble of legal relations, but the following: that case law and scholarly commentary, in interpreting the law, only directed themselves at an inquiry into [legislative] will, and that they only drew out the logical solutions accepted by the legislator—and not the modern legislator, but the very author of the law, whatever interval of time had passed between the past and the present.]

Saleilles, supra note 11, at xiv.

\textsuperscript{39} \textit{See 1 MÉTHODE D'INTERPRÉTATION, supra note 4, at 51.}
guise of the legislator’s intent, legal theorists could substitute some of their own ideas or even fabricate completely new constructs.\textsuperscript{40} Legal commentators did not passively receive law, they created law.\textsuperscript{41}

3. Abuse

The “juristes inquiets” argued that, in the face of the actual incoherence of the Code, and of the consequent indeterminacy of exegesis, the classicists “abused” the exegetical method. That is, they manipulated its logical operations in order to give their specific resolutions of apparent gaps, conflicts, and ambiguities that permeated the legal system a false appearance of logical necessity.\textsuperscript{42} Génry summarized the misapplication of the logical processes and thus defined the negative aspects of conceptualism:

\textit{Cet abus consiste... à envisager, COMME DOUÉES D’UNE RÉALITÉ OBJECTIVE PERMANENTE, des conceptions idéales, PROVISOIRES ET PUREMENT SUBJECTIVES de leur nature. Et, cette fausse manière de voir, qui, à mon sentiment, nous représente comme un vestige de l’absolu réalisme du moyen âge, aboutit à faire tenir, A PRIORI, tout le système du droit positif, en un nombre limité de CATÉGORIES LOGIQUES, qui seraient prédéterminées par essence, immuables dans leur fonds, régies pas des dogmes inflexibles, insusceptibles par conséquent de s’assouplir aux exigences changeantes et variées de la vie.}\textsuperscript{43}

In Saleilles’s view, the classical detachment from material reality and its propensity to conceal the true origins (les réalités profondes) of its legal constructs were due to its manipulative abuse of conceptualism.\textsuperscript{44} As a social science, the task of law was not to develop logical reasoning but to “penetrate” reality.\textsuperscript{45} Under the

\begin{enumerate}
\item\textsuperscript{40} See 1 id. at 52.
\item\textsuperscript{41} See 1 id. at 41.
\item\textsuperscript{42} See 1 id. at 121. It also led to censure processes of forced interpretation which carry the search for legislative intent to abusive ends. See 1 id.
\item\textsuperscript{43} \textit{(This abuse consists... of perceiving, AS ENDOWED WITH A PERMA-
NENT OBJECTIVE REALITY ideal conceptions, THAT ARE PROVISIONAL AND
PURELY SUBJECTIVE by nature. And, this false manner of seeing, which to my
point of view, represents a relic of absolute realism from the Middle Ages results in
holding, A PRIORI, the entire system of positive law, to a limited number of LOGI-
CAL CATEGORIES, which would be predetermined in essence, perpetual in substance,
regulated by inflexible dogma, and consequently not susceptible to be flexible to the
varied and changing necessities of life.)} 1 id. at 129.
\item\textsuperscript{44} RAYMOND SALEILLES, DE LA PERSONNALITÉ JURIDIQUE: HISTOIRE ET
THÉORIÈRES: VINGT-CINQ LEÇONS D’INTRODUCTION À UN COURS DE DROIT CIVIL COMPARÉ
SUR LES PERSONNES JURIDIQUES 671 (1910).
\item\textsuperscript{45} See Raymond Saleilles, \textit{Compte-rendu Critique: Marcel Planiol—Traité
legal classical regime, an artificially created construct developed into an objective reality that possessed a formal and separate existence. What had initially been fiction eventually became reality.46 Rather than analyzing the realities hidden behind the artificial construct and adapting the construct to the complexities of reality, conceptualization allowed jurists to proceed through “assimilation,” which consisted in the absorption of one doctrine or institution into another:

Et ce danger se présente dans tous les cas nombreux où le droit procède par voie de fictions, en vue de sanctionner par analogie certains rapports juridiques dignes d'intérêt, et ne rentrant pas dans les cadres légaux. Au lieu d'analyser les réalités qu'ils recouvrent et d'adapter la construction qui s'y réfère à toutes les complexités qui s'en dégagent, on procède par voie d'assimilation, on fait de cette assimilation une entité, ayant, dans l'esprit tout au moins, une existence distincte et formelle . . .47

Saleilles used the example of the corporation, known in civil law as the “personne morale” (moral person), to illustrate his point of view. This legal institution was devoid of all the composite elements of personality:

On crée de toutes pièces une personne nouvelle, qui devient complètement indépendante des individualités qui la composent, elle les ignore. C'est un chef-d'œuvre d'unité; mais c'est aussi un chef d'œuvre d'abstraction. Et cette abstraction, qui ignore les réalités auxquelles elle se rattache, prend une vie indépendante d'elles, elle agit en dehors d'elles, sans qu'il y ait aucun lien d'action ou de réaction entre ces deux entités séparées, d'une part l'être abstrait dont l'existence est purement juridique, et d'autre part, l'être collectif qui est une réalité vivante.48

---

46. See Saleilles, supra note 44, at 613.
47. [And this danger is present in all the numerous cases where law proceeds by means of fictions, with the goal of sanctioning by analogy certain legal relations that merit interest even though they do not fit within existing legal frameworks. Instead of analyzing the realities they embody and adapting the legal construction to their complexities, one proceeds by means of “assimilation”: one makes of this “assimilation” an entity which has a distinct and formal existence, at least in the mind . . .] Id. at 355.
48. [We create out of whole cloth a new person, who becomes completely independent from the individuals out of whom she has been created and who has no knowledge of them. This creation is a masterpiece of unification; it is also a masterpiece of abstraction. And this abstraction, which ignores the realities to which it is related, takes on an independent, active life of its own. There is no link of action or reaction between those two separate entities, the abstract being whose existence is purely legal, on the one hand, and the collective being who is a living reality, on the other.] Id. at 654.
Ignoring reality, the law gave this moral person an independent life of its own. Yet, this abstract being had a purely legal existence while the individuals who had created it were part of a “living reality.”

The internal critique taken as a whole was supposed to set the stage for the “juristes inquiets” countervision by showing that the classicists misrepresented how the system actually worked. The apparent gaps, conflicts, and ambiguities were indeed being resolved, but not by the exegetic method, in spite of the attempts of the method’s abusers who tried to make it appear that way.

III. THE COUNTERVISION

The essence of the “juristes inquiets” countervision was the claim that in fact law “evolved” to “meet social needs,” rather than consisting of prefixed rules applied over and over to new situations. The engine of evolution was the work of various kinds of legal practitioners, judges, and doctrinal writers who exploited the gaps, conflicts, and ambiguities to generate new rules to meet new “realities” based on “social needs.”

A. The Principle of Evolution to Meet Reality and Social Needs

The “juristes inquiets” believed that the law had an immanent tendency to harmonize itself with the surrounding “social reality.” However, they did not clearly define the meaning of the

49. See Raymond Saleilles, École Historique et Droit Naturel, d’après quelques Ouvrages Récents, 1 REVUE TRIMESTRIELLE DE DROIT CIVIL 80, 95 (1902).
50. See id. at 106–07.
51. The slogan “Law must be harmonized to society” can be found everywhere in the writings of the “juristes inquiets.” For instance, Gény wrote: “Avant tout, le droit positif doit rester chose vivante. Or, vivre, c’est se mouvoir et se transformer. Pour le droit, c’est plus encore: c’est lutter, en vue d’une parfaite et constante adaptation aux exigences de la vie sociale.” [“Above all, positive law must remain a living thing. Now, to live is to move and change. For law, it means something more: to struggle, with the aim of a perfect and constant adaptation to the demands of social life.”] 2 MÉTHODE D’INTERPRÉTATION, supra note 4, at 225.

Later, he wrote: “Tout au rebours, on paraît rester trop facilement convaincu que, dans sa sphère propre de réglementation positive, le droit puisse se suffire à lui-même. . . . En définitive, donc, le droit positif se présente à nous, comme une mise en valeur des sciences morales et politiques.” [“On the contrary, one seems to remain too easily convinced that in its own sphere of positive regulation, law can suffice to itself. Positive law finally presents itself to us as a valorization of moral and political sciences.”] 2 id. at 232. He also wrote:

Les observations, qui précèdent, impliquent que l’interprétation juridique, loin d’être bornée par la loi écrite ou par les catégories étroites d’une
logique abstraite, ne peut trouver son plein champ de développement et, pour ainsi dire, son terrain de culture propre, que dans le milieu moral, social, économique, qui est comme l'atmosphère du monde juridique.

[The preceding observations imply that legal interpretation, far from being limited by written law or by the narrow categories of abstract logic, can only find its full field of development and, so to speak, its own field of cultivation, in the moral, social, and economic milieu, which is like the atmosphere of the legal world.]

1 id. at 220.

In his preface to Gény’s Méthode d’Interprétation, Saleilles wrote in 1899:

[L]e droit n’est plus une science isolée, qui se suffise à elle-même, et qui puisse se renfermer dans ses textes et ses formules; le droit est une science de faits, une science du dehors, qui comme toutes les sciences, puisse dans la nature des choses ... ses éléments premiers de formation et d’interprétation.

