

RE-MEMBERING LAW IN THE INTERNATIONALIZING WORLD*

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*Le chaland glisse sans trêve sous l'eau de satin,
Où s'en va-t-il, vers quel rêve, vers quel incertain du destin?
... [L]e courant fait de nous toujours des errants ...*¹

I. INTRODUCTION

This article addresses the current unprecedented intermingling of laws and legal norms in our internationalizing world. It examines in particular the meeting of the common and civil law in the European Union as an indication of the often unseen and misunderstood issues that lurk beneath the surface where law joins different communities, and where it meets within them.

These issues are of still greater magnitude when transposed to a global level. They involve contexts of origin that produce different understandings of legal standards allegedly shared across legal cultures, and conflicting approaches to future orientations of law that derive from unspoken, incompatible ideas about the nature of law and the needs of legal orders.

Comparative analysis is of urgent importance to clarify the ongoing debates. It is needed not just among different legal communities, but also within each, as our world evolves both through new encounters of laws and legal norms throughout the world, and by transitions within national legal systems that require continuing recollection and examination of history. The “re-membering” of law that this article hopes to shed light on deals with (1) recompositions of law as it increasingly ignores old borders and categories; and (2) the ongoing need to remember law’s past

* À la mémoire de Blanche, ma sœur bien-aimée. C’est ton œuvre à peine entamée que je tente de continuer ici.

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1. From LE CHALAND QUI PASSE, a French song popular in the 1930s (“The barge slides without cease beneath the water of satin / Where is it headed, towards which dream, which uncertainty of fate? / ... The current always transforms us into wanderers ...”).

meanings in order to understand its present incarnations and imagine its potentials.

II. LAW LIKE A RIVER

Our time is marked by accelerating transience.² Transience is the characterizing condition both of individual life and of history, but its speed and visibility of occurrence are not constants. In our era, law is experiencing currents of change at a dizzying pace, increasing the difficulty of assessing the present.

In studying individual consciousness, the neurologist Oliver Sacks emphasizes the role of successive, discrete mental imaging as the key to human perception, such that the concept of the person as a stable entity must be revisited.³ Law too cannot be understood without accepting the centrality of transience to its nature and experience. But what does a transient nature imply about continuity? The past is supplanted, but it does not disappear. Rather, it functions as an inescapable and formative frame of reference that processes and defines the present, and the presently changing, law:

How, if there is only transience, do we achieve continuity? Our passing thoughts . . . do not wander round like wild cattle. Each one is owned, our own, and bears the brand of this ownership, and each thought . . . is born an owner of the thoughts that went before, and dies owned, transmitting whatever it realized as its Self to its own later proprietor . . . [W]e consist entirely of a collection of moments, even though these flow into one another like [a] . . . river.⁴

Continuity thus emerges notwithstanding discontinuity, and must be understood as part of an ongoing process of change, as new moments collect both to displace and to redefine the old even as they give shape to the present. But just as mathematics tell us that there can be infinities of differing sizes,⁵ there can be newness supplanting the old that in some eras are newer in kind than in other eras, transiencies of greater magnitude in some times than in others. Not only is law by its nature vulnerable to having “ideological drifts” that both enable and obfuscate changes,⁶ but, in addition, our era is one of both compounded change

2. On the “accelerated rate” of evolution in modern civilization, see Henri Marrou, *The Heritage of the Ancient World*, in 1 CHAPTERS IN WESTERN CIVILIZATION 11 (3d ed. 1961).

3. See Oliver Sacks, *In the River of Consciousness*, N.Y. REV. BOOKS, Jan. 15, 2004, at 41, 44.

4. *Id.* (internal quotation marks omitted).

5. See MALCOLM E. LINES, A NUMBER FOR YOUR THOUGHTS: FACTS AND SPECULATIONS ABOUT NUMBERS FROM EUCLID TO THE LATEST COMPUTERS 189-99 (1986).

6. See J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869

and of a compounded obfuscation of change.

Today, “[t]he various human communities are no longer merely in contact, . . . [t]hey are in a state of mutual penetration. . . .”⁷ The legal norms that are multiplying and meeting signify differently according to context, a context which may be that of nation, or of kind of court, or of the legal status of the norm in the forum in question.⁸ Contexts that endow legal standards with various meanings may challenge law’s capacity for objectivity or neutrality.⁹

In addressing issues that arise as today’s legal orders intermingle, this article hopes to debunk some fictions and suggest some facts as to how layers of national and non-national law can interact in ways often misunderstood because difficult to perceive. I use the awkward term “non-national” because I mean that which is “other” to the national, but not precisely international, supranational, transnational, or necessarily

(1993).

7. André Tunc, *Comparative Law, Peace and Justice*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 80, 83 (Kurt H. Nadelmann et al. eds., 1961).

8. See, e.g., MIREILLE DELMAS-MARTY, *LE RELATIF ET L’UNIVERSEL: LES FORCES IMAGINATES DU DROIT* (2004) [hereinafter DELMAS-MARTY, *LE RELATIF ET L’UNIVERSEL*]; David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1697 (2003). The profusion of norms is such that drafters of a proposed European civil code complain of the difficulty “paradoxically . . . [of] integrat[ing] the uniform law that already exists” in addition to devising a code that articulates the commonalities of EU member state laws. Christian von Bar, *Le groupe d’études sur un code civil européen*, 1-2001 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 127, 137 (2001). Various sorts of uniform regimes thus intertwine in potential mutual interference. On the problem of conflicts between the EU’s human rights regime (1) with that of the member states, see Craig T. Smith & Thomas Fetzer, *The Uncertain Limits of the European Court of Justice’s Authority: Economic Freedom Versus Human Dignity*, 10 COLUM. J. EUR. L. 445 (2004); (2) with that of the ECHR, see Ambrose Evans-Pritchard, *EU Judges End Human Rights Law for Press*, DAILY TELEGRAM, Oct. 18, 2004, available at <http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2004/10/18/weu18.xml>. For contrasting approaches to the issue of intertwining domains of law on a non-national level, see Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183 (1997); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); MIREILLE DELMAS-MARTY, *GLOBALISATION ÉCONOMIQUE ET UNIVERSALISME DES DROITS DE L’HOMME* (2004) [hereinafter DELMAS-MARTY, *GLOBALISATION*].

9. On the one hand, it may be that legal standards which depend on context may be capable of objectivity and neutrality in a context-specific sense, as Isaiah Berlin’s work would imply. Henry Hardy summarizes Berlin’s position over his lifetime on this point in his introduction to the first volume he edited of Berlin’s correspondence. See Henry Hardy, *Preface* to ISAIAH BERLIN, *LETTERS 1928-1946*, at xxxvii, xliii (Henry Hardy ed., 2004) (noting that Berlin’s pluralist view rejected relativism, although misinterpretations of his position have confused the two). On the other hand, neutrality that may be achievable within a given context, such as a national legal system, may be unsustainable when the field of application extends to other arenas. A third alternative may be that context dependence will suggest that law is subjective at its innermost core. Law’s contemporary transitions to increased planetary contacts and claims merely may have rendered this more visible, and may require us to keep in mind the discomfiting possibility that contextuality may not be separable from relativism, nor relativism from subjectivity.

postnational.¹⁰

This article examines the dynamic developing between national and non-national law in Europe. The European model is not an exact replica of the interaction between traditional national and international law. The internationalizing world is not shifting to a world governed by international law, but by a panoply of legal phenomena, and in ways specific to innumerable contextual factors. While not a mirror for global developments in law, the EU nevertheless is experiencing some of the challenges that are characteristic of global incorporations of standards which do not fit within the traditional international law framework.¹¹ Its experiences reflect a certain number and kind of obstacles to understanding law in a world of increasingly mixed and juxtaposed legal sources, sometimes mutually incompatible, as with principles and claims of universalism and pluralism, or, as Delmas-Marty puts it in her recent book devoted to the subject, of the Relative and the universal.”¹²

An aim of this article is to further and to re-orient current understandings of the national and non-national in law by scrutinizing the EU’s inner grammar. To the extent that Europe’s departure from the nation-state model may presage a new era of socio-political life, the EU may be both a hallmark of our historical period, and a precedent for the rest of the world to emulate or avoid, depending on how it unfolds.¹³

As our world struggles with twin principles of universalism and pluralism, and as *inter-*, *trans-*, *supra*, and *sub*-national legal norms increasingly find their way into and among national legal systems,¹⁴ it

10. Habermas has coined the term “post-national” for the EU, a concept that Christian Joerges specifically endorses with respect to law. I am reluctant to adopt that term because of how much remains unknown as to both the depth and nature of the departures from the national law that abound in today’s overlapping legal domains. The struggle for terms in this area to describe the current non-national law is reflected in Eric Wyler, “L’*internationalité*” en droit international public, 108 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 633 (2004). To this list, one now also may add “sub-national.” See Stephen Tierney, *Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State*, 54 INT’L & COMP. L.Q. 161 (2005).

11. See *infra* Part III.

12. MIREILLE DELMAS-MARTY, *LE RELATIF ET L’UNIVERSEL*, *supra* note 8. For an extremely interesting analysis of law’s simultaneous globalization and fragmentation through the lens of Carl Schmitt’s *Nomos der Erde*, see Martti Koskenniemi, *International Law as Political Theology: How to Read Nomos der Erde?*, 11 CONSTELLATIONS 492 (2004).

13. See Yves Lequette, *Quelques remarques à propos du projet de code civil européen de M. von Bar*, D. [2002] chron., at 2202, 2211 (2002) (noting that the EU may undermine and destroy its vision of future peace if it abandons national distinctions in favor of European legal unification).

14. See MIREILLE DELMAS-MARTY, *LE RELATIF ET L’UNIVERSEL*, *supra* note 8, at 7-14. The United States has tended to be legally insular, and its resistance to foreign and comparative law is exemplified by the recent House Resolution disapproving the United States Supreme Court’s use of “foreign laws and public opinion in their decisions, [and] urging the end of this practice immediately . . .” H.R. 468, 108th Cong. (2003). On the other hand, United States Supreme Court Justices such as Ruth Bader Ginsburg, Stephen Breyer and Sandra Day O’Connor have endorsed

becomes crucial to decide the ways and extent to which the national should be retained and should prevail, and the ways in which it should be eradicated.¹⁵ The EU's uniquely visible potentials for departing from national aspects of law, and the incipient stage of its development, make it useful for exploring how future orientations should deal with the nation-state model, however difficult it may be even to imagine effective alternatives to past experiences.

This article focuses on issues associated specifically with law, one of which is to decipher the nature of law's *capacity* to internationalize. It more particularly examines the peculiar dynamic where law purports to have meaning for legal systems with significantly different underlying cognitive grids.¹⁶ It is true, as Clifford Geertz put it, that "whatever it is that the law is after it is not the whole story,"¹⁷ but law is a core part of the story.

Decisions as to future directions in law urgently require an understanding of current realities. It is difficult to understand the present in a time of multiple and rapid changes where non-national models may be externally different from but substantively similar to the national, and vice versa.¹⁸ It is a process of decoding a language whose connotations change just as they begin to acquire meaning, a language in which all of the speakers are among the uninitiated. This article seeks to take a step in the interpretive process.

comparative legal approaches to resolve U.S. cases, and the House Resolution was a reaction against this trend in the Supreme Court's decision-making. *See, e.g.*, Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20, 20-21. For the most recent exchange by United States Supreme Court Justices on this issue, see Antonin Scalia & Stephen Breyer, U.S. Supreme Court Justices, Discussion at American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), available at <http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (last visited Oct. 28, 2005). On issues of international and national law commingling in France as sources of law in the formation of the French legal system after the Revolution as the new nation-state was taking shape, see JEAN-LOUIS HALPÉRIN, *ENTRE NATIONALISME JURIDIQUE ET COMMUNAUTÉ DE DROIT* 7-45 (1999).

15. *See* Slaughter, *The Real New World Order*, *supra* note 8, at 183-84 (arguing equally against a liberal internationalist ideal" and a "new medievalism" that "proclaim[s] the end of the nation-state," and in favor of a disaggregation of the state into "functionally distinct parts [that] . . . are networking with their counterparts abroad, creating . . . a new, transgovernmental order"). Slaughter emphasizes the unofficial manner in which transgovernmentalism has been evolving. *See id.* at 190. She concludes that "[t]ransgovernmental networks often promulgate their own rules, but the purpose of those rules is to enhance the enforcement of national law." *Id.* at 191.

16. *See* Christian Joerges, *Europeanization as Process: Thoughts on the Europeanization of Private Law* (unpublished manuscript, on file with author) (analyzing law in what he calls a "multi-level [legal] system," and the EU as a "multidimensional disaggregation of statehood").

17. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY* 173 (1983).

18. *See infra* Part IV.

III. COINCIDING

The legal approaches of the EU's member states correspond to two ideas of law, two distinctive manners of legal reasoning, and emanate from two modes of intellectual discourse that have separated the law worlds of Europe in the past. Some of the presences, absences and meanings of the common and the civil law that combine in the EU today have been misinterpreted due to deceptive appearances of surface similarity or difference.

These challenges to legal understanding are still greater on the global level where normative claims of universal applicability implicitly also contain claims of human-wide commonality, despite vast separations of geography and historical development throughout the world, covering areas and peoples with far fewer historical and cultural intersections than among the EU member states. While the European phenomenon may be different from the global one precisely because of a more common, shared heritage,¹⁹ to the extent that its *lack* of commonality (a focus of this article) impedes legal integration, we may conclude that similar interactions are operating at a still greater magnitude in the larger global context.²⁰

This article examines whether two worlds cohabiting within Europe can meet and join in the law and the courts, or if their forced encounter today is an unmindful collision. It illustrates this issue, of still greater magnitude and complexity for global interactions, by examining the case of *Pretty v. United Kingdom*.²¹ The applicant, dying of a degenerative and incapacitating disease, had lost her national court actions to procure immunity from prosecution for her spouse if he were to assist her in committing suicide. The case's origins were in the common law courts of the UK, from which the plaintiff appealed to the European Court of Human Rights ("ECHR"). That decision became a source of law, *inter*

19. On the proclaimed commonality of legal heritage of the EU member states, see Treaty on the European Union (EU) art. F(2), Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253; in the context of the European Convention on Human Rights, see European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. Slaughter and Helfer argue that the European experience is able to be generalized on a global scale, but their point of departure is that the European experience in law is a success story to be emulated. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

20. Toynbee advocated the examination of events of small scale to assist the process of historical analysis and reasoning. He was of the view that the comparatively small scale of the Peloponnesian War was crucial to Thucydides's success in analyzing it rationally, and that subsequent eras have profited from his analysis in understanding the far later and vaster world wars of the twentieth century. See Marrou, *supra* note 2, at 28-29.