[Law is no longer an isolated science, sufficient unto itself, which could withdraw into its texts and formulas; law is a science of facts, a science of the outside, which, like all sciences, draws from the nature of things ... its basic elements of formation and interpretation.]

Raymond Saleilles, Preface to 1 MéTHODE D’INTERPRÉTATION, supra note 4, at xxiv.

Elsewhere Saleilles wrote: “Le droit ne vit pas de ces abstractions [conceptions abstraites extraites d’analyses philologiques des textes]; il vit d’une adaptation constante aux besoins qui se font jour,” [“Law does not live from these abstractions [abstract conceptions drawn from philological textual analysis]; it lives from its constant adaptation to the needs which appear,”] and later, “Or l’homme ne vit pas d’abstractions, mais de réalités” [“Man does not live from abstractions, but from realities”]. Saleilles, supra note 9, at 99, 117.

Likewise, Gaston Morin entitled one of his conclusions “Vers un ordre juridique plus réaliste et plus humain” [“Towards a More Realistic and Human Legal Order”]. JULIEN BONNECASE, SCIENCE DE DROIT ET ROMANTISME 67 (1928) (quoting GASTON MORIN, LA LOI ET LE CONTRAT: LA DÉCADENCE DE LEUR SOUVERAINETÉ 61 (1927)). The subtitle of Julien Bonnecase’s 1926 Science du Droit et Romantisme, “Le conflit des conceptions juridiques en France de 1880 à l’heure présente,” [“The Conflict of Legal Conceptions in France from 1880 to the Present.”] is itself revealing of the clash between the different currents of legal thought. See id. Bonnecase also believed that law had to be harmonized with social reality. About the relation between legislation and the social context, he wrote:

La mise en application du texte suppose donc connu le but social et celui-ci ne peut lui-même être compris que par le lieu social, les rapports sociaux à travers lesquels est appelé [sic] à se mouvoir l’institution créée par la loi.

Nous ne saurions trop le répéter, un texte de loi est une formule abstraite, faite pour la vie mouvante; il faut bien se garder de la discuter en dehors de son lieu, sous peine de lui faire manquer son effet et de tomber dans l’erreur. C’est cependant ce qu’a fait l’école de l’Exégèse ... .

[The application of a text thus assumes knowledge of the social purpose; this purpose can itself only be understood by the social context and the social relations within which the institution created by law will evolve. We can not repeat often enough that a legal text is an abstract formula, made for an ever-changing life. One must never discuss it outside of its context, at risk of making it miss its goal and falling into error. This is, however, what the École de l’Exégèse has done ... .]

JULIEN BONNECASE, L’ÉCOLE DE L’EXÉGÈSE EN DROIT CIVIL 227 (1924).
terms "social reality" and "harmonization." Was their aim to change only the law (législation), or to transform society as a whole through the law (droit)? Were they interested in merely modifying or reforming the law, or was their purpose to provoke a revolution? Did harmonization mean that the law mirrored social transformation or was the legal system to be the catalyst of social reform?

1. Social Transformations Give Rise to New Social Needs

Saleilles contended that the social setting which had given birth to the Code civil in 1804 had totally changed. However, the fundamental judicial principles of the Code civil had not been modified or altered. Numerous social transformations involving new ideas; economic innovations; the legal relationship between capital, labour, and consumers; new international rights; and the search for more autonomy and security in contractual relations gave rise to novel social needs requiring new legal applications. Saleilles wrote:

Qu'on ait eu cette prétention [que la loi suffisait à tout] aux époques tout à fait voisines de la mise en œuvre du Code civil, alors que l'on était sous l'influence immédiate des conditions sociales qui l'avaient inspiré, et que l'on restait imbui de l'esprit même qui en avait dirigé la confection, rien n'était plus justifié. Mais, depuis, le milieu social a changé du tout au tout. D'autres idées se sont fait jour, non pas que les principes éternels de toute justice se soient modifiés ou altérés; mais les applications quiussent en être faites se présentent dans des conditions désormais toutes différentes. Des créations d'ordre économique, que personne ne pouvait prévoir il y a un siècle, ont bouleversé les rapports juridiques entre le capital et le travail, entre ceux qui produisent et ceux qui consomment; et des aspirations nouvelles sont issues de cet état de choses jadis insoupçonné. Des droits nouveaux se sont révélés; des besoins surtout d'une nature plus universelle, plus internationale, si je puis dire, se sont propagés. Les volontés ont réclamé un surcroît d'autonomie propre; mais, en même temps, et

Finally, in a book review, Gény wrote:

Au fond, il [Demogue] se propose surtout de mettre à nu les éléments variés et complexes de la vie juridique. Il considère que cette vie se présente, à chaque époque, en une forme propre, harmonisée avec l'esprit du temps, qui se traduit parallèlement aussi dans le style et les tendances de l'art. [Basically, Demogue sought above all to expose the varied and complex elements of the life of the law. He considered that this life presents itself in each epoch in a distinctive form, harmonized with the spirit of the time, which is also carried over into the style and tendencies of art.]

François Gény, R. Demogue.—Les Notions fondamentales du droit privé. Essai critique, r Nouvelle Revue Historique de Droit 110, 113 (1911) (reviewing R. Demogue, Les Notions fondamentales du droit privé: essai critique pour servir d'introduction à l'étude des obligations (1911)).
tout à l'inverse, la sécurité des relations, les nécessités du crédit, peut-être aussi certaines découvertes sociologiques, nous ont montré enfin que le libre jeu des volontés ne suffisait pas à tout, que le contrat allait perdre de sa suprématie ou de son monopole et que, en dehors du libre contrat, il y avait place pour des créations juridiques, nées d'une écllosion coutumière et spontanée, inspirée, par un sentiment de justice et d'équité, par je ne sais quelle intelligence d'une solidarité plus étroite et plus complète, par où les individualités, si jalouses qu'elles soient de leur indépendance, fussent arriver à se soumettre à l'empire de certaines lois générales, dominant de haut le libre jeu de leurs relations juridiques avec les autres. 52

For Saleilles, the need for legal change arose from the fact that the individualist and bourgeois conceptions embodied in the Code civil since 1804 had been overwhelmed by social and economic changes. 53

52. [Nothing was more justified than that we should have had this pretension [that law was sufficient for everything] in periods quite close to the making of the Code civil, when we were under the immediate influence of the social conditions which had inspired it and remained steeped in the very spirit that had directed its construction. The social situation has, however, completely changed since then. Other ideas have come to light—not that the eternal principles of justice have been modified or altered but, rather, that they must now be applied under totally different conditions. Economic creations that nobody could foresee a century ago have completely changed the legal relationship between capital and labor, between those who produce and those who consume; new aspirations have also emerged from these unprecedented conditions. New rights have been revealed; above all, needs of a more universal, of a more, so to speak, international nature, have proliferated. Individuals have demanded greater autonomy for their will; but, at the same time, and quite to the contrary, the security of relationships, the necessities of credit, perhaps also certain sociological discoveries, have shown us at last that the free play of individual wills is insufficient. They have shown that contract was going to lose either its supremacy or its monopoly; they have also shown that, outside free contract, there was room for legal creations born of customary and spontaneous developments, inspired by a feeling of justice and equity, by an understanding of a closer and more complete solidarity whereby individuals, jealous as they may be of their independence, must eventually submit to the empire of certain general laws that govern from above the free play of their legal relations with others.] Saleilles, supra note 51, at xiv.

53. Saleilles claimed that the 1804 Code civil was the "Code de la Bourgeoisie." Saleilles, supra note 9, at 115. Originally, "le Code civil allait devenir le droit privé d'une démocratie" ["the Code civil would become the private law of a democracy"]. Id. It had taken half a century of social inequality and economic hardship to belie the Code's claim to have brought equality and freedom. Nor had class divisions and the "régime de la grande propriété" ["large estate ownership regime"] been eliminated despite the formal abolition of such pre-Revolutionary institutions as the sale and inheritance of "privilèges" and rules governing succession to property:

En théorie, on avait échafaudé une vaste construction dans laquelle tous devaient trouver place. En fait, il arrivait que seules les classes possédones s'y trouvaient à l'aise et que les autres restaient à l'entrée, luttant et s'écrasant pour y pénétrer. A ceux-là seulement qui avaient franchi la porte,
Gény was less forthcoming than Saleilles in his comments concerning the concept of "social reality." This is particularly surprising in light of the fact that an important part of Gény's Free Scientific Research method relied on an interpretative principle which he called the "positive nature of things" (nature des choses positives). This concept referred to "living realities," which Gény defined as being the social context of legal institutions and doctrines. For

Id.

After a full century of use, the need for a "Code du travail" (labour code) and a "Code de la liberté" (freedom code) to complement the Code civil, or the "Code de la propriété" (property code), was recognized. For Saleilles, these codes would be followed by the "Code de l'association qui sera la loi sociale par excellence, l'analoge pour le droit privé de ce qu'est le régime démocratique pour le droit public" ("Code of free association which will be the ideal social law, the analogue for private law of the democratic regime for public law"). Id. at 116. Saleilles also pointed out that members of the labour class, children born out of wedlock, and women were the three categories of people who were left out of the Code civil. See id. By 1904, it became clear that more favourable treatment was necessary. See id.

54. See, e.g., 2 MÉTHODE D'INTERPRÉTATION, supra note 4, at 88–93. Gény wrote: Telle que l'avait indiquée Runde et qu'elle a été comprise à sa suite, la nature des choses, envisagée comme source (lato sensu) du droit positif, repose sur ce postulat, que les rapports de la vie sociale, ou, plus généralement, les éléments de fait de toute organisation juridique (du moins possible), portent en soi les conditions de leur équilibre, et découvrent, pour ainsi dire, eux-mêmes, la norme qui les doit régir. [As Runde has shown . . . . . , to consider the nature of things as a source (lato sensu) of positive law rests on the postulate that the relations of social life, or more generally, the factual elements of any (at least possible) legal organization bear within themselves their conditions of equilibrium and reveal by themselves, so to speak, the norm which should govern them.]

2 id. at 88–89. He also wrote:

Ici, intervient donc, comme matière d'investigation, à la fois riche et féconde, cette nature des choses positive, qui, accessible aux seuls procédés scientifiques, va élargir singulièrement l'horizon du jurisconsule, et le faire nécessairement sortir du champ, un peu étroit, de l'interprétation des sources, pour proposer, à son étude, le terrain inépuisable des réalités vivantes. [Thus, intervenes here, as a rich and fertile means of investigation, this positive nature of things, which, accessible only by scientific method, enlarges singularly the jurist's horizon and makes him leave behind the somewhat narrow domain of the interpretation of legal sources to propose, in his analysis, the inexhaustible terrain of living realities.]

2 id. at 114.

55. The notion of "nature des choses" ("nature of things") pushed legal interpret-
Gény, the law was a product of social relationships. In this context, the term “social reality” represented a variable, ever-changing, and complex concept. Gény equated “social reality” with a “substance vivante” (living substance).  

2. The Principle of Evolution

For Saleilles, the German Historical School had successfully demonstrated that law evolved by adapting principles to social phenomena. Law was subject to transformations notwithstanding its resistance and conservatism. In addition, these legal transformations that emerged from incessantly changing social forces were influenced by the interests and the conflicts of the various social classes following the laws of “evolution”:

[L’]adaptation aux phénomènes sociaux, et aux sciences qui les ont pour objet, des principes d’évolution. Que le droit se transforme, en dépit de toutes les résistances et de tous les éléments de conservation et de permanence qu’il consolide en lui et autour de lui, c’est une loi aujourd’hui démontrée et qui ne peut soulever désormais aucune objection sérieuse. Que cette transformation se fasse sous la poussée des forces sociales incessamment changeantes, sous l’influence débordante des intérêts en conflit, et des classes toujours en lutte pour la satisfaction de leurs aspirations économiques, c’est là également une vérité de plus en plus évidente, et qui tend à introduire dans cette marche progressive du droit un élément de fatalisme . . . devant lequel tout le monde est d’accord aujourd’hui pour abaisser la raison déductive, celle qui se laisse conduire par des abstractions, et qui veut tirer les faits d’une idée de raison, au lieu d’adapter la raison aux faits.  

For Saleilles, the German Historical School was the first to raze the legal classicists’ “fortress”; the principle of “evolution” could

\[\text{\footnotesize err to use an amalgam of informative sources regarding the social context such as religion; political mores; political, economic, and social organization; history; the individual and social nature of humanity; sociology; individual and collective psychology; social and individual ethics; and political economy. See 2 id. at 131-42.}
\]

56. See 1 id. at 132.

57. ([T]he adaptation to social phenomena and to related sciences of the principles of evolution. That law (droit) develops, in spite of all the resistances and elements of conservation and permanence that it consolidates within and around itself, is a law (loi) that has today been demonstrated beyond any serious objections. It is also an increasingly evident truth that this transformation occurs under the pressure of ever-changing social forces, under the overwhelming influence of conflicting interests and classes always struggling to satisfy their economic aspirations. This process tends to introduce an element of fatalism into the progressive march of law . . . with which everyone today agrees in order to diminish the role of abstract reason, which lets itself be guided by abstractions, and which seeks to draw facts from the ideas of reason, rather than adapting reason to the facts.] Saleilles, supra note 49, at 94.
now bring forth the creative energies of the newly liberated "terrain":

Un fois le terrain ainsi déblayé, l'école historique paraissait merveilleusement armée pour aller de l'avant et faire son oeuvre. La forteresse de l'école déductive était à bas, et devant le terrain qui s'ouvrait et où il n'y avait plus qu'à marcher, un principe d'action féconde et une force créatrice venaient de se révéler, le principe de l'évolution.\(^{58}\)

The concepts of progress and evolution were linked by the ineluctable direction of facts towards justice and reason:

\[
\text{[L']e progrès organique, dans le domaine de l'évolution juridique, se fait dans le sens d'un idéal de justice et de raison: le législateur se trompe s'il prétend le découvrir et l'incarner dans une formule prématurée qui devient le plus souvent une formule fausse; mais les faits qui ne trompent pas nous y acheminent par un insensible progrès.}\(^{59}\)
\]

\[\text{B. The Role of Legal Practice, Custom, and Case Law}\]

Case law, custom, and practice were influential in adapting a given text to ever-evolving circumstances. In his contribution to the book on the centennial of the Code civil, Saleilles explained his view of the judges’ functions:

Si l'on veut apprécier l'oeuvre du Code civil, ce n'est pas à son texte seulement qu'il faut regarder; c'est la machine tout entière, telle qu'elle a été organisée par la main puissante du premier Consul, qu'il faut analyser de près et voir fonctionner. A côté d'un texte aux mailles très lâches, aux formules très souples, et, quoi qu'on en ait dit, aussi peu précises et aussi peu scientifiques que possible, s'étagent une série d'organes prêts au fonctionnement de la vie juridique; notaires et hommes d'affaires qui formulent en actes juridiques les volontés imprécises des parties; avoués qui, au début de l'action judiciaire, dégagent le point de droit à soumettre au juge; barreau, solide et savant, fort de ses traditions, fier de son éloquence, qui forcerà le juge à examiner telle ou telle conception

---

58. [Once the terrain had thus been cleared, the historical school appeared marvelously armed to proceed and do its work. The fortress of the deductive school had been razed and on the field which had opened up, and where one had only to walk forward, a principle of fertile action and a creative force had been revealed: the principle of evolution.] Id. at 95.

59. [Organic progress, in the domain of legal evolution, is achieved in the direction of an ideal of justice and reason: the legislator is mistaken if he claims to discover it and embody in a premature formula which most often becomes a false formula; but the facts which do not deceive us take us there by an imperceptible process.] Raymond Saleilles, Quelques mots sur le rôle de la méthode historique dans l'enseignement du droit, 19 REVUE INTERNATIONALE DE L'ENSEIGNEMENT 482, 486 (1890).
nouvelle, jusqu'au moment inaperçue et non encore jugée; magistrature très dévouée à sa profession, très imbue de l'idée de ses devoirs et de sa haute fonction, défiant des purges abstractions et toujours soucieuse des besoins de la pratique, qui saura concilier son respect du texte avec son rôle d'arbitre des intérêts privés et sociaux: voilà les pièces maîtresses du système. 60

Saleilles concluded, "Tels sont les rouages de cette machine immense, qui va mettre en œuvre et réaliser, dans l'application de la vie, le texte muet et inerte par lui-même du nouveau Code civil." 61

Saleilles recognized that legal practice, in its many different forms and degrees of specialization, complemented the work of the courts in developing the legal system. He wrote:

A côté d'eux, se trouvaient, divisés et répartis dans leurs fonctions diverses, tous ces auxiliaires de l'action juridique, praticiens de toutes sortes, qui réalisaient, dans le domaine de l'application juridique, la loi de la division du travail, de façon à coopérer, chacun dans sa sphère, au perfectionnement de la technique et de la pratique du droit. 62

In their professional capacities, these legal "businessmen" were the forced auxiliaries of different parties for the drafting of private agreements and for executing their judicial transactions. 63 Although their contributions were largely neglected, these legal practitioners refined the law.

----

60. [If one wants to appreciate the achievement of the Code civil, one needs to look at more than the text; one must closely analyze and examine the functioning of the entire machine, as it was organized by the powerful hand of the first Consul. Laid out in rows, at the side of a text with weak links and with formulas that are both very flexible and, whatever one says, as little precise and scientific as possible, are a series of organs suitable for the functioning of the legal machine: notaries and businessmen who formulate in legal acts the imprecise will of the parties; civil servants who, at the beginning of the lawsuit, identify the point of law to be submitted to the judge; the bar, solid and knowledgeable, strong in its traditions, proud of its eloquence, who will force the judge to examine this or that new conception, heretofore unperceived and thus unjudged; a judiciary, very devoted to its profession, highly imbued with the idea of its duties and its high function, mistrustful of pure abstractions and always concerned with practical needs, who will know how to reconcile its respect for the text with its role as arbiter between private and social interests. These are the masterpieces of the system.] Saleilles, supra note 9, at 106-07.