21. 2002-III Eur. Ct. H.R. 157.

alia, to all of the EU's member states, thus applying both to the common law state in which it had originated, and to the civil law states of the EU, because they all are signatories to the European Convention on Human Rights.²²

The ECHR decision differed markedly from the manner in which it was understood by and absorbed into one civil law state: namely, France. The case's trajectory illustrates what a realm of legal encounter between two legal systems both means and does not mean. The common law origins of *Pretty* were absorbed and even extended by the ECHR, as the European court wrote a bi-methodological decision, demonstrating a genuine convergence of common and civil law.²³ France's rendition of that decision to its national legal community expurgated its common law attributes, however.²⁴

Pretty illuminates an ongoing dual integration and dis-integration in law when communities share enacted legal standards that resonate differently because they are understood through and expressed in distinctive codes, or systems of signs.²⁵

The *Pretty* case also serves to remind that it is simplistic to assume the continuing validity of law-processing models when institutional frameworks are modified. Thus, the applicability of the supreme court model which national law systems have trained the western legal mind to associate with judicial constructs no longer is adequate to explain the new legal order.²⁶ Despite an official hierarchy that attributes ultimate substantive superiority to European courts, they are the last fora of appeal without being supreme, because a case's real trajectory does not end with its substantive legal resolution if the court of last resort is the ECHR or the European Court of Justice ("ECJ").

In the step into national legal systems that each case takes after the European courts have adjudicated, the peculiar integration of law that is occurring within the European tribunals²⁷ reverses itself, as national

22. See European Convention, *supra* note 19; see also Matthias Hartwig, *Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights*, 6 GERMAN L.J. 869 (2005), available at <http://www.germanlawjournal.com/article.php?id=600> (providing a recent discussion of issues of signatory state independence from ECHR decisions).

23. See *infra* Part V.

24. Carole Girault, *La Cour EDH ne reconnaît pas l'existence d'un droit à la mort*, JCP 2003 II 15.

25. See Vivian Grosswald Curran, *Semiotics and Law*, in HI-FIVES: A TRIP TO SEMIOTICS (Roberta Kevelson ed., 1998); Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149, 160 (2004) (discussing the "many . . . versions of European law").

26. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

27. For an analysis of legal integration in the ECJ, see Thijmen Koopmans, *The Birth of European Law at the CrossRoads of Legal Traditions*, 39 AM. J. COMP. L. 493 (1991).

legal cultures process and absorb European court decisions through the filter of national legal categories, with cognitive grids of civil or common law creation that do not assimilate information from the other system of legal thinking and reasoning. Thus, the “supreme” European courts that formally represent the parties’ ultimate recourse are only a penultimate level of significance.²⁸

The process of France’s rendition and understanding of the ECHR *Pretty* decision speaks to the manner in which law signifies within national legal communities today. A hidden layer beneath apparent legal integration reflects resistance to the new that is not willful, but results from classifications and categorizations that reprocess the non-national through categories incapable of absorbing the new because the categories themselves have not been altered so as to have the capacity to admit the new.²⁹ Legal convergence is like a flickering flame, repeatedly snuffed out by the air into which it is introduced before it can be ignited.

Member states generally transmit European court decisions to their legal communities in much the same manner as they present national court decisions.³⁰ France is typical in that, despite the widespread availability of European court decisions in their original form in all member states, except for specialized practitioners in European law who do read European court decisions in their original form, lawyers read them after they have been converted into the legal code of their national system.³¹ The member states to date consequently have remained entrenched in their national legal mentality.³²

Far from being static themselves, however, the member states’ legal systems are representative of today’s nation states throughout the world in that they are evolving with time and multiplying contacts, some due to the EU and others to the astronomical increase in communication in our

28. European cases also follow another route, not addressed in this article: horizontally signifying for future cases at the peak level of European court law.

29. For an excellent illustration of how underlying cognitive limitations can impede and ultimately undermine a legal system’s capacity to adopt foreign law, see Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227 (2000).

30. See *infra* notes 123-53 and accompanying text.

31. Thus, the specialized practitioners of “European” law engage in specialized “European” law reading for their practice. See, e.g., 1 ALEXANDER LAYTON & HUGH MERCER, EUROPEAN CIVIL PRACTICE (2d ed. 2004). Such works also may wish to garner readers with national legal practices, but my observation is that this remains a largely aspirational goal to date. See Lord Bingham of Cornhill, *Foreword*, in *id.* (urging the expansion of European law reading to the national practitioner: “[A]ny civil or commercial practitioner who today handles cases with what used to be called ‘a foreign element’ would be well-advised to have [this book] within easy reach. There was a time, not so long ago, when national legal systems could regard themselves as splendidly isolated from those of neighbouring countries, allies and trading partners. The world has changed.”).

32. See *infra* notes 123–53 and accompanying text.

time. The *nature* of this evolution, however, is not readily apparent, and, perhaps most significantly, is the more elusive to official control for being poorly identified. Among others, if the national legal reporters and commentators who communicate and analyze European court decisions are unmindful of the underlying mentality coloring their own analysis, legal integration will be illusory, or, more accurately, will proceed at a greatly reduced speed, and in a haphazard progression. Misunderstandings that undermine legal integration cannot be equated with preserving national cultural pluralism as envisaged by the EU and its member states inasmuch as the differences that remain and solidify do not result from choice.³³

Pretty also suggests that legal integration and convergence can occur; that they are occurring in the European courts of the ECHR and ECJ; that the barriers to intercultural legal communication both are surmountable,³⁴ and have been surmounted in Europe-specific institutions, such as the ECJ and the ECHR, but nevertheless that national legal systems can long remain impervious to “others” with which they are joined in name, and in the name of law. The presentation of *Pretty* to the French legal community suggests far less a conscious rejection of the “other” than an unconscious rejection. It represents a failure to recognize the ECHR decision’s common law aspects, rather than an intention to erase them. Conversely, legal convergence *is* taking place within the EU member states, but precisely not where it frequently is trumpeted by those eager to promote and perceive legal convergence.

IV. DECEPTIVE APPEARANCES

As layers of legal norms from non-national sources become superimposed on national norms, systems may undergo transformations difficult to observe because unintended and not visibly substantive in nature. The very expectation that convergence will result from encounter has caused a tendency to take apparent convergence for the authentic item, while simultaneously making it more difficult to perceive its occurrence elsewhere.

Contrary to frequent claims, it is illusory that anything like a common law *stare decisis* became a part of the EU civil law states when they recognized European court decisions as a source of law. Such

33. See Joerges, *supra* note 16, at 2 (“[T]he Europeanization of private law should be seen as a process that triggers disintegration within national private law systems and affects their systematic consistency.”).

34. This is disputed by some. For a recent summary of the debate, see Raffaele Caterina, *Comparative Law and the Cognitive Revolution*, 78 TUL. L. REV. 1501, 1505-09 (2004).

apparent commonality offers tempting bait for overinterpretation, but is misleading on closer scrutiny. A civilian rendition of the EU legal system's integration of the common law rule of following precedents is that Italy and Germany, even internally, actually have become more common law than the common law states, that they have "transcend[ed] the limits of the common law . . ." ³⁵ because the federal constitutional courts in those countries do not just view ECJ precedents as binding future similar cases—they view ECJ decisions also as binding future factually *dissimilar* cases:

In the living experience of the process of European integration, as attests the fact that the German Constitutional Court affirmed that interpretive decisions "bind all the jurisdictions of the Member States invested by the same question even in different cases," there is growing recognition of the precedential value of Court of Justice decisions even to factually dissimilar cases. ³⁶

What does such a formulation, utterly foreign to a common law ear, mean? Closer examination reveals a civilian reformulation of *stare decisis*, and a failure of translation. The application of a precedent to a future *dissimilar* case is a reinsertion of the civil law tradition into what is being called a common law respect for case law. It is possible only by way of a devalorization of the facts of cases, and therefore a rejection of the most central aspect of the common-law understanding of what case law is: namely, as fact-based and fact-dependent. ³⁷

Similarly, the Italian private-law Supreme Court (*Corte di cassazione*) often is described in comparative law circles as an example of how much convergence the modern era is seeing between the common law and the civil law. ³⁸ This is because in modern Italy, Supreme Court decisions are recognized as a source of law. But when we look at how they are a source of law, we see that Italian lawyers read the Court's decisions in the form known as the "*massime*," short summaries of the rules of the cases that usually are factually

35. PAOLO MENGOZZI, EUROPEAN COMMUNITY LAW: FROM COMMON MARKET TO EUROPEAN UNION 190 (Patrick Del Duca trans., 1992). I note with respect to the quoted phrase, as well as to the following quote, *see infra* note 36 and accompanying text, that this language is from the first edition of Mengozzi's book, and is not in his subsequent, second edition (1999).

36. *Id.*

37. For a detailed discussion of the role of facts in common law systems, see Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001) [hereinafter Curran, *Romantic Common Law*].

38. See Francesco G. Mazzotta, *Precedents in Italian Law*, 9 MICH. ST. J. INT'L L. 121, 128, 140 (2000).

decontextualized, containing no description of the facts of the case.³⁹ Like its English cognate, “maxim,” the *massima* is a normative principle, written in a style similar to that of an article in a civil code, such that *massime* cannot spawn the inductive, analogical reasoning that is the hallmark of the common law. It comes therefore no longer as a surprise that, when reformulated as civilian, code-like texts, such alleged “case law” can be applied to future *dissimilar* cases.

This “civilianization” of case law lies in indissociably linking cases to the civilian conception of law as a formulation of prescriptive norms. A case that is accepted as a source of law in a civil law state is transformed into a factually decontextualized, normative principle in order to be deemed “law.” Thus, what a common law lawyer would extract as only one component of the case, namely, its rule, becomes the sum total of the case in civil law states which accept cases as a source of law. This greatly reduces the capacity of such “case law” for the intricate analogizing and inductive reasoning that depend on fact-based law, and which are vital characterizing attributes of the common law concept of “case law.”

Moreover, the civilian understanding of the court’s role in creating “case law” is different from its common law counterpart. For the civilian, the courts whose decisions will be a source of law are performing the civilian judicial task of applying enacted law—a law enacted by those endowed with legislative powers.⁴⁰ This is a far cry from the common law idea that courts create case law through case adjudications, in a dynamic of mutual interaction between living factual circumstances and analogical reasoning to precedents, so constituted that even governing legislation, where it exists,⁴¹ recedes in importance to a vanishing point next to the preeminent court opinions that determine law and law’s meaning.⁴²

39. See Michele Taruffo & Massimo La Torre, *Precedent in Italy*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 141, 148 (D. Neil MacCormick & Robert S. Summers eds., 1997).

40. See Jean Foyer, “*Le Code civil est vivant. Il doit le demeurer!*”, JCP 2004 I-120 13, at 543, 545 (2004) (criticizing the excessive power that the European courts have acquired in the process of “interpreting” European Community and human rights law).

41. Moreover, here it should be remembered that the common law tradition is based on a system in which it is the exception, not the rule, for courts to operate under the aegis of enacted legislation. See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908).

42. Kahn-Freund pointed out not only the lowly hierarchical place of the statute in comparison to case law common law systems, but also and more particularly a greater common law judicial reluctance to implement public policy where the law is statutory rather than when it is judge-made case law. OTTO KAHN-FREUND, SELECTED WRITINGS 254 (Modern Law Review 1978). On ECHR methodology, reflecting the unquestioned assumption that, even though the Court is committed to keeping the European Convention a living document, attuned to contemporary needs,

On the other hand, legal convergence has been occurring unobtrusively within member states in the *process* by which law is changing. The supremacy of European law has caused throughout the EU a method of legal change characteristic of common law systems, and which represents a break with the most profound civil law idea of what law creation means. First, EU directives are not drafted in a code-like manner to allow civilian states to apply them in habitual ways, but are far more detailed in style, in the manner of the common law expectation for enacted law.⁴³ Moreover, in order to remain compliant with EU directives and court decisions, the member states must change their own internal laws as necessary.⁴⁴ This process goes against the civilian idea of law as emanating from a coherent whole.⁴⁵ It is a common law progression of specific statutory enactments in reaction to changed circumstances.

Many civilians are disturbed by this. As Zimmermann has put it, “[t]his way of ‘[e]uropeanizing’ our . . . law has been highly unsatisfactory We are dealing with no more than fragments of . . . law, inserted . . . inorganically, and in a ‘higgledy-piggledy’ fashion, into the various national legal systems.”⁴⁶ Another civilian legal scholar writes that this new way of law-formation is in confrontation with “the established understanding of law.”⁴⁷ This confrontation is with

the ECHR is applying enacted law, see Bruno Genevois, *Le Conseil d'État et l'interprétation de la loi*, 4 RFD.A 877, 881 (2002). On the common-law culture's incorporation of legislation into case law, see Curran, *Romantic Common Law*, *supra* note 37.

43. See Christian von Bar, *Le groupe d'études sur un code civil européen*, 1-2001 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 127, 138 (2001); Foyer, *supra* note 40, at 545. On the difference between the two legal cultures in this respect, and the difficulty member state judges experience when dealing with enacted law from the “other” system, see Lord Denning's opinion in *Bulmer (H P) Ltd v. J Bollinger SA*, [1974] 2 All. E.R. 1226, 1236 (C.A.); Curran, *Romantic Common Law*, *supra* note 37.