61. ["These are the gears of this immense machine that will put into action and realize, in the application to life, the mute and, by itself, inert text of the new Code civil." Id. at 107.

62. [At their side, distributed among their diverse functions, were all those auxiliaries of legal action, practitioners of all kinds, who implemented the law of the division of labor in the domain of legal application, so as to cooperate in the perfecting of the technique and practice of law, each in his own sphere.] Id. at 105.

63. See id.
Case law created numerous institutions from scratch which were geared to meet new social needs. Insurance law constituted a primary example of such integral creation by case law. Article Academic work fulfilled an important role in preparing and justifying the innovations undertaken by case law. Saleilles identified situa-

64. See id. at 125. Many other examples fell into the category of case law innovations, such as "certaines théories sur les effets de commerce et quelques essais . . . en matière de tutelle des enfants naturels et d'administration légale . . . les constructions jurisprudentielles relatives aux droits de caractère intellectuel, propriété littéraire ou industrielle, droit au nom, et autres de ce genre" ["certain theories about negotiable instruments and a few essays . . . about guardianship of natural children and legal administration . . . case law constructions concerning intellectual property rights, literary or industrial property, the right to one's name, and others of this kind"]). Id.

65. Saleilles wrote:

Je reconnais cependant qu'il subsiste une nuance entre le rôle de la doctrine et celui du juge; c'est que l'une doit préparer et justifier les innovations ou les hardises de l'autre. . . . [L]es innovations jurisprudentielles, si l'on veut qu'elles ne constituent, pour les intéressés, ni surprise, ni arbitraire, doivent être préparées, ou, tout au moins, comme jalonnées, par le mouvement scientifique de la doctrine. Celle-ci, n'ayant pas à décider d'un fait concret, mais à fournir une règle, abstraite pour les décisions à intervenir, décisions dont les appréciations de fait lui échappent, peut, sans risque, ni scrupule, proposer, sans tenir compte des précédents, toute solution ou toute conception nouvelle, qui réponde à son idéal scientifique. Et, si l'idée fait son chemin, ce sera à la jurisprudence de se l'approprier.

I recognize, however, that a slight nuance remains between the role of scholarly writing [doctrine] and that of the judge: the former must prepare and justify the innovations or bold measures of the other. . . . If one wishes judicial innovations to seem neither surprising nor arbitrary to the interested parties, such innovations must be prepared, or at least foreshadowed, by the scientific movement of scholarly writing. Such writing does not have to decide concrete cases, but to provide an abstract rule for future decisions, of whose factual considerations it is unaware; thus, without risk, scruple, or attention to precedent, it may propose any solution or new conception that conforms to its scientific ideal. And if the idea is accepted, judges in their adjudication will appropriate it.

Saleilles, supra note 49, at 104. However, these roles could also be reversed where case law was the driving force for innovations that were resisted by scholars because of their attachment to abstract concepts and deductive reasoning:

On voit par là quelle interversion des facteurs va se substituer à l'opposition classique entre doctrine et jurisprudence: l'une plus littérale, plus conservatrice, plus dédaigneuse des faits et plus attachée aux raisonnements purs; l'autre plus influencée par les nécessités pratiques, allant de l'avant et forçant la main à la doctrine. De quelque côté que vienne l'impulsion progressive, nous la saluons et ne nous plaindrons pas d'une substitution des rôles.

One thus sees the reversal of factors that will replace the classical opposition between scholarly writing and case law: the one more literal, more conservative, more disdainful of facts and attached to pure reasoning; the other more influenced by practical necessities, moving forward and forcing
tions where new rights had been created outside of the parameters of the Code civil. He concluded that legislation was progressively ignored as “new law” emerged. The development of this new law consisted of a three step process: first, an idea based on the needs of “life” and “liberty” was born; second, the new idea was then applied by legal practitioners; and finally, the practice was accepted by case law. In this way, an entire set of legal norms were created, developed, and used outside the confines of the Code civil.

C. Ambiguity and Subjectivity: Virtues Rather than Vices

For the “juristes inquiets,” ambiguity was a source of flexibility; subjectivity was not a defect but rather an occasion for creativity, as long as it was recognized for what it was. Ambiguity enabled law to meet social needs by developing or changing along with reality. Ambiguity was not, as the classicists thought, a defect to be denied or eliminated. The subjectivity of the process of inferring constructs from the mass of particular legal rules was one of the main vehicles of development to meet social needs.

For instance, Saleilles emphasized the fluidity of the Code’s provisions. He believed that fluidity was necessary in order to ensure that the law could adapt to evolving social circumstances. For this reason, Saleilles preferred the vague and abstract sections of the Code civil because they could evolve, adapt, and transform according to societal needs. The evolutionary process could lead to the establishment of legal findings that contradicted, surpassed, or superseded the text of the law and was therefore the key to the Code civil’s success. Saleilles believed that all legal progress was achieved by deformations, simulations, and fictions that were invented to bypass the law (loi): “Tous les progrès juridiques, en droit romain, en droit anglais, et partout ailleurs du reste, se sont produits au moyens de déformations, de simulations, ou de fictions,

---

the hand of scholarship. We will salute the progressive impulse from whichever side it comes and will not bemoan the reversal of roles.

Id. It is not clear what Saleilles meant by the classic opposition of doctrine and case law. However, he believed that the progressive and innovative role should come from doctrinal work and the conservative and prudent impulses from case law. “Mais, régulièrement, scientifiquement, les hardiesse devraient venir de ceux qui taillent dans le vif et qui travaillent dans l'abstrait, et les scrupules de ceux qui se heurtent aux intérêts concrets ressortant des réalités de la vie.” [“However, regularly, scientifically, the bold liberties were to come from those who deal first hand, who work in abstraction, and the scruples from those who deal with concrete interests emerging from the realities of life.”] Id.

66. See Saleilles, supra note 9, at 106.
destinées à tourner la loi. On empruntait des formes légales qui ne faisaient que recouvrir des réalités interdites ou extra-légales.\textsuperscript{67}

Law (droit) necessarily included an indeterminate number of variable, progressive, and evolutionary constructs which could not be completely prohibited.\textsuperscript{68} Without them, there could be neither progress nor legal science:

Le droit ne se passera jamais d’une partie constructive, parce que tout rapport de droit vise un but social, et que, par suite, il répond à une conception idéale qui en synthétise le but, la portée et la vie interne. Construction variable, progressive, et toujours en voie d’évolution, mais construction inhérente à la réalité juridique, et, sans laquelle il n’y a ni progrès, ni science du droit.\textsuperscript{69}

However, Saleilles distinguished between legal concepts that were essential to human thought and legal fictions that dissimulated normative choices and masked the values of a system.\textsuperscript{70} This description of how law worked laid the foundation for asking whether the mistaken classical view of law in general, and, in particular, the abusive practice of the classicists trying to make choices look like mere logical operations, were helpful or harmful to the evolutionary process.

IV. THE EXTERNAL CRITIQUE

The essence of the "juristes inquiets" external critique was that the descriptive claim that law was complete and coherent, along with the abusive practice of the exegetical method of induction and deduction, were harmful to the process of legal evolution. The critics argued that these factors impeded the "progress" of the law in responding to changes in reality so as to meet changing social needs.

\textsuperscript{67} ["All legal progress, whether in Roman law, English law, and everywhere else, was achieved through deformations, simulations, or fictions, aimed at getting around the law. One adopted legal forms which only served to give cover to forbidden or extra-legal realities."] \textit{Saleilles, supra} note 44, at 15.

\textsuperscript{68} \textit{See id.} at 16.

\textsuperscript{69} [Law will never do without a constructive part because every legal relation aims at a social end, and, consequently, corresponds to an ideal conception that integrates its goal, scope, and internal life. This construction is always variable, progressive and in the process of evolution, but it is inherent in legal reality. There would be neither progress nor legal science without it.] \textit{Id.} at 487.

\textsuperscript{70} \textit{See id.} at 629–32.
A. Unconscious Mechanisms

The "juristes inquiets" argued that evolution had had to take place through unconscious mechanisms, because the official version of law denied that it changed or that judges, practitioners, and doctrinal writers were actually lawmakers. Explicitly stated policy considerations would not be so easily manipulated. Progress would be better served by the invocation of policy considerations consciously stated in legal decisions. On this matter, Gény stated:

Mais, le fond de ces conceptions restant essentiellement subjectif, malgré l'apparence dogmatique dont on les recouvre, on ne peut éviter que l'esprit du juge ne les déforme et n'en altère la portée, plus facilement encore qu'il ne pourrait dénaturer les véritables et réels fondements de l'ordre juridique, je veux dire les motifs moraux, psychologiques, économiques, sociaux et politiques, dont on lui laisse l'appréciation dans le silence des textes positifs.71

B. Binary Rule Structures

Moreover, the classicists had a covert preference for a particular kind of solution to legal problems while all the time denying it and claiming to be operating purely logically. Binary, on/off rule structures pleased the classicists because such structures helped maintain the illusion of the complete logical determination of the system. However, such binary structures were particularly ill suited to furthering legal evolution based on reality to meet social needs.

For example, in interpreting the rules governing patrimony (condition d'une masse universelle), legal classicists had to choose between contradictory provisions of the French Code civil.72

71. [However, these conceptions remain essentially subjective, in spite of the dogmatic appearance with which we cover them over. We cannot prevent the judge from deforming them and changing their meaning, especially since he would be unable to denature the true foundations of the legal order, the moral, psychological, economic, sociological and political grounds, the appreciation of which is left to him in the silence of the positive texts.] 1 MÉTHODE D'INTERPRÉTATION, supra note 4, at 170.

72. See 1 id. at 149. "Masse universelle" ["patrimony"] is defined as: La condition d'une masse universelle (biens et dettes), sur laquelle plusieurs personnes ont des droits coexistant, en vertu d'une situation contractuelle qui unifie partiellement leurs intérêts,—telles, la communauté entre époux, les diverses sortes de sociétés ou d'associations,—soulève des problèmes juridiques nombreux, qui engagent des intérêts parfois considérables. [The condition of patrimony [masse universelle] (goods and debts), on which several persons have coexisting rights, by virtue of a contractual situation which partially unifies their interests—such as the community among spouses, the various kinds of companies or associations—raises many legal problems which involves sometimes considerable interests.]
Code's detailed regulation of the community property between spouses, as well as that which existed between commercial entities, solved most difficulties relating to the nature of common or social funds, the rights of each participant, the rules of application of moveable or immovable property, and the rights of third parties.73 However, problems arose when dealing with entities that were similar to these institutions but not exactly the same. These included civil entities and nonprofit associations.74 Classical doctrine provided two possible solutions: "Ou bien, on rattache la masse sociale à une personne civile, ayant son domicile et sa représentation propres, distincte des personnes individuelles des participants. . . . Ou bien, à défaut de cette personnalité civile . . . ce serait le régime de la pure indivision."75

Neither of these solutions was based on any formal legal authority.76 In his analysis, Gény showed that the necessity of choosing either one theory or the other was unwarranted. Rather than adopting an either-or method of overcoming difficulties, the Code civil often favored a mix of the two competing theories.77 Nonetheless, classical legal theorists stressed that the choice between two rigid doctrines was imperative. Notwithstanding the prevalence of this view among theoreticians, Gény observed that many practitioners favored broad, flexible approaches that combined elements of both theories.78

Gény believed that this example illustrated how "l'interprétation moderne s'accusant elle-même en quelque sorte, [est] poussée, par la force des besoins juridiques, à rompre en visière à sa propre méthode" ["modern interpretation, indicting itself in a way, is forced by legal needs to break off from it's own method"]. 1 id. at 156. Otherwise, legal classical orthodoxy led to the paralysis of progress.

73. See 1 id. at 150.
74. See 1 id.
75. ["Either the social equity is bound to a legal person, with its own domicile and judicial representative that is distinct from the individual participants. . . . Or lacking this civil personality . . . a regime of joint ownership"] 1 id. at 151.
76. Gény wrote that an "idée admise a priori, sans être recommandée ni par la vraie tradition historique, ni par la loi, ni par l'intention des parties, ni assurément par la préoccupation de fournir un point d'appui efficace à la pratique" ["idea accepted a priori, recommended neither by true historical tradition nor by law, and certainly not by concern to provide practice with effective support"]). 1 id. at 156.
77. See 1 id. at 152.
78. See 1 id. at 154–55. In contrast with modern case law, Salesilles's work demonstrated how ancient French law never attributed a fictive personality to "sociétés civiles" ["non-commercial corporations"] or to "sociétés commerciales" ["commercial corporations"]. Only the modern doctrine personified concepts. See 1 id. at 154. Ancient law attributed these effects to a concept of communal property "issue de l'idée toute rationnelle, et nullement fictive, de l'autonomie de la volonté" ["which emerged from the completely rational, and in no way fictive, idea of the autonomy of the will"]). 1 id. at 155. Salesilles sought to return to this fertile and less constraining notion.
The question of the burden of risk in contracts illustrated another limitation of rigid dual constructs which was the imprudent use of formulas. Legal classicists had elaborated two opposing adages: res perit domino (the thing perishes for the owner) and res perit creditori (the thing perishes for the creditor). As a result, the risks associated with a contract were imputed to one or the other of the parties. The respective situation of each party was not a factor to be considered. 79

C. Rigidity or Arbitrariness as a Result of Excess Abstraction

The "juristes inquiets" also denounced the general vice of rigidity and arbitrariness that they saw as a characteristic of the classical style of solving legal problems. This system was too rigid and narrow to respond to the needs of society. 80 Gény wrote:

Il semble que l'intelligence du juriste se sente à l'étroit dans ce cercle de conceptions et de systématisations strictement moulées sur les réalités de la vie. En tout cas, elle apparaît, parfois, secouant l'étreinte des contingences,brisant l'enveloppe des besoins sainssables, pour ne plus considérer que les notions pures, et les ordonner en elles-mêmes, indépendamment des circonstances concrètes dont elles sont issues. C'est le régime du concept, isolé des intérêts qu'il représente . . . . 81

Gény believed that the many reactions against a previously uncontested point of view could only be explained: "parce que chacun sent inconsciemment que ce point de vue paralyse l'essor de la théorie du fonds social, sous le rapport des effets pratiques, que requièrent les exigences de la vie" ("because everyone felt unconsciously that this perspective, in view of its practical effects, irremediably paralyzes the development of the social theory [fonds social] required by life's demands"). 1 id. Gény believed that the example of the rules governing "patrimony" (condition de masse universelle) also illustrated the defects of the traditional system of conceptions and legal constructs. They had a limited capacity to respond to concrete problems.

In order to discover the concept of "patrimoine, qui concilie la volonté légitime des membres de la société avec les intérêts des tiers, sous le point de vue supérieur de l'intérêt général," ("patrimony, which reconciles the legitimate will of the members of society with the interests of third parties, in light of the general interest,") one had to "[l]a découvrir que par tâtonnements; et vous ne devez y voir autre chose qu'une approximation hypothétique, essentiellement susceptible de changements, puisqu'elle manque de toute réalité objective" ("discover it by trial and error; you must not see in it anything other than an hypothetical approximation, essentially vulnerable to change since it lacks any objective reality"). 1 id. at 156.

79. See 1 id. at 169.
80. See 1 id. at 149.
81. [It seems that the jurist's intelligence feels narrowed within this circle of conceptions and systematizations strictly molded to the realities of life. In any case, it sometimes seems to shake off the grip of contingencies, bursting the envelope of perceptible needs, in order to consider only pure notions and organize them among themselves independently of the concrete circumstances from which they emerge. This
A consequence of hierarchical legal categorization was that solutions were confined to already existing abstract concepts. Thus, the judicial response to any particular situation had already been determined. Gény believed that the function and goal of legal doctrines and institutions was to create law. Legal classicism ignored this objective. Instead, artificial and utopic notions that had little relation to concrete reality were upheld. Legal constructs were problematic mainly because they were excessively abstract:

Mais, la technique du droit ne se contente pas de dégager les principes et de les revêtir de la forme plastique nécessaire pour la satisfaction des besoins de la vie. Elle s'élève parfois au-dessus de ces réalités, pousse du pied le sol ferme, et d'un bond monte dans la région des idées pures. Ici, interviennent les conceptions et constructions juridiques. On laisse en arrière le but, rationnel et pratique, des institutions, pour n'en retenir qu'un élément idéal, dépourvu de tout contact avec la nature et la vie. Sur cet élément, isolé de son milieu d'écllosion par un effort d'abstraction, le juriste travaille des seules forces de son esprit.—Dépourvues de valeur objective, ces opérations d'une logique transcendantale n'ont, en soi, qu'un mérite purement théorique, et qui dépend de l'ingéniosité de celui dont elles émanent. 82

In this context, Gény analyzed the rule establishing the inalienability of a dowry, which was dealt with in a cursory manner by the Code civil. Problems arose because of a provision of the Code that provided for “the inalienability of the dowry” (inaliénabilité dotale). As a result, legal classicists searched for the fundamental principles underlying this legal institution. They concluded that only two possible explanations existed. 83 The dowry was inalienable either be-

82. [However, legal technique is not satisfied with extricating the principles and dressing them up in such a flexible form necessary for the satisfaction of the needs of life. It sometimes elevates itself above these realities, plants one foot on firm ground and with one leap ascends to the region of pure ideas. It is here that legal conceptions and constructions intervene. One leaves behind the institutions' rational and practical goal, in order to keep only the ideal element deprived of any contact with nature and life. The jurist works solely with the forces of his own spirit on this element isolated from the milieu of its birth by an effort of abstraction.—Deprived of objective value, these operations of transcendental logic have only a purely theoretical merit which depends on the cleverness of those who produce them.] 1 Méthode d'Interprétation, supra note 4, at 190.