44. See, e.g., Treaty Establishing the European Economic Community art. 10, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

45. For an overview of the civil-law emphasis on the coherent whole, in one of its purest extant forms, see ANTOINE GARAPON & IOANNIS PAPADOPOULOS, *JUGER EN AMÉRIQUE ET EN FRANCE* (2003); Christophe Jamin, *Un modèle original: la construction de la pensée juridique française*, BULLETIN D'INFORMATION COUR DE CASSATION (2004).

46. Reinhard Zimmermann, *Civil Code or Civil Law?—Towards a New European Private Law*, 20 SYRACUSE J. INT'L L. & COM. 217, 218 (1994) [hereinafter Zimmermann, *Towards a New European Private Law*] (criticizing the EU-generated process of legal evolution, but not advocating a European civil code as the remedy); accord Reinhard Zimmermann, *Civil Code and Civil Law: The “Europeanization” of Private Law Within the European Community and the Re-Emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63, 63, 78, 80 (1995) [hereinafter Zimmermann, *The “Europeanization” of Private Law*]. Zimmerman notes that EU law has “no more than a tenuous relationship to the core of private law”; *id.* at 78, and that it is troublesome that EU law is proceeding apace “without a clearly defined policy”; *id.* at 79.

47. Friedrich Kübler, *Traumpfade oder Holzwege nach Europa? Oder: Was wir uns der Rechtsgeschichte wünschen sollten*, 12 RECHTSHISTORISCHES J. 307, 307 (1993).

the established *civil law* understanding of law, imbued with an underlying ideology, reflected in Enlightenment thinking, of applying scientific methods to all areas of study, including law, privileging the whole, the coherent and interrelatedness, as opposed to the component part, the particular and the isolated.⁴⁸ Not surprisingly, there is support for an EU civil code, which would be just such an overarching, interrelated whole, embodying the spirit of the law, as to halt the current manner of progression, and create an all-encompassing tissue of principles and norms as a retroactively construed point of departure for all future specific legal developments.⁴⁹

Indeed, in arguing for a European civil code, the head of the study group to develop the code, Christian von Bar, attributes the “Amomentum” for it to a growing uneasiness with the many new EU directives which had begun to make deep inroads on . . . national laws,⁵⁰ and because “*the current . . . ‘piecemeal’ approach of directives . . . [is] endangering the quality and systematic coherence of our private law.*”⁵¹ Von Bar’s insistence on such “*systematic coherence*”⁵² reflects in civilian manner an unquestioned assumption of the essential role of both system and overall coherence in the idea of law itself.⁵³

Von Bar’s view is consistent with fierce criticism in France of the new legal progression. In the context of domestic anti-terrorism laws enacted to meet specific problems, one French author criticizes the new

48. See Curran, *Romantic Common Law*, *supra* note 37, at 75-114. But see Zimmermann, *The “Europeanization” of Private Law*, *supra* note 46, at 85 (citing HAROLD J. BERMAN, *LAW AND REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION* 9 (1983) (discussing the proposition that overarching legal coherence is the basis of western conception of law, without differentiation between common and civil law)); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT’L L.* 553, 553-79 (2002) (arguing that the call for overarching legal coherence is a reaction against the postmodern world, rather than linking it to civilian legal conceptions. It is noteworthy, however, that the proponents of legal coherence the authors cite overwhelmingly are civilians, and those they cite as being undisturbed by current legal fragmentation overwhelmingly are common law jurists). See also Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 *CAMBRIDGE REV. INT’L AFF.* 197, 212 (2004) (“the space of the cosmopolitan, previously occupied by intergovernmental, federalist public law schemes is taken up by a ‘postmodern’ process where the structural coupling between the political and the legal—constitutionalisation—takes place through fragmented and uncoordinated forms of normative specification at different levels of transnational activity”).

49. See Christian v. Bar, *From Principles to Codification: Prospects for European Private Law*, Lecture at the *Cour de cassation* (Apr. 12, 2002), <http://www.courdecassation.fr/manifestations/conference/2002-04-12-von-Bar/societe-de-legislationEN.htm> (last visited Nov. 5, 2005).

50. *Id.*

51. *Id.* at 5 (emphasis added).

52. *Id.*

53. For the crucial nature of both to civilian law ideation, see Jamin, *supra* note 45.

evolution as follows: “The creation of new violations . . . also corresponds to the inflationist trend in defining crimes: *the enacted law no longer exists to resolve in a general way; rather, it resolves particular problems . . . [but] slid[es] towards a different conception of criminal law.*”⁵⁴ He emphasizes that law is “there to regulate in a *general manner.*”⁵⁵ Further, he signals by his choice of section subtitle, “*The Loss of Essential Frames of Reference,*”⁵⁶ that the danger of legal evolution by and for the isolated, the particular, and due to factual occurrences in the life of parties, is nothing less than a danger to the meaning of law.⁵⁷ As Portalis explained to the legislators of France, the great lesson that Montesquieu taught in his *Spirit of the Laws*, was “never to separate the details from the whole.”⁵⁸

Transposed to a planetary level, this same discomfort with piecemeal legal progression also observed on the world stage permeates Delmas-Marty’s call for a world-wide legal order that would take stock of, and overcome, the current progression in law which depends on multiplying “fragments,”⁵⁹ and that she fears is resulting in a legal world disorder.⁶⁰ She emphasizes that a pluralist legal goal must be of “ordered pluralism.”⁶¹

Conversely, in what reflects a profoundly common law perspective but is not discussed as such, Anne-Marie Slaughter describes in glowing and highly optimistic terms contemporary legal and governmental change on the planetary level, corresponding closely to the “higgledy-piggledy” and “piecemeal” method so discomfiting to civilian legal scholars.⁶² She writes that nation states are “disaggregating into . . . functionally distinct parts. These parts—courts, regulatory agencies, executives and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a

54. Jean-Paul Levy, *Pénalisation et répression: adaptation à la criminalité ou dérive sécuritaire?*, GAZETTE DU PALAIS, May-June 2004, at 1552, 1553.

55. *Id.* at 1552 (emphasis added).

56. *Id.*

57. *Id.* For a more detailed discussion of how these two patterns correspond to the common and civil law, see Curran, *Romantic Common Law*, *supra* note 37.

58. CONSEIL D’ÉTAT ET DU TRIBUNAT, MOTIFS ET DISCOURS PRONONCÉS LORS DE LA PUBLICATION DU CODE CIVIL (Portalis et al. eds., Paris, 1838), reprinted in Valerie Lasserre-Kiesow, *Le discours final de Portalis*, JCP 2004 I-122 13, at 553, 555.

59. DELMAS-MARTY, GLOBALISATION, *supra* note 8, at 3.

60. *Id.* at 3, 4 (emphasis added).

61. *Id.* at 4 (emphasis added).

62. See, e.g., Slaughter, *The Real New World Order*, *supra* note 8; see also SLAUGHTER, A NEW WORLD ORDER, *supra* note 8, at 263. For a similar structure to global judicial communication, see Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003).

new, transgovernmental order.”⁶³ She welcomes this new world order of “transgovernmentalism” based on a proliferation of piecemeal agreements reached as needed among professional counterparts throughout society, both private and public, because of how efficiently they produce solutions to ongoing needs as they present themselves in our “increasingly borderless world”⁶⁴ She applauds the process of state “disaggregation”⁶⁵ for its functional benefits, stressing both that “[u]niformity of result and diversity of means”⁶⁶ are the hallmark of the new world. She defends “disaggregation” and “transgovernmentalism” against the charge that they diminish democracy and the nation state, arguing that professional networks operating transgovernmentally are constrained by national law, and therefore are under the supervision of “national leaders who are accountable to the[ir] people.”⁶⁷

Slaughter’s term of “disaggregation” of the state connotes just the sort of *autonomous* multiplicity of measures that typifies common law legal development, a law based on case by case progressions, and on statutes enacted where a particular problem and need are identified, engendering a statutory solution that wrests a specific problem from judicial control.⁶⁸ In other words, it typifies an evolution antithetical to the civilian conception of legal evolution and legal order proceeding from a cohesive, harmonious whole. Delmas-Marty sees the profusion of new norms that are developing spontaneously without an overarching, controlling, coherent set of rules, as a dangerous normative fragmentation,⁶⁹ while Slaughter, on the other hand, seeks principally to allay fears that disaggregation may be correlated with democratic deficits. Indeed, her view is that the resulting disaggregation is positive

63. Slaughter, *The Real New World Order*, *supra* note 8, at 184.

64. *Id.* at 186.

65. *See id.* at 184; SLAUGHTER, A NEW WORLD ORDER, *supra* note 8, at 5-6, 12-15, 18-21, 31, 36-37, 132, 254, 257, 263-69 (discussing state disaggregation).

66. Slaughter, *The Real New World Order*, *supra* note 8, at 192.

67. *Id.* Compare Weiler’s description of the EU’s legal order as having “to a large extent *nationalized* Community obligations” Weiler, *supra* note 26, at 2421.

68. *See* Slaughter, *The Real New World Order*, *supra* note 8, at 184; SLAUGHTER, A NEW WORLD ORDER, *supra* note 8, at 5-6, 12-15, 18-21, 31, 36-37, 132, 254, 257, 263-69 (discussing state disaggregation).

69. DELMAS-MARTY, GLOBALISATION, *supra* note 8, at 6-7. Both Niklas Luhmann and Günther Teubner study legal globalization as a unification causing fragmentation, but also as operating on an inner logic to which extra-legal normativity (such as from the field of ethics) is not germane. *See, e.g.*, NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Klaus A. Ziegert trans., 2004); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998); Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

because it puts legal progression in the hands of the specialists at local levels of decision-making and cooperation, who are best able to craft particular solutions to the particular problems they themselves encounter.

In contrast, Delmas-Marty fears potential catastrophe from an overall ethical perspective where the particular change that impacts an interstate, international arena, need not be engendered and monitored by an overarching world order.⁷⁰ She believes that human rights already are becoming the collateral damage of an ever-growing accumulation of isolated developments that functionalist goals have spawned, ungoverned by a coherent legal framework to embody the spirit of law itself.⁷¹ Such a process of “higgledy-piggledy” change already may be inexorable, as Slaughter believes.⁷² If so, then the attempts to reverse it within the EU by a new civil code or constitution may be doomed to failure. Whether inexorable or not, however, it is the reverse of the civilian conception of law itself.⁷³

With the notable exception of Legrand’s analysis, the debate is not taking place on the terrain of common versus civil law, however.⁷⁴ Neither Slaughter nor Delmas-Marty, nor others, associate their evaluation in terms of how it typifies a common law versus a civilian

70. DELMAS-MARTY, GLOBALISATION, *supra* note 8, at 6-7.

71. The overarching framework that undergirds the civilian concept of law by embodying the spirit of all the laws, is of law in the general, abstract sense: the French *droit*; German *Recht*; Spanish *derecho*; Italian *diritto*, as opposed to enacted law: the French *loi*; German *Gesetz*; Spanish *lege*; Italian *lei*. On the difference, see THOMAS HOBBS, *LEVIATHAN* 84 (Oxford 1960) (1651).

72. See Slaughter, *The Real New World Order*, *supra* note 8; SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 8.

73. Similarly undisturbed by challenges to a coherent whole is Stephen Tierney in his approving analysis of “sub-state” phenomena. See Tierney, *supra* note 10.

74. Legrand consistently and insistently has signaled the centrality of differing legal cultures and mentalities as an unspoken influence on law. He derives a conclusion of inalterable non-convergence. See, e.g., Pierre Legrand, *European Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52, 61-62 (1996); Pierre Legrand, *Sens et non-sens d’un Code civil européen*, 48 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 779 (1996) (noting that a European civil code would be an act of arrogance and an illusory, indeed repressive, symbol of legal convergence). While it may seem that he underassesses the role of encounter and exchange in spawning convergence, and overassesses the obstacles to mutual understanding between the common and civil law, he identifies the many and subtle layers of differences that make a difference. One of his recent contributions is suggestive of not just the nature, but also the potential, of comparison in law, and the mysterious and intriguing links between law and life. See Pierre Legrand, *The same and the different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 240 (Pierre Legrand & Roderick Munday eds., 2003). But see Peter Birks, *Roman Law in Twentieth-Century Britain*, in *JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* 249-68 (Jack Beatson & Reinhard Zimmermann eds., 2004) [hereinafter *JURISTS UPROOTED*] (noting that until the decline of Roman law courses in British law schools in the 1960s, all British-educated lawyers were intimately familiar with the civilian legal mentality through their study of Roman law).

mentality.⁷⁵ The common law–civil law divide in my view is central to understanding much about the underlying nature of the debate, however. Only by understanding the centrality of the overarching textual legal normative structure to govern each legal act in civilian legal culture can one understand why Slaughter’s defense of legal disaggregation on the basis of democratic viability does not address the civilian concern, and why Delmas-Marty’s call for a world order based on enacted textual law is not shared by Slaughter.

The debate surrounding a European civil code does not deal only with giving European legal developments the point of departure from, and points of reference within, a European-wide arena compatible with the civilian or, alternatively, with the common law understanding of law. There are other reasons why scholars favor or oppose a European-wide civil code, and the positions taken do not all tally with the civilian-common law divide discussed above.⁷⁶ Some civil law scholars oppose it because of unrelated priorities that supersede the desire to organize the process of law into the civilian idea of coherent law-generation.

This can be seen on the part of French opponents to a European civil code, who, coming from the more traditional end of the spectrum of civilian legal culture, might have been expected to be greater proponents of a European-wide legal framework than their German colleagues.⁷⁷ Their opposition to a European civil code does not reflect a common law perspective on the understanding of law, however, but, rather, an attachment to the French Civil Code of such magnitude as to make them consider the prospect of France’s Civil Code being superseded by a European code as more dangerous to the integrity of French legal culture than a piecemeal and therefore disorderly (by civilian standards) progression of law.⁷⁸

75. Nor do others in this debate, such as Lequette, von Bar or Mattei. *See* Lequette, *supra* note 13; von Bar, *supra* note 43; Mattei, *infra* note 76.

76. *See, e.g.*, Ugo Mattei, *Hard Code Now!*, GLOBAL JURIST FRONTIERS, Volume 2, Issue 1 (2002), available at <http://www.bepress.com/gj/frontiers/vol2/iss1/art1> (supporting the European civil code in order to protect consumers); Lequette, *supra* note 13 (opposing the European civil code in order to maintain national traditions deemed essential to cultural identity).

77. One can see a predictable civilian opposition to the piecemeal legal evolution in internal French law where numerous legislative reforms have been occurring without a more comprehensive rethinking to ensure overall coherence. *See* LEVY, *supra* note 54 Jean-Grégoire Mahinga, *Libéralités entre époux après la loi No. 2004-439 du 26 mai 2004 réformant le divorce*, JCP 2005 I-104 4, at 107 (emphasis added) (“Important modifications are being brought to the law . . . the law . . . now awaits a *comprehensive reform*.” (“*une réforme d’ensemble*”)).

78. *See* Lequette, *supra* note 13. Lequette’s belief that a European civil code must displace the national ones may well be a reasonable prediction. Even while protesting that this would not be the case, von Bar goes no further than to say that, “[a]t this time, no one is aiming . . . to abandon the existing national codes.” von Bar, *supra* note 43, at 131 (emphasis added).

Indeed, a principal proponent of this view, Yves Lequette, in addition to his primary concern that a European civil code would be the death knell of French legal culture by overriding the national code, explicitly argues that a European civil code would subvert law by resulting in an empowerment of judges (a common law attribute) and thereby undermine legal coherence: legal “diversity could well be reintroduced from one country to another at the level of [judicial] application,”⁷⁹ a harm that he assumes a European code should be aspiring to prevent. Jean Foyer, former French Minister of Justice and law professor, believes that an excessive empowerment of judges already has occurred in European law:

The power of the European Court of Justice in interpreting European law and that of the European Court of Human Rights are considerable and—in my opinion—excessive. Portalis [drafter of the French Civil Code] said that the judge should always be “under the legislator’s supervision.” However, [European] Community law and the European human rights regime are systems in which the courts are all-powerful. The counterbalance of a legislator able to check their excesses is sorely wanting.⁸⁰

Like Lequette, Foyer is hostile to a European civil code under the assumption that it would undermine France’s Civil Code: “We should be under no illusion: if a European civil code comes into being, . . . we will not find in it the concepts of French Law.”⁸¹ The view that the national civil codes of continental Europe reflect each nation state’s culture in profound ways is especially strong in France because of the influence of the French code on other civil codes enacted as a result of Napoleonic conquests.⁸² The strong attachment to the Civil Code of France, as opposed to a European one, derives from the belief that the European code inevitably would displace and supplant the French Civil Code notwithstanding European pledges of preserving national legal cultures to the contrary.⁸³ There is no dearth of French opposition to the un-

79. Lequette, *supra* note 13, at 2210.

80. Foyer, *supra* note 40, at 545.

81. *Id.* at 546; *see also* Rémy Cabrillac, *L’Avenir du code civil*, JCP 2004 I-121 13, at 547, 548 (noting that a European civil code would mean the erasure of all of the member states’ fundamentally national law).

82. *See, e.g.*, Lequette, *supra* note 13, at 2213; Foyer, *supra* note 40, at 544 (“[T]he [French] Civil Code is a monument of the heritage of France, equal to the Cathedral of Reims or Versailles. We all remember Napoleon saying . . . in Saint Helena: ‘my real glory is my civil code . . . it shall not perish . . .’”) (“*le Code civil est un monument du patrimoine français, au même titre que la cathédrale de Reims ou Versailles. Chacun se souvient de la confiance de Napoléon . . . à Sainte-Hélène : « ma véritable gloire, c’est mon code civil . . . il ne périra point . . . »*”).

83. *See* Lequette, *supra* note 13, at 2213; Pierre Legrand, *Against a European Civil Code*, 60

civilian elements growing in European law, however. Rather, the French view tends to consider a European civil code as an unacceptable solution to the problem. Conclusions as to the desirability of a European-wide code thus depend upon which priorities the proponent or opponent privileges.

Ugo Mattei, for instance, prioritizes yet another concern. Like Lequette, Foyer and Legrand, who oppose a European civil code, he views the adoption of an EU code as “a dramatic rupture with the past,”⁸⁴ but Mattei nevertheless favors its adoption. He believes that the code is needed to promote basic fairness, and that failure to enact it will lead to gross injustice to consumers, and particularly to the poor.⁸⁵

Mattei and Di Robilant use the term “psychological refusal” to decry scholarly denial of the political implications to the debate about the European civil code.⁸⁶ Their call to a reality check substantively echoes some of Delmas-Marty’s focus on ethical violations as the collateral damage of superimposed legal norms meeting outside of an overarching frame of reference, or legal order.⁸⁷ Delmas-Marty’s concerns are of a betrayal of basic human rights values as the predictable and already present danger of failing to establish a world legal order.⁸⁸

MOD. L. REV. 44, 51-52, 53-55 (1997).

84. Ugo Mattei & Anna Di Robilant, *Les longs adieux: La codification italienne et le Code Napoléon dans le déclin du positivisme étatique*, 4-2004 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 847, 861 (2004).

85. See Mattei, *supra* note 76, at 11, 13, 15, 17-18, 25; Mattei & Di Robilant, *supra* note 84, at 861. Contra Zimmermann, *The “Europeanization” of Private Law*, *supra* note 46, at 73 (doubting if a common European private law would be able to protect consumers). Mattei and Di Robilant also signal the inevitably independent future of codes vis-à-vis their drafters; they also recognized two hundred years ago by Portalis, drafter of the French Civil Code, foreseeing that the European civil code will elude the control of Brussels: “A single European Code represents a dramatic rupture with the past and at the same time a political-constitutional moment that cannot take shape entirely within the Directions of Brussels.” Mattei & Di Robilant, *supra* note 84, at 861. Portalis put it this way: “[A] myriad of details escapes him [i.e., the legislator]” (“*il est une foule de détails qui lui échappent*”). PORTALIS, DISCOURS PRÉLIMINAIRE AU PREMIER PROJET DE CODE CIVIL 18 (éditions confluentes 1999) (1841).

86. Mattei & Di Robilant, *supra* note 84, at 861. The denial to which Mattei and Di Robilant refer may be well below the surface, however, and, as I have described elsewhere, result from numerous concerns of highly varying natures, such that the debaters are arguing from different contexts. See Vivian Grosswald Curran, *On the Shoulders of Schlesinger: The Trento Common Core of Private Law Project*, 11 EUR. REV. PRIVATE L. 66, 73 (2003) [hereinafter Curran, *Shoulders of Schlesinger*]. Mattei attributes what he views as a European refusal to consider ethical consequences to legal proposals to the influence of United States scholars on their European colleagues. In my view, what he criticizes as United States ethical recklessness is, rather, the tradition in U.S. scholarship of writing without expecting to wield practical influence. See *id.*

87. See DELMAS-MARTY, GLOBALISATION, *supra* note 8, at 1, 4.

88. *Id.*; accord MICHAEL IGNATIEFF ET AL., HUMAN RIGHTS AS POLITICS AND IDOLATRY 171-73 (Amy Gutmann ed., 2001) (endorsing human rights precisely in their “minimalism,” and, like Delmas-Marty, urging them as legally binding and enforceable).

She suggests a planetary regime of human rights as a kind of civil code of the world, describing the legal concepts involved as abstract and porous.⁸⁹ These are the very hallmarks of continental European civil codes.⁹⁰

Part of the civilian discomfort with the method of EU law production today concerns the large quantity of legislative enactments it is spawning. The civilian legal system's coherence and rule of law are considered to have depended on paucity of enacted law since the time of the Napoleonic Code of 1804, because only the generalization and abstraction of codified law permit civil codes to withstand vicissitudes of time.⁹¹ Thus, in civilian legal culture, the written law should avoid specificity and multiplicity precisely because the written should be permanent, and should transcend time. The idea is that a profusion of legislation signifies "useless [enacted] laws [that then] undermine needed laws."⁹²

The Enlightenment tenet of an air-tight framework of logic, reason and coherence, also fundamental to the civilian conception of law,⁹³ is threatened by implosion from a surplus of legislation. Writing endows law with a character of permanence,⁹⁴ but, once written, law becomes concretized, losing the fluidity of transformative potential that the unwritten preserves. Consequently, one of France's leading journals of legal developments carried a supplement in November, 2004, criticizing the "inflation" in legislative enactments by drawing attention to the inevitable character of "permanence" that written law creates.⁹⁵ As another scholar puts it, European law "tend[s] to ossify the law."⁹⁶ Portalis wrote that "perpetuity is the wish of laws."⁹⁷ Indeed, the genius of the civilian states has been the vast unsaid *within* the written, the capacity for suggestion inherent in codified principles that are abstract and vague, such that law's permanence does not undermine the ever-

89. See DELMAS-MARTY, *GLOBALISATION*, *supra* note 8.

90. See GARAPON & PAPADOPOULOS, *supra* note 45; Jamin, *supra* note 45; Curran, *Romantic Common Law*, *supra* note 37, at 106 n.212.

91. See GARAPON & PAPADOPOULOS, *supra* note 45. The French Civil Code was the first successful code of modern times because its drafters understood this. See PORTALIS, *supra* note 85, at 17.

92. Foyer, *supra* note 40, at 545 ("[les] lois inutiles nuisent aux lois nécessaires").

93. See Curran, *Romantic Common Law*, *supra* note 37, at 94.

94. See *Dossier special[:] Législation; Inflation Législative Galopante*, J.C.P., No. 46, at 1 (Supp. Nov. 10, 2004) ("Special File[:] Legislation," on "Gallop[ing] Legislative Inflation").

95. *Id.*

96. Zimmermann, *The "Europeanization" of Private Law*, *supra* note 46, at 78.

97. Jean François Kneegk, *Le bicentenaire du Code civil, "péristyle de la législation française"*, GAZETTE DU PALAIS, Jan.-Feb. 2004, at 8 ("[L]a perpétuité est dans le vœu des lois") (citing Portalis).

changing needs of society.⁹⁸

More precisely, as the French legal journal criticism of “legislative inflation” suggests, the civilian view of evolving problems is that they rarely justify enacting legislative solutions, since the text, by virtue of being text, and therefore concrete and permanent, may outlive the problems and thereby entrap society through written directives that later become senseless.⁹⁹ As Garapon and Papadopoulos suggest in their recent book, the foundational civilian mythology of overarching coherence in a codified law that embodies law’s spirit remains at the root of the civilian legal culture,¹⁰⁰ however many doubts have been cast on the mythology by continental European theorists such as Kant, Jhering, Kantorowicz and Ehrlich in Germany, and by Lambert, Géný and Saleilles in France.¹⁰¹

Another component of the civilian concern that has not surfaced explicitly, but that I believe to be a deeply disturbing factor to many today, is that the profusion of EU law, in turn spawning a profusion of domestic law, is associated in the civilian mind with being anti-law because it was a characteristic of the fascist period in Europe that preceded the formation of the EU. The fascist dictatorships enacted a huge number of laws, constructing a legalistic façade that hid the profoundly unlawful nature of the laws themselves.¹⁰² “The system inaugurated a government of men, not of laws, although it operated through a constant effusion of new statutes.”¹⁰³ Today, statutory

98. See, e.g., PORTALIS, *supra* note 58; GARAPON & PAPADOPOULOS, *supra* note 45; see also Mattei & Di Robilant, *supra* note 84, at 857 (linking codification to an increasing trend to generalization, as epitomized by the use of general clauses).

99. See *Dossier spécial*, *supra* note 94.

100. See GARAPON & PAPADOPOULOS, *supra* note 45; Curran, *Romantic Common Law*, *supra* note 37. The French legal supplement ends with the Latin dictum, “*cessante ratione legis, cessat lex*” (“when the reason of law ceases, so should cease the law”).

101. See, e.g., IMMANUEL KANT, *FIRST INTRODUCTION TO THE CRITIQUE OF JUDGMENT* (James Haden trans., 1965); RUDOLF VON JHERING, *DER ZWECK IM RECHT* (Leipzig, 1884); RUDOLF VON JHERING, *SCHERZ UND ERNST IN DER JURISPRUDENZ* (Darmstadt, 1964) (1884); HERMANN KANTOROWICZ (GNAEUS FLAVIUS), *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (Heidelberg, 1906); EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (photo. reprint 1994) (Walter L. Moll trans., 1936); 2 *CONGRÈS INTERNATIONAL DE DROIT COMPARÉ, PROCÈS-VERBAUX DES SÉANCES ET DOCUMENTS* (Paris, 1907); FRANCOIS GÉNY, *MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (Paris, 1919); RAYMOND SALEILLES, *Préface*, in *id.*

102. See, e.g., MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* 7 (Thomas Dunlop trans., 1998); INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* 71 (Deborah Lucas Schneider trans., 1991); RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* 390 (1996); Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy’s Suicide in Vichy France*, 50 *HASTINGS L.J.* 1, 10 (1998).

103. Maria L. Marcus, *Austria’s Pre-War Brown v. Board of Education*, 32 *FORDHAM URB.*

profusion has acquired a lurking association in the civilian legal mind with the end of the rule of law.¹⁰⁴

Thus, a supranational civil code, the latter itself a kind of economic and cultural constitution of Europe,¹⁰⁵ would accomplish several civilian objectives. If approved by all member states, it would ensure that an overarching, cohesive system engenders particular legal consequences; that legal developments are not the byproducts of circumstances, rather than part and parcel of a well thought-out scheme; and that its coherent framework would be a bulwark against an end to the rule of law, reversing the current pattern of ever-growing numbers of statutory enactments due to European requirements, but not emanating from a reliable cohesive text.