83. Gény wrote: “Pour les uns, l'inaliénabilité dotale apparaîtrait comme une incapacité exceptionnelle, atteignant la personne même de la femme. Pour les autres, ce serait une indisponibilité réelle, frappant les biens plutôt que la personne.” [For some, dowal inalienability seems an exceptional incapacity, impairing the very person.
cause a married woman was legally incompetent or because the goods and property in question were inalienable. The consequences of choosing one precept or the other were vastly different. Limited to one of these basic principles, the judicial interpretation as a whole inevitably lacked flexibility. It was riveted in advance to the logical deductions drawn from these two concepts which were considered a priori the only ones possible.84

In stark contrast, case law tended to examine the inalienability of the dowry according to the specific circumstances of the case at hand. Logic was used to elucidate all possible consequences in the existing social context.85 For this reason, Gény found no cases that clearly adopted one theoretical approach or the other. Rather than be caught in a rigid doctrinal framework, the case law was able to adapt to changing circumstances. Gény concluded that concepts, derived a priori and raised to the rank of absolute truth, were risky, useless, and prevented the unearthing of other rational solutions.86

The need to link a practical rule to its theoretical origin carried two erroneous assumptions: (1) that a preconceived theory was essential to justify a practical rule and (2) that such a practical rule could not be justified independently on its own merits.87

For Gény, classicism had also curtailed legal progress “par l’effet des préjugés régnants sur le caractère impériaux et rigide des conceptions et constructions théoriques.”88 Gény used life insurance to illustrate this assertion. As a contract that was neither foreseen nor regulated by private law, it gave rise to much doctrinal research.89 Gény advocated giving effect to the insured’s legitimate

of the woman. For others, it is a real unavailability, striking at goods rather than persons.” 1 id. at 157.
84. See 1 id.
85. See 1 id. at 158.
86. Gény wrote: “Le moindre reproche, que puissent encourir les conceptions de ce genre, lorsqu’on les veut ériger à l’état de vérités absolues, c’est d’être inutiles et d’entraver sans profit le développement des considérations rationnelles, qui animent seules vraiment toute institution juridique.” [“The least of the reproaches to which such conceptions are subject, when one wants to raise them to the level of absolute truths, is that they are useless and hinder, without any benefit, the development of those rational considerations which alone truly drive any legal institution.”] 1 id. at 158–59.
87. Gény wrote: “Comme si l’intervention d’une théorie préconçue était indispensable pour justifier une règle toute pratique! Et comme si cette règle ne pouvait avoir sa raison d’être propre et indépendante!” [“As if the intervention of a preconceived theory was indispensable to justify a most practical rule! As if this rule could not have its own independent raison d’être!”] 1 id. at 159.
88. [“through the effect of prejudices concerning the rigid and imperious character of theoretical concepts and constructs.”] 1 id. at 161.
89. Gény specifically examined the thesis of M. Deslandres. See 1 id.
intentions on the basis of the principle of autonomy of will.\textsuperscript{90} However, classicism dictated that "toute opération juridique doit rentrer dans une catégorie, à caractère net, à conditions fixes, à effets prédéterminés."\textsuperscript{91} Consequently, legal classicists proposed three conceptions to deal with life insurance contracts. It was either:

(1) une stipulation pour autrui . . . ; (2) la théorie de la gestion d'affaires . . . ; (3) une conception . . . qui, . . . décompose l'opération en deux actes et envisage le contrat d'assurance, au profit de tiers, comme obligeant seulement la Compagnie, envers l'assuré, à offrir, après le décès de celui-ci, l'indemnité d'assurance aux bénéficiaires.\textsuperscript{92}

For Gény, each of these three conceptions met certain needs but excluded others.\textsuperscript{93} Some jurists argued in favor of the simultaneous application of the three conceptions in order to satisfy social

\textsuperscript{90} Gény wrote:
[S]erait-il rien de plus simple et de plus satisfaisant à la fois, que de consacrer, de plano, les solutions déduites de l'intention très morale et très légitime de l'assuré, en poussant à fond l'analyse de cette intention et ne se laissant guider que par le principe de l'autonomie de la volonté, limité seulement par le respect des droits supérieurs au vouloir de l'individu? ([W]hat could be both simpler and more satisfying than to sanction, de plano, the solutions deduced from the very moral and legitimate intention of the insured, by fundamentally analyzing this intention, guided only by the principle of the autonomy of the will, limited only by respect for rights superior to the will of the individual?)

\textsuperscript{91} ["every judicial operation must fit into a category, with clearly fixed conditions, and with determined effects."] 1 id.

\textsuperscript{92} [(1) a stipulation in favour of a third person . . . ; (2) the theory of managing one's affairs; (3) a conception . . . which . . . divides the operation into two acts and views the insurance contract, in favour of a third party as engaging only the company towards the insured to offer, after the latter's death, the insurance indemnity to the beneficiaries.] 1 id.

\textsuperscript{93} Gény wrote:
Ces différentes manières de voir aboutissent, toutes trois . . . à la construction d'un système rigoureusement juridique. Mais elles n'y parviennent, qu'en couchant l'opération, qu'il s'agit d'apprécient, sur un lit de Procruste, qui en déforme ou en restreint toujours par quelques côtés, les développements naturels. Et, si chacune d'elles satisfait à certains desiderata pratiques, chacune également en méconnait d'autres.
[These three different ways of seeing all culminate . . . in the construction of a rigorously juridical system. However, they only arrive at this result in placing the operation that we must consider in a procrustean bed which always deforms or restrains the natural developments in several ways. And, while each of them satisfies certain practical desiderata, each also misunderstands the others.]

1 id. at 162.

1 id. at 163.
and economic needs. Gény contended that this expedient and ingenious solution did not succeed in avoiding the major inconvenience of systematic constructs. The adaptation of multiple constructs to one legal situation was ineffective in providing all useful solutions. In addition, the fact that legal classicists attempted to reconcile contradictory concepts demonstrated the concepts’ "objective irreality,” their inability to provide determinate results in concrete cases. Gény concluded that the “method” of abstract constructs led to a shrinking and sterile legal domain.

Gény used the example of the presumed “mandate” that was used in the theory of solidarity between debtors (solidarité passive) to demonstrate the arbitrariness of the inevitability of “logical” conceptions. He summarized Tissier’s work which demonstrated that the idea of mandate in this context did not exist in Roman law or in ancient French case law. He also showed that it was not used during the interpretative beginnings of the Code civil. Rather, the idea of “mandate” was a recent doctrinal invention that had problematic implications:

[C]e concept était faux en lui-même, manifestement contraire à la réalité des choses, et surtout, au point de vue de ses résultats, que, bien loin de constituer un progrès dans la théorie de la solidarité, il y avait introduit des solutions fâcheuses et contraires aux exigences

94. See 1 id. (citing Deslandres).
95. Gény wrote: “Car il arrivera bien souvent que l’adaptation de constructions multiples, si nombreuses et variées qu’on les suppose, à une même situation juridique, reste impuissante à engendrer toutes les solutions désirables.” [“As it happens quite often that the adaptation of multiple constructions, as numerous and varied as one could suppose, to a single legal situation, remains impotent in engendering all the desirable solutions.”] 1 id.
96. See 1 id. at 164.
97. Gény wrote:
En somme, et puisque aussi bien que je dois me borner, les applications précédentes auront suffi peut-être à faire voir comment ce procédé des constructions abstraites,—quand on oublie son caractère essentiellement subjectif et malléable, pour le stérétotyper, en quelque sorte, au moyen de conceptions, prédeterminées, immuables, revêtues d’une fausse objectivité,—bien loin d’élargir et de féconder le champ de notre science, le rétrécit, au contraire et le stérilise.
[In sum, and since I must limit myself, the preceding applications will have perhaps sufficed to show how this method of abstract constructions restricts and sterilizes the field of our science rather than enlarging and fertilizing it—when one forgets the method’s essentially subjective and malleable character and somehow stereotypes it by means of predetermined, immutable conceptions clothed with a false objectivity.]
1 id.
98. See 1 id. at 165.
99. See 1 id. at 166.
D. Social Preferences

Finally, the "juristes inquiets" occasionally attacked the legal classicists' pretention to have elaborated a universal legal logic. The critics argued that the classicists, consciously or unconsciously, deployed the purportedly neutral exegetical method to resolve the Code civil's gaps, conflicts, and ambiguities in favor of their own social predilections.

Saleilles cited countless examples where the judiciary had disregarded the Code civil.\textsuperscript{101} Judges acted independently "lorsque les besoins de la pratique l'exigent et que le texte ne se présente pas sous une forme suffisamment impérative pour fermer la voie à toute velléité d'indépendance!"\textsuperscript{102} In many situations, the Code civil prohibited a particular legal institution that case law subsequently permitted. The case law approach was justified by labelling the particular legislative provision as exceptional or ineffective, or by using an indirect means to reach the desired end. For example, magistrates eliminated the prohibition on illicit donations in the Code civil by developing the "impulsive causal" theory. Case law also validated the temporary and relative inalienability of goods notwithstanding the fundamental economic principle ensuring their free movement. Prior to legislative changes in 1901, courts had recognized nonprofit organizations despite the 1804 Code civil's strict instructions on the recognition of collective entities.\textsuperscript{103} In exercising their judicial autonomy, judges resisted pressing economic needs and favored the interests of credit over those of ownership. Saleilles wrote:

\begin{quote}
Cela ne veut pas dire, à coup sûr, que dans les libertés qu'elle [la jurisprudence] a prises avec la loi, elle se soit donné pour guide un système d'évolution sociale conscient et voulu. Tant s'en faut. Souvent même, nous la voyons rétive aux sollicitations les plus pressantes des besoins économiques, surtout lorsqu'il s'agit de la protection, aujourd'hui si importante, de la fortune mobilière. Il semble bien que, chez elle, la préoccupation du crédit l'emporte en-
\end{quote}

\textsuperscript{100} [This concept was false in itself, manifestly contrary to the reality of things. Above all, in light of its results, far from constituting an advance in the theory of solidarity, it introduced deplorable solutions contrary to practical exigencies—solutions whose ideal and logical character and point of departure make them very difficult to eradicate today.] \textit{id.}

\textsuperscript{101} \textit{See Saleilles, supra note 9, at 121–25.}

\textsuperscript{102} ["where required by practical necessities and where the text [was] not sufficiently imperative to bar all independent designs." \textit{id.} at 125.