Because the new European process of piecemeal legal evolution has not been recognized by its opponents as common law in nature, and indeed came about without being intended as such, its rejection by civil law scholars has not been associated with any semblance of overt rejection of the common law as a worthy legal partner. The criticism of a “higgledy-piggledy” process therefore does not take into consideration that the current pattern of legal evolution is rich in potential for increased legal integration, and for bringing together the two law worlds of Europe in an unexpected way.

V. LEGAL INTEGRATION AND DIS-INTEGRATION: THE *PRETTY* CASE

In the ECHR *Pretty* decision, the space of encounter between the common and civil law systems led to an interplay of convergence and non-convergence.¹⁰⁶ The ECHR set forth, in prototypical civil-law style, the texts of the governing law, since the civilian concept of law is a written text that applies to the case, here the European Convention on

L.J. 1, 36 (2004).

104. Extremely interesting in this regard is that, contrary to perception, the number of new laws proposed by France’s parliament in fact seems not to have increased since 1968. See *VIVE LA LOI! 9* (Christian Poncelet & Centre d’Etudes eds., 2004). This astonishing fact opens the door to exploring the cause of the widespread erroneous perception, and whether it stems from a reaction against the European legal directive, and more particularly from anxiety over the penetration of the EU’s alien approach into the national legal order perceived to be vulnerable to silent, creeping systemic change that bypasses democratic channels of approval and adoption.

105. See GARAPON & PAPADOPOULOS, *supra* note 45; Mattei & Di Robilant, *supra* note 84, at 863.

106. For other illustrations of this phenomenon at work in the ECJ, see Koopmans, *supra* note 27. For the view that because the ECJ and the ECHR write long, explanatory decisions, they have adopted the English style, and renounced the French style of reasoning, see Sophie Gjidara, *La motivation des décisions de justice: impératifs anciens et exigences nouvelles*, *PETITES AFFICHES*, May 26, 2004, at 3, 20.

Human Rights.¹⁰⁷ Because the ECHR had to decide if the English courts had violated the Convention, the Court also looked at the various UK court opinions in *Pretty* that had preceded the applicant's appeal to the ECHR, as well as at the ECHR's own past decisions.¹⁰⁸

With respect to a number of cases it cited and discussed, the ECHR extracted a factually decontextualized, abstract, normative rule only.¹⁰⁹ This reasoning exemplifies the civilian conception of case law, and is compatible with a civilian reconceptualization of *stare decisis* as a doctrine which may operate as an application of prior court decisions, recognized as sources of law, even to future dissimilar case situations.¹¹⁰ In addition to applying abstract principles from past cases, however, the ECHR also reproduced long quotes from the House of Lords, and thereby automatically engaged vicariously or metatextually in the inductive, analogical reasoning process of the common law courts that had adjudicated the case domestically.¹¹¹

The ECHR then also proceeded to reason analogically on its own, however, focusing on the *Rodriguez* case.¹¹² In discussing *Rodriguez*, the ECHR engaged in reasoning antithetical to the civil law system rooted in the text of the enacted law deemed to govern the case at bar, because the court that had decided *Rodriguez* had not been interpreting the European Convention on Human Rights, the text the ECHR was applying in *Pretty*. *Rodriguez* had been decided under the Canadian Charter.¹¹³ The ECHR explicitly signaled this, thus indicating its own departure into the waters of common law reasoning by factual analogy. It explained its view that *Rodriguez* was relevant to *Pretty* in the most quintessential of common law terms: because *Rodriguez* "concerned a not dissimilar situation to the present."¹¹⁴

The ECHR upheld the UK's refusal to apply to assisted suicide a domestic UK statute that had legalized suicide itself.¹¹⁵ The ECHR found that the UK's refusal to immunize the applicant's husband from

107. These textual references are interspersed throughout the decision. See *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 157, 184.

108. See *id.* For a sweeping characterization of its own case law, see *id.* at 188.

109. See, e.g., *id.* at 190.

110. See *supra* notes 35-42, and accompanying text. The ECHR's other civilian aspects included an evaluation of claims in terms of proportionality, and underscoring the need to interpret all convention articles at issue in a mutually harmonious manner, evaluating if the challenged state acts were out of proportion to legitimate state goal(s).

111. See *Pretty*, 2002-III Eur. Ct. H.R. at 163.

112. *Rodriguez v. British Columbia*, [1993] S.C.R. 519; see *Pretty*, 2002-III Eur. Ct. H.R. at 195.

113. See *Rodriguez*, [1993] S.C.R. at 532.

114. *Pretty*, 2002-III Eur. Ct. H.R. at 195.

115. *Id.* at 201.

future prosecution should he assist her in committing suicide did not constitute a violation of such fundamental European Convention principles as the right to life,¹¹⁶ the right to be free from inhumane or degrading treatment;¹¹⁷ the right to self-determination;¹¹⁸ the right to freedom of belief,¹¹⁹ and the right of the disabled to be free from discriminatory treatment.¹²⁰ The ECHR emphasized that sanctity of life and the respect for human dignity are foundational principles of the Convention,¹²¹ upholding the UK position that “the sanctity of life entails its inviolability by an outsider.”¹²² The applicant’s husband could be deemed such an outsider.

The impact of the ECHR’s convergent, bi-methodological *Pretty* decision was not the end of the story, however. The final step always is local, where European law is brought into its concrete applications. Most lawyers in the EU have domestic practices, and read European court decisions to the extent that they affect national law in general, and their own practice of law in particular. They follow European law by reading the regular, national law publications they are used to reading to keep abreast of national court decisions. Since EU membership, these publications now also include renditions and analyses of European law, including ECHR and ECJ decisions.¹²³ The French case law publication from which many in the French legal community received notice of the case is *La Semaine juridique*.¹²⁴ The purported reporting and presentation of the ECHR *Pretty* decision in that publication considerably distorted it due to (1) the highly excerpted format in which the ECHR decision was reproduced; and (2) the thick filter of interpretation that characterized the French legal commentary.

The French write-up was an entirely civil law analysis. The first aspect of the European legal dis-integration, or retreat into the national, was the French publication’s translation of the ECHR decision in so abridged a form as to be of a length typical for a French national court

116. *Id.* at 185-87.

117. *Id.* at 189-92.

118. *Id.* at 193-97.

119. *Id.* at 198-99.

120. *Id.* at 200-01.

121. *Id.* at 194-95.

122. *Id.* at 167 (quoting *Airedale N.H.S. Trust v. Bland*, [1993] A.C. 789, 831 (H.L.) (appeal taken from Eng.) (U.K.)).

123. European court decisions also are summarized and commented on in special books devoted to the case law of the European courts, but that reproduce only summaries of the courts’ decisions, along with the author’s explanatory and evaluative commentary. The publications present an interpretation of the decision, sometimes quite critical, and profoundly entrenched in national legal ways of analyzing.

124. See Girault, *supra* note 24.

decision. The ECHR decision of over forty pages was abridged into fewer than four pages.¹²⁵ Because European court decisions are many times longer than typical French court decisions, they are reproduced in French publications of court decisions only in excerpted form. By contrast, the typically far shorter decisions of French court generally are reproduced in toto. Thus, the shortening of the European court decision was the first step in the rendering familiar of European law to the French legal community.

The choice of which ECHR passages to excerpt and which to elide was the second national, civilian filter applied to *Pretty*. The abridged version of the ECHR decision deleted virtually all of the common law aspects of the original decision. Where a French summary of the ECHR decision referred to cases the ECHR had analyzed, it did so in terms of factually decontextualized, normative rules, very much like the *massime* of the Italian private law supreme court discussed above.¹²⁶ Thus, the choice of which ECHR passages to reproduce and which to elide became a civilian filter in the way it was applied to *Pretty*. Consequently, even though the French publication of *Pretty* purported to be an abridged French *translation* of the original ECHR text, the French publication reads in a very different way, and, moreover, in the same way that national French court decisions read.

As is the customary manner of presenting national court decisions in civil law systems, the French scholar also gave her own critique.¹²⁷ This involved an independent analysis of the European Convention's application to the legal theories and arguments. The critique seems to a common law reader to be like a court analysis, as though the scholar were now the court.¹²⁸ Moreover, since the scholarly critique follows the summary of the ECHR's decision, by its very position it implicitly suggests that it is the last word, of greater analytical authority than the ECHR's analysis, as indeed it will be within the French legal system, since the judges who apply the ECHR case to future French cases will be looking to the scholarly commentary as to how it should be applied.¹²⁹

125. See *Pretty*, 2002-III Eur. Ct. H.R. at 157; see also Girault, *supra* note 24, at 676-79.

126. See *supra* notes 38-39 and accompanying text.

127. See Girault, *supra* note 24.

128. For the role of scholars in steering court decisions in civil law culture, principally Germany and France, and its roots in Roman law, see, for example, JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968).

129. There are two widely publicized cases in France today, ongoing as of this writing, dealing with this issue. It is my contention that the judges will understand the ECHR decision in *Pretty* from the *Semaine juridique*. The cases relate to the assisted suicide of Vincent Humbert, a young man who publicly appealed for the right to die after being paralyzed in a car accident. His case became famous when he appealed to President Chirac, and the latter refused to agree. The young man wrote

The French scholar approved the ECHR's ruling against the applicant, but was severely critical of the Court for relying on prior cases. Without a glimmer of recognition that anything "common law" had occurred, the French scholar wrote: "It seems that it is a case decision . . . rather than a well-thought-out analysis [*plus qu'une analyse réfléchie*]" that persuaded the European judges,¹³⁰ as though the two were of a mutually exclusive nature. Indeed, the French phrase also might be translated as "rather than a *considered* analysis," because the words connote that an analysis based on a prior case is not "thought-out" or "considered" at all in any legally valid sense.

The French scholar also was scandalized by the ECHR's suggestion that, although the UK was not obliged to give advance immunity from prosecution to the applicant's spouse, it also would not be *obliged* to prosecute him.¹³¹ Indeed, the ECHR had said that the UK's denial of immunity from prosecution should be upheld in part because the UK had made clear that it might choose *not* to prosecute Mr. Pretty.¹³²

The French commentator wrote of this: "Is the [European] Court giving us to understand that *failure to apply the law* can be an answer . . .?"¹³³ This would be incompatible with the civilian concept of the supremacy of the law-text, of the supremacy of legislature over the courts, of, in short, the civilian court's most immutable and fundamental duty as being to *apply* laws that others have enacted. Indeed, the French tradition was that the courts were obliged to apply the law "even if one can not discern its reason."¹³⁴

a book which was published within days of his death. See VINCENT HUMBERT, "JE VOUS DEMANDE LE DROIT DE MOURIR" (2003). His mother said she had helped him die, and was charged with murder. See Marie Humbert, "Je ne regrette rien," PARIS MATCH, Dec. 18-24, 2003, at 67. Within days of the mother's announcement, however, his physician revealed that the mother's dosage of poison had not been lethal, because Vincent had grown resistant to drugs, and that he, the physician, had administered an additional dosage that was the lethal one. The physician has been charged with premeditated murder. See FRÉDÉRIC CHAUSSOY, JE NE SUIS PAS UN ASSASSIN (2004). The case provoked enormous outcry throughout France, with Vincent Humbert's book climbing the best-seller list. In April 2005, France's parliament passed a new law, commonly referred to as the "Humbert law," which relaxes standards for end-of-life-decisions, but does not legalize assisted suicide. Law No. 2005-370 of Apr. 12, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France] Apr. 23, 2005, p. 7089.

130. Girault, *supra* note 24, at 681.

131. *Id.* at 682.

132. *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 157, 197.

133. Girault, *supra* note 24, at 682 (emphasis added) ("*La Cour veut-elle alors signifier que la non-application de la loi peut être une réponse . . . ?*").

134. Alain Pariente, *Le refus de soins: réflexions sur un droit en construction*, 5-2003 REVUE DU DROIT PUBLIC 1419, 1435 (citing *Conclusions sur l'arrêt Mérilhou, du 4 mai 1861*, in 2 SIREY 493 (1862)).

The French scholar pursued as follows: “We prefer to believe that this [apparent ECHR approval of failing to apply the law] is not the case”¹³⁵ and that such unacceptable reasoning on the part of the ECHR “would be beyond the thinking of the European judges.”¹³⁶ The French author made clear that, if there should be any leeway by courts, it is not to fail to prosecute, but that they need not actually *punish* anyone.¹³⁷ This quintessentially civilian perspective was reflected in the comments of a physician at Paris’ Cochin hospital on euthanasia: “Justice must adjudicate cases like that of Dr. Chaussoy [who admitted to administering the lethal dose to tetraplegic Vincent Humbert¹³⁸] with clemency, by imposing a punishment [only] of principle, but he must be tried. The law is ‘all or nothing.’”¹³⁹

Antoine Garapon, for many years a judge in France, has commented that, in civilian legal culture, the “very objective of law . . . lies in its symbolic expression rather than its application in reality. This is why the distortion, in France, between the rigidity of law and the versatility of its practice is confusing [to the common law world]. ‘A stiff rule, a soft practice,’ said the great Tocqueville. . . .”¹⁴⁰

This widespread civilian outlook can be seen in Germany as well. In 2004, more than fifteen years after the fall of the Berlin wall, former East German guards were convicted for the deaths of people trying to flee west before reunification: “[*but t*]he men won’t be punished, the judge said.”¹⁴¹ The civilian requirement that courts apply all enacted law in what, to a common law eye, seems to be in name rather than in deed, also can be seen in the German Federal Constitutional Court analysis of a proposed statute to *de-penalize*, but not *de-criminalize* certain abortions.¹⁴² Similarly, in Italy, even the conscious decision to adopt a

135. Girault, *supra* note 24, at 682.

136. *Id.* (“*pareille conclusion dépassant . . . la pensée des juges européens*”).

137. See Albert Maron et al., *Droit penal et procedure pénale*, JCP 2005 I-161 31-35, at 1503. (noting that French judges determine punishment). Cf. LON L. FULLER, *LAW IN QUEST FOR ITSELF* 33-41 (photo. reprint 1978) (1940) (noting that all societies have laws on the books that are not applied, and concluding that legal positivism is intellectually bankrupt).

138. See CHAUSSOY, *supra* note 129.

139. For Claire Chartier’s interview with Dr. Debré, see “*Il ne faut pas légiférer*,” *L’EXPRESS* (Fr.), Jan. 15, 2004, at 28. Dr. Debré has joined the ranks of those who have written a book on the subject. See BERNARD DEBRÉ, *NOUS T’AVONS TANT AIMÉ: L’EUTHANASIE, L’IMPOSSIBLE LOI* (2004).

140. Antoine Garapon, *French Legal Culture and the Shock of ‘Globalization’*, 4 *SOC. & LEGAL STUD.* 493, 500 (1995). This position was reflected by the Hôpital Cochin doctor reacting to the arrest of Vincent Humbert’s attending physician. See HUMBERT, *supra* note 129.

141. *Former Guards Convicted Fifteen Years After Wall Fell*, *USA TODAY*, Nov. 10, 2004, at 8A (emphasis added).

142. See Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] 1975, 39 *Entscheidungen des Bundesverfassungsgerichts* [BverfGE] 1 (F.R.G.). Another scholar expressed

common law adversarial model to replace Italian criminal procedure stopped short of changing the civilian obligation to prosecute all violations of the law.¹⁴³

In the French rendition of *Pretty*, also typically civilian was the scholar's sense of interpretive freedom in her own role. In describing the applicant's argument as asking the court to "forgo applying the law"¹⁴⁴ and to "authorize the future commission of [a] crime,"¹⁴⁵ the scholar did not pause to consider how contrary to the applicant's own account of her claim such a description might be.

In civil law states, the national law's coherence comes from a complex fabric in which the scholar's voice is an important contributing factor.¹⁴⁶ Here, in a process reminiscent of regression to the mean, the scholar re-assimilated the binding case into a civilian mode of reasoning that rendered it familiar as a "case" to the French legal reader. In so doing, the ECHR decision was transformed into a civilian court decision.

Further, the very existence of the civilian tradition of scholar-commentators to present, explain and critique court decisions plays a crucial role in the meaning of court decisions in civilian states.¹⁴⁷ Even if *La Semaine juridique* had presented an exact word for word translation of the entire ECHR decision, a decision that was highly detailed and self-explanatory, a French lawyer with a domestic law practice would not expect to understand *Pretty* directly from a court's writing. The national lawyer focuses foremost on the scholarly critiques which follow the texts of court decisions, because civil law scholars play a determinative role in both formulating and forming the meaning of court decisions, and in transforming them into points of departure to be followed by future courts, or into discredited approaches for future

contemporary civilian judicial methodology as the "interpret[ation of] standards in light of their goals and underlying principles and [the] restrict[ion] or expan[sion of] the scope of a particular provision accordingly, when [the judges are] faced with a tension between the literal meaning of the statute and those goals and principles." Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 INT'L J. CONST. L. 461, 473 (2004).

143. See Ennio Amodio, *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, 52 AM. J. COMP. L. 489, 492 (2004).

144. Girault, *supra* note 24, at 679. ("elle demanda au Director of Public Prosecution . . . de renoncer . . . à faire application de la loi").

145. *Id.*

146. See, e.g., JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 80-84 (2d ed. 1985).

147. An analogous point for common law is that much can be explained about English law by its antecedents in the civil jury trial, despite its having renounced juries in non-criminal cases. As John Dawson put it, "certain habits of the mind persist." John P. Dawson, *The General Clauses, Viewed From a Distance*, 29 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 441, 454 (1977).

courts to avoid.¹⁴⁸

The origins of the exalted role of scholars in France lie in part in the cryptic style of the traditional French court decision, such that the text of a court decision was not comprehensible without explanatory and evaluative commentary. Under the influence of commissions that have urged more transparent and explanatory writing by courts, some courts in France have departed significantly in substance, if not in style, from the traditional one-sentence decisions that could not be deciphered without scholarly guidance.¹⁴⁹ For a lawyer to make use of such a decision without taking into account the scholarly commentary written about it, however, can be analogized to the common law peril of citing a case without shepardizing it.¹⁵⁰ Civil law national lawyers are not free to interpret a court decision on their own because the judiciary itself continues to rely on scholarly interpretation. This means that predicting the outcome of a future case requires knowledge of the scholarly views that the judges will be consulting.

The analogy to shepardizing is of limited accuracy, in the sense that shepardizing serves to alert a United States common law lawyer to *subsequent* court action that may have effected a change in the meaning of an earlier court opinion, whether of reversal, modification, explanation or the like through a later court's interpretation of the prior case. In civilian systems, the *initial* meaning and import of a decision is influenced by the input of the non-judicial commentator. In other words, for the civilian lawyer, a court decision has insufficient meaning on its own at any point.¹⁵¹

Finally, in France, the primacy of the scholarly commentator's interpretations of court decisions is reflected by the respective physical presentations of the texts the courts write and the texts the scholars write. The *Semaine juridique* publication of the abridged ECHR French translation of *Pretty* is in uninvitingly tiny print, with narrowly spaced lines.¹⁵² In contrast, the scholar's commentary that follows the case is in much larger type, with more generous spacing between lines.¹⁵³ The effect is to suggest implicitly that the court decision is difficult to read,

148. See e.g., DAWSON, *supra* note 128 (discussing the various aspects of civilian legal culture).

149. See Lyndel V. Prott, *A Change of Style in French Appellate Judgments*, 7 ÉTUDES DE LOGIQUE JURIDIQUE 51, 58-66 (1978).

150. For an illustration of this situation, see, for example, Vivian Grosswald Curran, *Politicizing the Crime Against Humanity: The French Example*, 78 NOTRE DAME L. REV. 677, 696 n.78 (2003).

151. See *id.*

152. Girault, *supra* note 24, at 676-79.

153. See *id.* at 679-82.

and even that the reader may proceed directly to the scholarly write-up that summarizes and analyzes it.

Pretty's journey thus demonstrates that EU legal convergence in supranational institutions does not necessarily mean legal convergence with the member states' national legal cultures. Failures of cross-cultural legal understanding result from an absence of comparative analysis to elucidate the legal norms underlying the relevant differing legal mentalities that, in turn, give shape and meaning to legal concepts.

VI. PAST AND PRESENT

In addition to having a trajectory suited to clarifying some of the challenges to integrating law among different legal communities, on a substantive level, the *Pretty* case elucidates another hidden mechanism of law. The case involves the peculiar relation of present to past in the establishment, evolution and transformation of legal significance.

Europe's past was a crucial but unspoken subtext of the European court decision in *Pretty* because of the issue of assisted suicide. Perhaps for no part of the post-war European order was the reaction against the Nazi genocide more of a formative influence than for the European Convention on Human Rights.¹⁵⁴ And perhaps no issue so much as euthanasia, including assisted suicide, is burdened today by associations with the Hitler past that disturb and sometimes distort European and indeed all western law, as courts struggle with the unexpected and the misunderstood.

Hitler explicitly hierarchized life's value among differently ranked groups, advocating and for a time practicing euthanasia against certain groups, even within the German population categorized as Aryan, principally those considered to be physically or mentally defective.¹⁵⁵

154. See MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 44 (2004) ("Human rights emerged from the Holocaust"); Jonathan L. Black-Branch, *Observing and Enforcing Human Rights Under the Council of Europe: The Creation of a Permanent Court of Human Rights*, 3 *BUFF. J. INT'L L.* 1, 2 (1996). But see Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *INT'L ORG.* 217, 230 (2000) (describing the foregoing as the "ideational" as opposed to the "realist" explanation of the ECHR's origins, and offering an intermediate third explanation, namely: that the ECHR and other international human rights institutions emerged from the effort of leaders of the renewed post-war democracies of Germany, Italy and France, to ensure the future of democracy in their fragile states through otherwise counter-intuitive agreements to abdicate national sovereignty in favor of binding human rights commitments, commitments seen as desirable not so much for their own ethical value, as for their perceived power to prevent future subversions of the newly installed democratic systems in the countries that had fallen to fascism).

155. See ROBERT PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* 185-94 (1988); RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 561 (1961); JAMES M. GLASS, "LIFE UNWORTHY OF LIFE": RACIAL PHOBIA AND MASS MURDER IN HITLER'S GERMANY 61-62 (1997).

The Third Reich proclaimed that “[i]t is the supreme duty of a national state to grant life . . . only to the healthy and hereditarily sound and racially pure”¹⁵⁶ The lesson post-war western Europe determined to take from the Hitler years was that henceforth all human life would be considered equally worthy, and that all human life would be considered sacred.¹⁵⁷ This principle was foundational to the European Convention on Human Rights.¹⁵⁸

The ECHR is obliged under the European Convention of Human Rights to uphold life as the most fundamental value and cornerstone of the Convention.¹⁵⁹ Legal claims that state-sanctioned prolongations of life against the will of the living are themselves a violation of the right to life take on an increasingly persuasive resonance, however, in our era of previously unimaginable medical technology, with new realities perturbing the meaning and definition of life.¹⁶⁰

The relevant legal language of the Convention has not changed, and sanctity of life therefore continues to be evoked as the mandated standard of law for all signatory states to the Convention.¹⁶¹ As modern medicine shifted the medical definition of life, the law shifted its own understanding of life in concert with evolving medical standards, however.¹⁶² The sanctity of life, the apparently clearest and least disputable of legal foundations, is being perturbed as changes in life’s definitions challenge a law that was meant to be foundational, beyond challenge, and forever valid, but that increasingly appears antiquated. In particular, euthanasia and assisted suicide cases have involved patients defined as being alive by medical definitions, but with so few physical functions as to lend credibility to those who plead to end it.¹⁶³ A closer look at the ECHR decision reveals that the Court has been swayed by societal transformations, and that it no longer applies a sanctity of life standard in anything but name.¹⁶⁴ In so doing, the ECHR is not initiating, but rather, joining the major judicial trend throughout the western

156. See the introductory quote to the book “LIFE UNWORTHY OF LIFE”, *supra* note 155 (quoting Dr. Arthur Guest, Director of Public Health, Ministry of the Interior in the Third Reich, 1935).

157. See, e.g., IGNATIEFF, *supra* note 154, at 44.

158. See European Convention, *supra* note 19.

159. See *id.* at art. 2.

160. See PETER SINGER, RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS 20-22 (1994).

161. See *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 157, 164-67.

162. See SINGER, *supra* note 160, at 27-28.

163. See *id.* at 132-58 (providing examples of cases where arguments in favor of actively ending patients’ lives via euthanasia and assisted suicide were persuasive).

164. See *infra* notes 166-72 and accompanying text. Peter Singer has shown this shift throughout the western world. See SINGER, *supra* note 160, at 132-58.

world.¹⁶⁵

In proclaiming sanctity of life in *Pretty*, the ECHR and the French scholar both cite to the UK *Bland* case in a decontextualized way, quoting the House of Lords' statement in *Bland* that it was applying sanctity of life as the legal standard.¹⁶⁶ In that case, however, the UK courts had upheld the right of doctors to decide on behalf of a patient in a persistent vegetative state that it would be in the patient's best interests for his feeding tube to be removed because "[t]he consciousness which is the essential feature of individual personality has departed for ever" while his brain continued to function, such that "there [was] every likelihood that he [would] maintain his present state of existence for many years to come."¹⁶⁷ The patient himself was not able to make any judgment or express any opinion.¹⁶⁸ The doctor's measures were categorized as legally analogous to withholding medical treatment, but what was being withheld was nourishment, not medicine, and the withholding had as its purpose the death of the patient.¹⁶⁹ In legitimating the doctors' actions, the House of Lords insisted, contrary to evidence, that it still was adhering to a sanctity of life standard,¹⁷⁰ and it is for that abstractly stated, decontextualized dictum that the ECHR and the French commentator cite *Bland*, in true civilian style, with no reference to the facts of the actual case.¹⁷¹ On the contrary, however, the *Bland* decision marked, as Peter Singer has shown, the end of sanctity of life as the legal standard courts apply, and a transition to a quality of life standard.¹⁷²

Under the immutable term "sanctity of life," a sea change in the meaning of the law occurred silently. The decision to withhold nourishment from *Bland* was justified as being in the best interests of the patient who otherwise would continue to live in a medical sense, but whose best interests the court agreed would not be served by *such* a life.¹⁷³ The evaluation of whether *Bland*'s life was worth continuing thus

165. See SINGER, *supra* note 160, at 20-37.

166. *Pretty*, 2002-III Eur. Ct. H.R. at 163; Girault, *supra* note 24, at 680.

167. *Airedale N.H.S. Trust v. Bland*, [1993] A.C. 789, 856 (H.L.) (appeal taken from Eng.) (U.K.).

168. See *id.* at 860 (Lord Goff of Chieveley).

169. See *id.* at 867-68, 870 (categorizing the *Bland* case in the above-described manner as a result of what Lord Goff called a correct formulation of the question). Lord Goff responds to his "formulation of the question" by stating that "[t]here is overwhelming evidence that, in the medical profession, artificial feeding is regarded as a form of medical treatment." *Id.* at 868, 870; see also SINGER, *supra* note 160, at 65-68 (categorizing nourishment as medical treatment is the leap from sanctity of life to quality of life in applicable legal standard).

170. See *Bland*, [1993] A.C. at 863-64, 899; SINGER, *supra* note 160, at 66-67.

171. See *Pretty*, 2002-III Eur. Ct. H.R. at 167; Girault, *supra* note 24, at 680.

172. *Bland*, [1993] A.C. 789; SINGER, *supra* note 160, at 57-80.

173. See *Bland*, [1993] A.C. at 868, 877.

was the true criterion applied.

This is a legal standard of quality of life.¹⁷⁴ To put it another way, to the extent that the judicial inquiry into whether physical life is of a quality to justify its continuation now has become essential to understanding and applying the legal standard of sanctity of life, then sanctity of life has become coterminous with a life of quality. The legal term, “sanctity of life” consequently no longer signifies that all physical life is to be deemed sacred, since, on the contrary, it may be deemed to be of too poor a quality to require preservation.