\textsuperscript{103} \textit{See id. at 124–25.}
core sur l'intérêt du propriétaire. Et c'est même là, pour le dire en passant, un point de vue social, nettement opposé au point de vue purement individualiste, quoi qu'on en ait pu dire. . . Mais, ce qui est certain, c'est que, sur des points nombreux, et presque dès l'origine, elle a pris par rapport à la loi civile, une attitude de franche indépendance, qui pendant longtemps, a surpris la doctrine et surtout frappé l'étranger. 104

The external critique laid the base for a program to reform juristic method.

V. THE PROGRAM

The reconstructive program was a key element of the "juristes inquiets" work. They viewed critique as potentially "ruinous" if not followed by a constructive program which could fill the "void" left by critique in the "legal edifice." 105 The "juristes inquiets" program

104. [This certainly does not mean that, in taking liberties with the law, case law has taken as its guide a conscious and deliberate system of social evolution. Far from it. We even often see it resistant to the appeals of the most pressing economic needs—especially in relation to the protection of personal property, which is so important today. It seems that the preoccupation with credit still wins out over the interests of the owner. And this, incidentally, is a social point of view, clearly opposed to the purely individualist point of view, whatever others have said about it. . . Yet, it is certain that the case law has taken an attitude of frank independence in relation to the civil law, an attitude which has long surprised the commentators and has particularly struck foreign observers.] Id. at 121–22.

105. Gény explained that the development of their own perception and the critique of legal classicism were necessary preparatory steps for the elaboration of his "grande oeuvre," the "Libre recherche scientifique" ["Free Scientific Research"]. 2 MÉTHODE D'INTERPRÉTATION, supra note 4, at 74–234. The self-avowed goal of his critique was to reconstruct the fortress he was tearing down. Gény made his aim clear by concluding his "critique négative" of legal classicism thus:

Toutefois je ne saurais m'arrêter ici. En attaquant les parties faibles du système traditionnel, j'ai ouvert, dans ce bloc résistant, quelques tranchées, qui le rendraient nuisibles, si je ne parvenais à en combler le vide. Il me faut donc, maintenant, revenir aux bases fondamentales de l'édifice, les prendre pièce à pièce, en éprouver la solidité, en marquer la juste place, y juxtaposer au besoin des matériaux nouveaux, de façon à donner à l'ensemble de la méthode la force et la sûreté nécessaires, pour qu'elle réponde à sa fin et satisisse pleinement tous les intérêts, dont notre science a charge.

[However, I must not stop here. By attacking the weak parts of the traditional system, I opened some fissures in this resistant block which would ruin it if I did not succeed in filling the void. I must now return to the fundamental bases of the edifice, take them up piece by piece, test their solidity, identify their proper place, juxtapose if necessary new materials, in order to give to the whole of the method the necessary strength and security so that it can fulfill its purpose and fully satisfy those interests for which our science must take responsibility.]

1 id. at 203.
emanated from their anxiety over the existence of massive social problems. The possibility of social unrest led the “juristes inquiets” to look for alternative ways to resolve legal issues.

A. The Chastened Role of Logic

The “juristes inquiets” advocated retaining an important, but nonetheless much chastened, role for logic. According to Gény, logical constructs were essential conceptual tools that had to be maintained but restricted to their proper function. He wrote:

[Les constructions logiques doivent conserver leur rôle capital dans toute méthode de droit positif. Mais, une condition s'impose, et s'impose absolument, pour les maintenir dans les limites, qui, seules en justifieront et en légitimeront l'emploi. C'est que notre science ne perde jamais de vue le caractère, essentiellement idéal et subjectif, de ces procédés, qu'elle se résigne, par conséquent, à n'en tirer que de simples hypothèses, toujours dominées par les faits, acceptables dans la mesure seulement où elles facilitent l'œuvre téléologique de la jurisprudence, prêtes à s'assouplir et à se transformer devant les exigences de la vie, au besoin, même à céder sans résistance à l'évidence du but pratique qui les contredirait.]

Although he struck down the weak links of legal classicism, Gény had only a patchwork replacement system. This was insufficient. His criticism attacked the very foundations of the traditional method. Saleilles also believed that if the historian could be content with a method of analysis, the jurist needed a legal methodology that was capable of providing a creative instrument in the development of law. See Saleilles, supra note 49, at 96. For Saleilles, the German Historical School had successfully demonstrated that law evolved; however, it remained to determine how it evolved and how a legal methodology provided the means to develop law. See id. Saleilles wrote:

Si le droit évolue, il faut que l'école historique nous dise comment il doit évoluer; si elle en est incapable ou qu'elle s'y refuse, autant dire qu'elle cesse d'être une école juridique, puisqu'elle est impuissante à fournir une méthode créatrice. Méthode d'étude peut-être; et cela peut suffire à l'historien. Cela ne suffit pas au juriste.

[If law evolves, the historical school must tell us how it should evolve; if it is incapable or unwilling to do so, it ceases to be a school of law, since it is impotent in providing a creative method. A method of study, perhaps, which would suffice for an historian. It does not suffice for a jurist.]

Id.

106. [Logical constructs must conserve their crucial role in any method of positive law. However, one condition is absolutely required in order to keep them within the limits that alone justifies and legitimates their use. [This condition] is that our science must never lose sight of the essentially ideal and subjective character of these procedures and that it consequently resign itself to only draw from them mere hypothèses, always subservient to the facts. They are only acceptable to the extent that they facilitate the teleological work of the case law, ready to become more flexible and to be transformed in the face of the exigencies of life—even, when necessary, to give way without resistance to a clear practical goal which stands in opposition to]
Gény limited the weight of legal definitions, classifications, categories, and systematizations. He approved of formal logic only when it facilitated the construction of principles which "conformed to the real" by embodying the "real characteristics" of social institutions:

D'après ces vues, les définitions juridiques n'auront de valeur objective que comme définitions de choses, résumant et synthétisant les caractères réels d'une institution d'après les faits, sauf à servir parfois d'instruments pratiques d'adaptation, comme définitions de mots. — Les classifications ne devront être tenues pour pleinement adéquates au but, que lorsqu'elles reposent sur la diversité de structure intrinsèque des éléments juridiques . . . . De même, les catégories juridiques n'auront une portée substantielle et profonde, qu'à la condition de marquer les traits généraux d'un précepte, d'une façon, qui permette d'y ramener les réalités par des considérations puissées dans la vie même. Et la systématisation des notions ne puisera elle-même son efficacité épistémologique que dans sa conformité au réel. — Quant à l'idéalisation pure, qui s'épanouit en la construction juridique, il faudra lui refuser son influence légitime au domaine de l'action ou de la technique.

Enfin, — si la logique proprement dite, employée sous son aspect formel, reste assurée de ses conclusions, quand elle met en valeur des principes juridiques dignes de ce nom, c'est-à-dire des préceptes synthétisant la réalité même du droit, — appliquée à des entités abstraites, elle doit toujours être maniée avec mesure, et assoupie au moyen d'une considération téléologique, qui forme le pendant de l'intuition. 107

107. [According to this view, legal definitions only have objective value as definitions of things, summarizing and synthesizing the real, factual characteristics of institutions—except when they serve at times as practical instruments . . . . to define words. Classifications should only be viewed as fully adequate to their purpose when they rest on the intrinsic structural diversity of the legal elements . . . . Similarly, the substantial and profound meaning of legal categories lies only in their ability to embody the general characteristics of precepts in a manner that permits the subsumption of realities under them by considerations drawn from life itself. And the systematization of concepts only draws its epistemological efficacy from its conformity to the real. As to pure idealization, which blossoms in legal construction, we must refuse to grant it any legitimate influence in the domain of action or technique.

Finally, as to logic, strictly speaking: when it is used in its formal aspect, it remains unshaken in its conclusions when it brings out the best in legal principles worthy of the name, that is, precepts synthesizing the very reality of law. However, when it is applied to abstract entities, it must always be handled with care and softened by means of teleological considerations, the counterparts of intuition.] 1 SCIENCE ET TECHNIQUE, supra note 81, at 136–37.
Likewise, Raymond Saleilles believed that ideals of justice and of reason had to submit to the “reality” of changing social facts: “Et il fallait que le droit se pliât à ce monde nouveau, qu’il donnât satisfaction à cette justice nouvelle, dont le principe reste immuable, mais qui, pour rester la justice, doit se plier elle-même aux transformations économiques et sociales qui se produisent!”