In *Pretty*, the ECHR had faced a dual problem: on the one hand, it struggled with the age-old difficulty for courts that are governed by textual language no longer appropriate to recent societal developments; on the other hand, the peculiar need to cling to the sanctity of life standard because of the historical associations that had inspired it. The specter of Nazi Europe’s rejection of human life as sacred,¹⁷⁵ and biblical teachings’ contrasting insistence on it,¹⁷⁶ are shared by all the European member states and were the common heritage of the Convention drafters. The ECHR’s resolution of the dilemma was to allow the language of the law to disguise its meaning. As Paul de Man put it, “[i]t is the distinctive privilege of language to be able to hide meaning behind a misleading sign.”¹⁷⁷ The history of law is of ample judicial use of this attribute of language.¹⁷⁸

174. This is one of the central points of SINGER, *supra* note 160, at 65-68.

175. See IGNATIEFF, *supra* note 154, at 44. When Peter Singer has lectured on the right to die, he has been received with particular animosity by German audiences, where it was explained to him that he was unable to identify sufficiently with German society’s need to sanctify life as part of Germany’s commitment to avoiding anything tainted by Hitler’s disregard for the right to life. See Daniel Mendelsohn, *The Fate of a Humanist*, N.Y. REV. BOOKS, Nov. 20, 2003, at 51 (reviewing SINGER, *supra* note 160). Ironically, Singer is the grandson of a collaborator of Sigmund Freud, David Oppenheim, who was deported to the Nazi concentration camp, Theresienstadt, because he was Jewish, and died there. Singer wrote a stirring book about the life and times of Oppenheim. See PETER SINGER, *PUSHING TIME AWAY: MY GRANDFATHER AND THE TRAGEDY OF JEWISH VIENNA* (2003).

176. See, e.g., *Genesis* 1:27 (humans are created in God’s image); René Cassin, *From the Ten Commandments to the Rights of Man*, <http://www.udhr.org/history/tencomms.htm> (last visited Mar. 21, 2005) (arguing that the Universal Declaration of Human Rights derives from Judeo-Christian tradition despite determination of its drafters not to draw inspiration from religion). Accord PHILIP S. JOHNSON, *WICCANS AND CHRISTIANS: SOME MUTUAL CHALLENGES 7*, available at http://www.jesus.com.au/html/page/human_rights/. The European Convention on Human Rights took direct and open inspiration from the Universal Declaration. See European Convention, *supra* note 19, at pmbl. (“Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948 . . .”).

177. PAUL DE MAN, *BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM* 11 (2d ed. 1983).

178. PIERRE BOURDIEU, *CE QUE PARLER VEUT DIRE* 21 (1982) (“Legal discourse is a language of creation that gives existence to that which it articulates.”); see also EDWARD LEVI, *AN*

Pretty suggests the need to engage in an open comparative analysis between present and past, with increased attention to historical antecedents. The struggle to understand the present is the search for which comparisons are the most valid and accurate. To what is the claim of a right to die most analogous? Should it be analogized to or differentiated from Hitler's theory of the life of the ill as defective and valueless? Should it be analogized to or differentiated from the right of the individual to be independent to choose, to be autonomous, and to be free of state interference in individual life and death decisions? Should it be analogized to biblical teachings of life as sacred even though "life" was itself a different concept in biblical times and long afterwards, until the advent of modern medicine? It is far from clear if the ECHR judges understood the ways in which the past may have influenced their decision-making.

Pretty suggests that one price of insufficient examination of the past in Europe has been the formation in law of unreflective associations with the past, which in turn have created an orthodoxy in judicial interpretation that is ill-equipped to adjudicate pressing issues of our time.

The look backwards unfortunately has become increasingly unpopular in Europe, as though the EU's *raison d'être* of avoiding the evils of the past is ensured of success, as though a new, permanent triumph of civilization in Europe were among its *acquis communautaires*,¹⁷⁹ rendering the backward glance not just tedious but also superfluous. As a line from a French poem ("[r]ien n'est jamais acquis à l'homme"¹⁸⁰) implies, in life and history, nothing acquired can be deemed to have been acquired definitively, and the past forever needs to be revisited for its instructive potential. A better understanding of the past in its historical context would improve the judiciary's acuity in establishing more valid analogies and distinctions with historical models, better enabling it to reconcile current needs and issues with law, without betraying foundational values.¹⁸¹

INTRODUCTION TO LEGAL REASONING (1949) (discussing law and language); Balkin, *supra* note 6.

179. See, e.g., Jürgen Habermas, *On the Public Use of History*, in JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 29 (Max Pensky trans. & ed., 2001) (describing mounting resentment against the "look back"). For an explanation of *acquis communautaire*, see Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 *FORDHAM INT'L L.J.* 1092, 1140-57 (1995).

180. LOUIS ARAGON, *IL N'Y A PAS D'AMOUR HEUREUX*, available at <http://www.feelingsurfer.net/garp/poesie/aragon.amour.html>.

181. For an excellent account of the failure of historical jurisprudence to take root in England, see Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 *VA. L. REV.* 1, 23 (2005). On Germany, see REINHARD ZIMMERMANN, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW:*

Not only did both the ECHR and the French scholar cite *Bland* for the principle of sanctity of life, but the French commentator also concluded that the applicant had to lose her claim because to validate it would be to cause the ill to lack human dignity.¹⁸² The scholar wrote that the ECHR's decision had done no less than restore human dignity to the dying and agonizing.¹⁸³ The problems in the logic of this reasoning may seem apparent, but they are particularly striking when contrasted with a point to opposite effect that Bruno Bettelheim made in an essay on Helen Keller and Anne Frank.¹⁸⁴ He had been explaining his observations on the disintegration of the personality during his own imprisonment in a concentration camp, where, already a trained psychologist, he had concluded that human life does not always retain anything resembling the core of human identity, as most people conceive of their identifying attributes.¹⁸⁵ His second point was that the belief that physical life always permits one's essential personality to remain intact is a widespread and tenaciously held illusion.¹⁸⁶ He explained the wild popularity of Helen Keller and Anne Frank as their enabling this illusion, and then proceeded to debunk it through a detailed analysis of the despair Helen Keller revealed in some of her writing, including private letters; and the dehumanizing end of Anne Frank's life, not contained in the diary that had closed before she was deported to a concentration camp.

Bettelheim's argument, put into the language of an assisted suicide

THE CIVILIAN TRADITION TODAY (2001).

182. Girault, *supra* note 24, at 682.

183. *Id.*

184. I read this essay during the 1970s, but have been unable to locate it. I cite hereinafter to several other publications in which Bettelheim made similar or supporting points. Confirmation from Bettelheim himself that he wrote the essay may be found in BRUNO BETTELHEIM, FREUD'S VIENNA AND OTHER ESSAYS 256 (Alfred A. Knopf 1990) (1956): "Some time ago I questioned in print why there is such vast admiration for the *Diary of Anne Frank*." With respect to Helen Keller, Bettelheim wrote that "[t]he world raved about Helen because she permitted us the illusion that one can have a complete, happy life although one is blind and deaf." *Id.* at 163.

185. On the human personality's capacity for total disintegration while the person remains biologically alive, see BRUNO BETTELHEIM, SURVIVING AND OTHER ESSAYS 3, 9-11, 13, 106-10, 113-14 (Alfred A. Knopf 1979) (1952).

186. Bruno Bettelheim, *The Ignored Lesson of Anne Frank*, HARPER'S MAG., Nov. 1960, at 45 ("To have to accept that one's personality might be changed against one's will is the greatest threat to one's self-respect The universal success of *The Diary of Anne Frank* suggests how much the tendency to deny the reality of the camps is still with us."). Bettelheim analyzed Helen Keller's life in a similar manner, analyzing a letter she wrote in rejection of a marriage proposal that revealed despair, in contradiction to the portrayal of herself she presented to the public. He analogized the two women as enabling the public to deny truths about dehumanized lives that were too terrible for most people to accept. A recent essay about the life of Helen Keller does not make Bettelheim's precise point, but suggests the extent to which Keller constructed her personality through a web of language. See Roger Shattuck, *A World of Words*, N.Y. REV. BOOKS, Feb. 26, 2004, at 21.

case like Diane Pretty's, was that biological life can be utterly without quality of life, such that to uphold life as sacred under a "sanctity of life" standard need not be to uphold quality of life. If Bettelheim was right, the European Convention's dual principles of sanctity of life and quality of life may be pitted against each other irreconcilably.¹⁸⁷ The ECHR was more nuanced on this issue than the French scholarly commentator. The ECHR acknowledged a tension between quality and sanctity of life,¹⁸⁸ whereas the French commentator saw no justification in the Convention for the modern trend to challenge life's sanctity through calls for legalized euthanasia and assisted suicide.¹⁸⁹

Had the ECHR examined more extensively and actively the historical antecedents of the Convention, including the Nazi past, its transition to a quality of life legal standard might have been made more openly, and debated with greater acuity, with more profit for the future. A comparative engagement with the past might enable the ECHR to chart a path to a better understanding of how courts today can respond to the needs of rapidly changing societies, without betraying the values that legal texts can convey only imperfectly through language.

VII. CONCLUSION

Facts and fictions in our internationalizing world are hard to perceive and to assess because we evaluate what we are seeing by means of the only frames of reference we can have, those formed by and for past events, and they impede our ability to detect the new, limiting and defining our "horizon of interpretation."¹⁹⁰ The "trace"¹⁹¹ of the old is essential to allowing us to configure the new, such that the absolutely new is "absolutely incognizable."¹⁹²

When we try to discern the ever-changing and superimposed legal worlds today, we are like adults who scrutinize a newborn. The infant has physical, mental and emotional features, but, although some individualizing characteristics are observable, they are vague and unformed when compared to the precise contours they will acquire with

187. On the ECHR's problems in hierarchizing various rights, see Gerald L. Neuman, *Talking to Ourselves*, 16 EUR. J. INT'L L. 139, 141-42 (2005).

188. See *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 157, 163.

189. Girault, *supra* note 24, at 682.

190. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 333, 397 (Sheed and Ward Ltd. trans., 1975).

191. See *THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS* 24, 30 (Nathan Houser & Christian Kloesel eds., 1992) [hereinafter *PEIRCE*]; 3 PAUL RICCEUR, *TEMPS ET RÉCIT* 177-83 (1985).

192. *PEIRCE*, *supra* note 191, at 30.

time. Much later, looking back, we may see or think we see how the features of the present were prefigured in the first stages of life, but only retrospectively can we make the connections that would have enabled us to understand them earlier. Moreover, even retrospective perception will not make clear how much of what developed might have taken a different shape, how much was due to inalterable constitutive ingredients, such as our genetic code, and how much to the particulars of life, to causalities that were steered by contingent events and by their contingent confluences, those infinities of variables that make history's progression seem linked to chaos rather than to plan.

In the present time of particular flux, decision-makers are making readjustments that will have great impact on the future. In Europe, the stakes for the future manifestly relating to *legal* integration include (1) the extent to which law should be made uniform, which in turn raises issues of whether legal uniformity can be legitimate; (2) whether legal integration can be meaningful, or if, rather, it is conceptually incoherent; and (3) whether adopting a European civil code would signal an undesirable and illegitimate shift in direction away from national legal autonomy, or if it would be reasonable, worthy and necessary. On the world stage, similar issues arise as to whether the tide of transgovernmentalism should be welcomed or stemmed and whether the dizzying array of legal standards, texts and claims emerging in ever new configurations require concerted world action.

Understanding Europe's law is a vital task today, as it may provide the best model for understanding the elusive nature of mixtures of the non-national and the national throughout the world. An essential part of understanding the present also lies in understanding and examining the past.¹⁹³ To ignore the past is to preclude understanding one's own time and, it has been suggested, also to betray it.¹⁹⁴

It has been suggested that *structural* attributes of the modern nation state which developed since the French Revolution had much to do with the cataclysm of Hitlerism and the Nazi genocide in Europe, and that genocide should be considered a predictable outcome of all modern nation states because of that inner, entrenched structural logic which "loads the dice" in favor of massacres for reasons other than substantive

193. See *supra* notes 180-81 (comparing Habermas's account of mounting resentment against the "look back").

194. "*Indem wir die Geschichte ignorieren, verleunden wir gleichzeitig unsere Zeit.*" ("To the extent we ignore history, we also betray our own time."). Nachrichtendienst für Historiker, <http://www.nfhdata.de/premium/index.shtml> (last visited Aug. 12, 2004). "*Ohne Kenntnis unserer Geschichte bleibt die Gegenwart unbegreifbar.*" ("Without knowledge of our history, the present remains beyond our grasp."). *Id.* (last visited Aug. 6, 2002).

politics or ideology.¹⁹⁵ In a review of the history of law in Europe that seemed nostalgic for a time he had not known himself, Rudolf Schlesinger evoked the end of the *jus commune* as beginning with the rise of national codifications.¹⁹⁶ Although Schlesinger never said so explicitly, he may have seen a direct, however inadvertent, link between the rise of codification and the pernicious nationalism and persecution of the “other” that he experienced in his own youth in Nazi Germany.¹⁹⁷ Schlesinger devoted many years to the pursuit of legal “common cores” that might provide a unifying element for humanity through shared legal values that he believed to reside beneath the surface of systemic and national differences.¹⁹⁸ National civil codes are envisaged, as we have seen above, as coherent systems of thought and expressions of the entire spirit of the nation’s law.¹⁹⁹ Their ascendancy ended the need for judges to seek counsel outside of their country, and indeed increasingly made resort to foreign law of questionable legitimacy.

Phenomena such as national codifications are precisely the sort of inherently innocent structures that Zygmunt Bauman seeks to identify as related, not *culpably*, but nevertheless *causally*, with modern massacres to the extent that they relate to “technological-bureaucratic patterns of action and the mentality they institutionalize, generate, sustain and reproduce.”²⁰⁰ Christian Joerges, one of the few in Europe today who insist on the look backwards as Europe engages in steering law toward its future, has suggested disconcerting aspects of the EU as having unexamined roots in Nazi legal conceptions developed by Carl Schmitt.²⁰¹

195. ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989); see also HILBERG, *supra* note 155 (suggesting a similar conclusion); ENZO TRAVERSO, *THE ORIGINS OF NAZI VIOLENCE* (Janet Lloyd trans., 2003) (same).

196. See Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477, 479 (1995). On the link between the national and the European civil codes, see Zimmermann, *The “Europeanization” of Private Law*, *supra* note 46, at 63-64, 65 n.8; (citing additional sources on this issue, including FRANZ WIEACKER, *INDUSTRIEGESELLSCHAFT UND PRIVATRECHTSORDNUNG* 79 (1974)); see also ZIMMERMAN, *supra* note 181, at 2 (arguing that national national codifications caused the loss of “fundamental intellectual unity” in European law).

197. For my reading of Schlesinger’s view on this matter, see Curran, *Shoulders of Schlesinger*, *supra* note 86.

198. Schlesinger, *supra* note 196.

199. See *supra* note 196 and accompanying text.

200. BAUMAN, *supra* note 195, at 95.

201. See Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE 167 (Christian Joerges & Navraj Singh Galeigh eds., 2003). Another European who also insists on the value of the look backwards is Reinhard Zimmermann. See Zimmermann, *The “Europeanization” of Private Law*, *supra* note 46, at 82-86 (stating that a preliminary to a successful European civil code is a thorough understanding of the common bases of law in Europe, through the study of Roman law). Zimmermann also has contributed greatly to the look backwards in numerous ways in his excellent book, *JURISTS*

One may ask today what the best analogy would be to a European civil code. It simply might transpose the problem Schlesinger signaled to a wider geographical arena, such that the nationalization of law now would be widened to a Europeanization of law, but with the potential for planting new seeds of exclusion in the process, a structural spur to creating a unitary self that rejects pluralism and a newly defined “other,” adopting a new *jus commune*, but for Europe only, rather than for a wider world.²⁰²

Bauman emphasizes the dangers of seemingly neutral structures and the need to study where structures may lead as they channel the substantive values a society institutionalizes.²⁰³ If he is right, then a substantive emphasis on individual human rights and even the right to life as cornerstones of the EU’s value system and legal order, and as the cornerstone of universally acknowledged legal rights in international law, on their own would not represent a future safeguard for those rights.²⁰⁴ On the other hand, if the modern nation state’s semiotic “grammar” is an indispensable causal aspect of genocide, it may be that Europe, through an imaginative and perceptive reconfiguration by means of its non-national character, can develop structures to resist such an inner logic of modernity that is embedded in the nation state model. If it can do so, it may become a model on a larger, world scale.

The question is vast and intricate, and an unreflective rejection of the nation state model also may prove disastrous. As Max Pensky sums it up in his introduction to Habermas’s *The Postnational Constellation*, “the nation-state is fading . . . [b]ut . . . there is no guarantee that [it] will be replaced by anything better.”²⁰⁵ The non-national model may contain the very attributes that were the most dangerous in the nation state model. If the non-national proceeds blindly, it may exacerbate the worst that we have known in the national, loading the dice to favor the likelihood of human catastrophe even more than occurred within modern nation states. For instance, as has been suggested by others, post-

UPROOTED, *supra* note 74. Bernd Rüthers and Michael Stolleis are yet others, whose many contributions are of inestimable value in this regard.

202. This is the issue increasingly referred to today as “Fortress Europe.” This issue has been raised in particular with respect to issues of citizenship and immigration. *See, e.g.*, Sophie Robin-Olivier, *Citizens and Noncitizens in Europe: European Union Measures Against Terrorism After September 11*, 25 B.C. THIRD WORLD L.J. 197 (2005); Lydia Esteve González & Richard Mac Bride, *Fortress Europe: Fear of Immigration? Present and Future of Immigration Law and Policy in Spain*, 6 U.C. DAVIS J. INT’L L. & POL’Y 153 (2000); Michael Pugh, *Drowning Not Waving: Boat People and Humanitarianism at Sea*, 17 J. REFUGEE STUDIES 50, 54 (2004).

203. *See* BAUMAN, *supra* note 195.

204. *See id.* Along these general lines, see also Koskenniemi, *infra* note 209.

205. HABERMAS, *supra* note 179, at xiii.

nationhood could spell the end of the ground in which democracy can most easily flourish and thereby increase the chances for autocratic, undemocratic rule, fulfilling one of the pre-conditions for the destruction of human rights.²⁰⁶

Ever-growing, albeit no longer national, bureaucracies may facilitate, rather than hinder, the potential for ruthless impersonality that the modern nation state was the first to hone, and that has been central in perpetrating massacres.²⁰⁷ On the other hand, non-national bureaucratic structures' coexistence with national counterparts may reduce this danger.²⁰⁸ Objectives of cultural pluralism, dedicated to preserving the national, may militate against harmony and coexistence, or, on the contrary, in the context of increased contact, may engender a beneficial convergence based on mutual comprehension. Convergence, whether of law or of other institutions formerly separated along national lines, may be a disguise for dominance, or may be the product of a pluralistic blend that reinforces mutuality of respect.²⁰⁹

Habermas's optimistic vision of a capacity to reformulate in individuals loyalties *from* nations *to* non-national configurations, as in earlier times loyalty to nation developed in modern states from smaller-

206. See NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH* 159-95 (1999). See also Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 489-95 (2001) (stating that democracy may be correlated inextricably with the nation-state, but also suggesting that this may be due to current weakness of non-national institutions); accord Eric Stein, *Democracy Beyond Nation State: On World Trade Organization and European Union*, 2 DEAN RUSK LECTURES: DEAN RUSK CENTER OCCASIONAL PAPERS 7, 10 (2003); cf. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 341 (1994) (discussing how the subsidiarity principle may safeguard democracy in the EU by enhancing local governance).

207. See BAUMAN, *supra* note 195 and accompanying text.

208. Bignami's analysis of the pressures on the EU Commission, leading to its growing protection of individual rights, gives rise to hope that this may prove to be the case. See Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 COLUM. J. EUR. L. (forthcoming 2005).

209. This tension was a main preoccupation in the writing of Isaiah Berlin. See, e.g., ISAIAH BERLIN, *THE AGE OF ENLIGHTENMENT: THE 18TH CENTURY PHILOSOPHERS* 11 (1984); ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969); ISAIAH BERLIN, *VICO AND HERDER: TWO STUDIES IN THE HISTORY OF IDEAS* (1976); *CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS BY ISAIAH BERLIN* (Henry Hardy ed., 1978); ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* (Henry Hardy ed., 1991); ISAIAH BERLIN, *THE SENSE OF REALITY* (Henry Hardy ed., 1996); ISAIAH BERLIN, *THE POWER OF IDEAS* (Henry Hardy ed., 2000). For more recent discussions of similar issues, see Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 115 (2005) (noting in the tradition of Herder that "the universal has no voice, no authentic representative of its own. It can only appear through something particular; only a particular can make the universal known"); KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005) (discussing similar issues from the perspective of Mills, whom Berlin also discussed at length in the sources cited above).

scale loyalties (“to village and clan”²¹⁰), even if accurate, cannot foretell if such a transfer is desirable or if the loyalty in question, however oriented, is problematic inherently and will remain unable to expurgate the will to annihilate the “other” that in the past on occasion accompanied loyalty to nation.

Habermas believes that in Europe the saving grace is an “otherness” that derives from unshared national pasts, and that it will persist among Europeans, such that developing loyalty to the European phenomenon would mean precluding the will to annihilate the other: “Citizens who share a common political life also are others to one another, and each is entitled to *remain* an Other.”²¹¹ If it is successful, the EU may be able to trace a path for itself and the rest of the world from the flawed and tragic modernity that spawned it into a socio-political phenomenon that can better perpetuate substantive ideals of human rights and civilization.

Isaiah Berlin’s analysis of the human-wide tendency to create “others” casts some doubt on Habermas’s optimism. The emotional depth of the need to create identity by differentiation from the “other” that Berlin describes does not contradict Habermas’s view that “collective identities are made, not found,”²¹² but it casts doubt on whether any collective identity that falls short of the global, once made, can avoid xenophobia.²¹³ It also casts doubt on whether an identity that claims global proportions can succeed in time in being anything more than superficial, ever vulnerable to the deep tribal instincts that lead people to crave identities that they forge in a mutually dependent process of choosing sameness with some, and difference from others.²¹⁴

210. Jürgen Habermas, *What is a People?: The Frankfurt “Germanists’ Assembly” of 1846 and the Self-Understanding of the Humanities in the Vormärz*, in HABERMAS, *supra* note 179, at 1, 18 [hereinafter Habermas, *What is a People?*]. Cf. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 215 (2003) (“Communities may gradually emerge, but they often require conscious construction.”).

211. Habermas, *What is a People?*, *supra* note 210, at 19. I think also of George Steiner’s comment, written some forty years ago, at a time when many of the dizzying changes in the EU and the world that are the subject of this article would have been unforeseeable. Steiner’s vision characteristically is darker than Habermas’s, but he formulated similar ideas about provisional loyalties that society would have to help individuals develop in order overcome the national. He concluded that “though the ideal of a non-national society seems mockingly remote, there is in the last analysis no other alternative to self-destruction.” GEORGE STEINER, *LANGUAGE AND SILENCE: ESSAYS ON LANGUAGE, LITERATURE AND THE INHUMAN* 153 (1967).

212. Habermas, *What is a People?*, *supra* note 210, at 19.

213. For an analysis of global citizenship issues, see Massimo La Torre, *Global Citizenship? Political Rights Under Imperial Conditions*, 18 RATIO JURIS 236 (2005).

214. While I use Berlin to caution against Habermas’s optimism, Berlin himself did not view the twentieth century’s tragic historical consequences of collective identity as the necessary outcome. Rather, he analyzed the past also in terms of a better outcome that might have been possible. See in particular his wistful analysis of Alexander Herzen and Russian populism as evidence that collective identities and the progeny of Romanticism’s ideals might have engendered

We also must bear in mind that structures set in place today will steer future developments less than the decision-makers expect and hope, as well as differently and unpredictably. How much stability or predictability institutions can ensure has been a matter of unresolved debate for centuries. Montesquieu believed that the foundational moments of institutions are primordial, because “[a]t the birth of societies . . . the rulers of Republics establish institutions and afterwards the institutions mould the rulers.”²¹⁵ A similar emphasis on the power of institutions to preserve stability through time and current events infuses the perspective of historical institutionalism,²¹⁶ yet history itself seems to suggest a story of far more mutual interaction in the dynamic between the ever-changing present and the ever-vulnerable institutions charged with resisting flux.²¹⁷ The winds of the future are beyond prediction, but the more penetratingly the past and the present are scrutinized for all that “lurks unseen” within them,²¹⁸ the better decision-makers will be able to decide where and how to try to preserve, and where and how to try to transcend the national.

Historical and sociological research suggests that the most humane of substantive legal foundations may be ineffectual unless endowed with the necessary structural apparatus to bolster substantive ideals.²¹⁹ Foundational times are periods of hope that institutional constructions can guide those who will people them in the future. The dashing of many eighteenth century values and hopes in the twentieth century may incline one towards the less optimistic view that, whatever the foundational moments and institutional protections may be, tribalism in human nature will ensure repeated catastrophes of ever worse proportions as modern technology better enables mass murder and subjugation.

While each new attempt to perpetuate a humane rule of law must

coexistence in mutual appreciation and respect, rather than ferocious hatred and exterminationist persecution of the other. *See, e.g.*, ISAIAH BERLIN, *RUSSIAN THINKERS* 186-209, 210-37 (Henry Hardy & Aileen Kelly eds., 1978); *see also* Isaiah Berlin, *Montesquieu*, in 41 *PROCEEDINGS OF THE BRITISH ACADEMY* 267 (1955) (discussing the possibility of mutual respect among societies with differing values).

215. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 38 (G. D. H. Cole trans., 1950) (quoting MONTESQUIEU, *THE GREATNESS AND DECADENCE OF THE ROMANS* (1734)).

216. *See* Bignami, *supra* note 208, and sources cited therein.

217. *See* ERNST CASSIRER, *THE MYTH OF THE STATE* (1946). This has been a principal theme of some of my past writing. *See* Curran, *supra* note 102; Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 *CORNELL INT'L L.J.* 101 (2001-2002).

218. The phrase is from KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 45 (Tony Weir trans., 3d rev. ed. 1998).

219. *See* BAUMAN, *supra* note 195; Vivian Grosswald Curran, *Racism's Past and Law's Future*, 28 *VT. L. REV.* 683 (2004).

remain experimental until history provides some perspective on its success, Europe today is an act of faith of our time that may have the capacity to generate a new social era and a step forward in civilization.²²⁰ Alternatively, if the past and present are not examined more searchingly, Europe may prove mired in structures whose novelty is superficial, a language of a new vocabulary generated by unchanged deeper structures of grammar and syntax.²²¹ The EU today is developing strategies of national and non-national coexistence, with options constrained principally only by the limits of imagination. The European mosaic reflects presences of the past and harbingers of the future that may facilitate consideration of similar issues on a larger scale, as law remembers.

220. There are many sources one might cite to convey concepts of civilization. I cite only one, a beautiful work that ties together much that has to do with hopes, thoughts and realities in the context of law. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001).

221. See Koskenniemi, *International Law as Political Theology*, *supra* note 12, at 492-93 (“Europeans embrace the Kantian view that the international world will in due course organize itself analogously to the domestic one . . .”); see also Koskenniemi, *supra* note 209, at 120 (describing the lawyer’s task as being to connect the present “to what . . . happened previously, a case, a precedent, tell it as part of a history. The point of the law [is] to detach the particular from its particularity by linking it with narratives in which it received a generalizable meaning, and the politician [can] see what to do with it.”).