A few years later, following the German Historical School, Saleilles wrote:

Et c’est, en effet, le second profit dont nous sommes redevables à l’école historique, c’est qu’elle a enlevé tout crédit et dénié toute valeur objective aux déductions tirées d’un raisonnement abstrait en matière d’applications sociales. Celles-ci ne seront jamais la résultante que des phénomènes en conflit dans la réalité des faits; . . . Il faut renverser les facteurs: observer les faits et les plier à la raison, à la justice et à l'idéal, et non partir de la raison, de la justice, de l'idéal pour en faire sortir les faits qui devraient être. Bref, la méthode déductive ne démontrera jamais ce qui peut être.

B. Different Means

The “juristes inquiets” used many different means to pursue their goal in their search for flexible and adaptable legal doctrine and methodology. Some adopted a comparative law approach, some appealed to case law, while others looked to the social sciences for answers. Not surprisingly, they promoted diverse alternatives to the existing classical system. Notwithstanding their differences, the “juristes inquiets” shared a common goal: they sought to discover law (droit) within social facts. They wanted to create a harmoni-

108. [“And it was necessary that law adapt itself to this new world, that it give satisfaction to this new justice—justice, whose principle remains unchanging, yet which must adapt itself to emerging economic and social transformations in order to remain just!”] Saleilles, supra note 11, at xv.

109. [And this is, in effect, the second benefit which we owe to the historical school: that it divested all credit and objective value from deductions drawn from abstract reasoning about social policies. The latter are always the outcome of real conflicts. . . . We must reverse the factors: observing facts and adapting them to reason, justice and the ideal, rather than starting from reason, justice, and the ideal and attempting to make the facts that should be emerge out of them. In short, the deductive method can never demonstrate what can be.] Saleilles, supra note 49, at 94–95 (emphasis added).

110. For instance, in 1919 Gény wrote:

Sous la variété des opinions émises, se révèlent toujours la pensée essentielle, de découvrir le droit dans les réalités même de la vie sociale, d'où il surgit, et la nécessité de mettre en oeuvre, pour cela, tous les moyens, par lesquels peuvent être dictées ou suggérées des règles, ordonnant la conduite de l'homme dans ses rapports avec ses semblables.
ous law that was ordered according to social reality. Finally, they believed that law was intrinsic to society and could be a progressive instrument of evolution.

In the 1919 epilogue included in Méthode d’interprétation, Gény gave an overview of the positive proposals that defined his time. Authors had generally preferred a less abstract and more humane approach to law. In adopting such an approach, they resorted to a variety of means that included attention to circumstances and factual details; precise analysis of the parties’ intentions; consideration of the interests at stake; study of moral, economic, and social considerations; taking principles of utility into account; examining substantive legislative ideas; consulting legal practice and case law; and subsidiary use of comparative law. Many of the “juristes inquiets” were dissatisfied with the uncertainty that the wide range of means used to achieve flexibility created. To counter this uneasiness, they tried to develop unifying themes that would provide a solid base for their reform enterprise.

[The variety of stated opinions always reveals the essential aim of discovering in the law the very realities of social life, from whence law derives, as well as the necessity to put in place all the means by which rules that order man’s relation with his fellows may be dictated or suggested.]

2 Méthode d’interprétation, supra note 4, at 284–85.

111. See 2 id. at 89, 92.
112. See 2 id. at 91.
113. See 2 id. at 246–86.
114. See 2 id. at 247.
115. Gény summarized these trends in the following terms:

   Augmentation de l’intérêt et du soin apportés à la description des faits (précision des circonstances, analyse des volontés), restriction des discussions de mots ou des arguments logiques au profit de considérations, morales, économiques, sociales, pénétrées par une intuition sympathique, prévalence des idées législatives de fond sur les éparchages de textes ou de travaux préparatoires, sacrifice des concepts à l’utilité, appréciation des intérêts, juxtaposée, sinon substituée, à la construction théorique, consultation constante de la pratique et de la jurisprudence, en vue d’une critique objective, intervention accessoire du droit comparé, pour le développement intrinsèque du droit national.

   [An increase in the interest in, and the care applied to, the description of facts (specification of circumstances, analysis of intentions), limitation of discussion of words or logical arguments in favor of moral, economic, and social considerations penetrated by a sympathetic intuition, priority of substantive legislative ideas over the dissection of texts or legislative history, sacrifice of concepts to utility, consideration of interests juxtaposed to, or substituted for, theoretical constructions, constant consultation of practice and case law with a view to objective critique, and subsidiary intervention of comparative law for the intrinsic development of national law.]
Gény observed that these proposals for reform had had little impact on the French legal culture.\textsuperscript{116} He attributed this lack of influence to the fact that the reforms had failed to show the existence of a renewed systematic methodology.\textsuperscript{117} In \textit{Méthode d'interprétation}, but mostly in his later work \textit{Science et technique}, Gény attempted to elaborate such a systematic legal methodology.\textsuperscript{118}

Saleilles advocated pragmatic, large-scale reform that was both creative and fluid. He focussed on the consequences of legal solutions. His preference for a factual, empirical, and concrete analysis combined with his genius for reconciling contrary positions defined his interest in the "is" of the legal system. Gény proposed alternative systems of methodology in 1899 and in the 1920s. In 1899, he put forth an alternative vision that was limited in scope and that bordered on legal classicism. By the 1920s, Gény had become even more conservative in outlook. His second proposal was unequivocally neoclassical. Gény's neoclassical preferences, which promoted a combination of experimental and rational legal elements, formed part of the general "return to order" in the culture of post–World War I France.

\begin{flushright}
\textsuperscript{116} See 1 \textit{id.} at 12.
\textsuperscript{117} Gény wrote:

\begin{quote}
Je crains seulement que ce mouvement n'ait pas encore pénétré assez avant dans la masse des jurisconsultes, qu'il ne reste jusqu'ici, malgré tout, que le fait d'une très faible minorité. Et, je me demande si cette insuffisance d'expansion ne viendrait pas de ce que l'évolution désirée n'a pas été assez souvent exposée et analysée d'un point de vue spéculatif, ou, plus simplement, de ce que la réforme à opérer, dans ce que j'appelle notre méthode traditionnelle d'interprétation juridique, n'a pas été décrite, en son entier, par plusieurs de ses partisans convaincus, et avec la pensée d'en fournir une justification aussi péremptoire que possible.
\end{quote}

[I fear only that this movement has not yet penetrated sufficiently the mass of lawyers, that, despite everything, it presently concerns only a small minority. And I wonder whether the inadequacy of its diffusion is not due to the fact that the desirable evolution has not been often enough described and analyzed from the theoretical point of view—or, more simply, due to the fact that the reforms necessary to effect on what I call our traditional method of legal interpretation has not been completely described by several convinced partisans with the aim of providing as definitive a justification as possible.]

\begin{flushleft}
\textsuperscript{118} Other juristes who had attempted similar reconstructive projects in private law included Édouard Lambert and René Demogue.
\end{flushleft}
VI. CONCLUSION

In this Essay, I have taken for granted the description of the École de l'exégèse as presented by the critical school. My underlying hypothesis, however, is that the significance of the contributions of the "juristes inquiets" lies not only in their internal and external critique of the classicist method but also in the manner that they described the École de l'exégèse. In other words, I am suggesting that the unity and systematic nature of the École de l'exégèse described, and criticized, in the writings of the "juristes inquiets" were in large part their own projections. I will explore this hypothesis in forthcoming studies. For this Essay, however, this hypothesis has two consequences which I will present in relation to the epigraph of this text.

First, if "pain is the ransom of formalism," the pain in question was in part that of the critics themselves. Their projection of a rigid formal and positivist legal classicist school, a school in pressing need of critique for reasons both of logic and social urgency, was itself symptomatic of their own theoretical and cultural malaise. One may speculate that their desire to make law a useful tool of social reform required them to explain law's prior failure to fill that role. The (mis)reading of their predecessors as legal classicists was the intellectual "ransom" that they had to pay to redeem their own fear of theoretical and social destabilization.

Secondly, although it is common to distinguish between the work of critique and the work of reconstruction of early twentieth-century legal innovators, the hypothesis that the "juristes inquiets" created the target of their critique by projecting it into the past suggests that such a distinction must be reconsidered. The projection of a rigid formal and positivist legal system was itself already the first step toward the work of reconstruction—the creation of an alibi for law's past failure to deal with social transformation. Their underlying social anxiety, which could be assuaged by making law a useful tool of social reform, had to be politically "ransomed" by the projection of the classicist past.

French civil law's critical tradition has remained hidden and forgotten. In this Essay, I have sought to begin the task of uncovering its legacy. In contrast, contemporary scholars have thoroughly documented their American common-law critical heritage. However,

the fact that the critique of the "juristes inquiets" was "borrowed" by the American progressives,¹²⁰ and very explicitly by Roscoe Pound,¹²¹ Benjamin Cardozo,¹²² and Morris Cohen,¹²³ is still obscured by current historical accounts. It is a fascinating question to what extent these scholars "distorted" the "juristes inquiets" critique, and another whether it had the same meaning in the American context that it had in the French.

¹²¹ See Roscoe Pound, Mechanical Jurisprudence, 7 COLUM. L. REV. 605, 611–12 (1908) (explaining that social and moral factors affect historical growth of law).