

Re-Membering Law in the Internationalizing World¹
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ABSTRACT

This article examines some of the challenges to understanding new, non-national legal configurations as contexts of origin color understandings and evaluations of legal standards allegedly shared across legal communities. It examines a case on assisted suicide, *Pretty v. U.K.*, decided by the European Court of Human Rights. The case illustrates mechanisms of legal integration in the European court, followed by a process of dis-integration that occurred when the decision was reported to the French legal community. The French rendition reflected a legal community's inability to process common law information through civil law cognitive grids. The article addresses both the capacity of law to internationalize, and the sorts of comparative inquiries necessary to perceiving what lurks unseen, as the world experiences superimposed legal norms and claims, some mutually contradictory. It also discusses the peculiar relation of past to present in the establishment, evolution and transformation of legal significance. The European court engaged in decision-making affected by unspoken associations with the Nazi past that collided with the needs of a society transformed by modern medical technology. The "re-membering" of law that this article addresses thus involves (1) recompositions of law as it increasingly ignores old borders and categories; and (2) the ongoing need to examine law's past meanings in order to understand its present incarnations and, most importantly, to imagine its potentials in our time of flux and of increasingly complex and elusive non-national legal constructs.

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¹*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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*Le chaland glisse sans trêve sous l'eau de satin
Où s'en va-t-il, vers quel rêve, vers quel incertain du destin?
...Le courant fait de nous toujours des errants³*

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 clarifying 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-membling” 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 meanings in order to understand its present incarnations and imagine its

³From *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.”)

potentials.

II. Law Like a River

Our time is marked by accelerating transience.⁴ 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. 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 cattle. Each one is owned, our own, and bears the brand of this ownership, and each thought ... is both an owner of the thoughts that went before, and dies owned, transmitting whatever it reached as its Self to its own later proprietor ... [W]e consist entirely of a collection of moments, even though these flow in one another like [a] ... river.⁵

⁴On the “accelerated rate” of evolution in modern civilization, see Henri Marrou, *The Heritage of the Ancient World*, 1 CHAPTERS IN WESTERN CIVILIZATION 2 (3d ed., Joseph Rothschild et al., ed.s, Columbia Univ. Press, 1961).

⁵Oliver Sacks, *In the River of Consciousness*, NY REVIEW OF BOOKS, January 15, 2004.(Inner quotation mars omitted).

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,⁶ there can be newnesses 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,⁷ but, in addition, our era is one of both compounded change 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.”⁸ 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.⁹ Contexts that endow legal standards with

⁶See MALCOLM E. LINES, *FACTS AND SPECULATIONS ABOUT NUMBERS FROM EUCLID TO THE LATEST COMPUTERS: A NUMBER FOR YOUR THOUGHTS* 189-99 (1986).

⁷See J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 *CONN. L. REV.* 869 (1993).

⁸André Tunc, *Comparative Law, Peace and Justice*, in *TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 80, 83 (Kurt H. Nadelmann et al., ed.s, 1961)

⁹See, e.g., MIREILLE DELMAS-MARTY, *LES FORCES IMAGINANTES DU DROIT: LE RELATIF ET L’UNIVERSEL* (2004); Daniel Golove, *The New Confederalism*, 55 *STANFORD 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*, 53 *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, e.g., Craig T. Smith & Thomas Fetzer, *The Uncertain Limits...*, 10 *COL. J. EUR. L.* 445

various meanings may challenge law's capacity for objectivity or neutrality.¹⁰

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 postnational.¹¹

This article examines the dynamic developing between national and non-national law in

(2004); and (2) with that of the ECHR, see "Ambrose Evans-Pritchard, *EU judges end human rights law for press*, DAILY TELEGRAM, 19 Oct. 2004 at <http://tinyurl.com/bkxss>, last visited on December 3, 2004. 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 AFFAIRS 183 (1997); A NEW WORLD ORDER (2004); Delmas-Marty [small bklet, Globalisation économique...]

¹⁰On 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 ISAIAH BERLIN LETTERS 1928-1946, xliii (Henry Hardy, ed., 2004) (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.

¹¹Habermas 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 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 REV. GÉN. DE DROIT INT. PUBLIC 633 (2004). To this list, one now also may add "sub-national." See Stephen Tierney, *Reforming Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State*, 54 INT'L. & COMP. L. Q. 161 (2005).

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. 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

¹²MIREILLE DELMAS-MARTY, LES FORCES IMAGINANTES DU DROIT, *supra* note —. 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).

¹³See Yves Lequette, *Quelques remarques à propos du projet de code civil européen de M. Von Bar*, LE DALLOZ, no. 28, 2202, 2211 (2004) (The EU may undermine and destroy its vision of future peace if it abandons national distinctions in favor of European legal unification).

legal systems,¹⁴ it 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

¹⁴See MIREILLE DELMAS-MARTY, *LES FORCES IMAGINANTES*, *supra* note –, 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.Res. 468 IH, Nov. 21, 2003. On the other hand, Supreme Court Justices such as Ruth Bader Ginsburg, Stephen Breyer and Sandra Day O'Connor have endorsed 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*, 45 *SEP. FED. LAW.* 20 (1998); For the most recent exchange by Supreme Court justices on this issue, see Transcript of Discussion Between U.S. Supreme Court Justice Antonin Scalia and Stephen Breyer – AU Washington College of Law, Jan. 13 [2005], available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2>. (Last visited Jan. 27 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).

¹⁵See Anne-Marie Slaughter, *The Real New World Order*, 76 *FOREIGN AFFAIRS* 183 (1997) (arguing equally against a "liberal internationalist ideal" and a "new medievalism" that "proclaims the end of the nation state," *id.* at 183, 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." *Id.* at 184. 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.

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 “[w]hatever 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 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.

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

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

¹⁷CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 175 (1983)

¹⁸*See infra*, notes – to – and surrounding text.

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 if 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. the 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 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,

¹⁹On the proclaimed commonality of legal heritage of the EU member states, see Art. F (2) TEU [Treaty on the European Union, the Maastricht Agreement]; in the context of the European Convention in Human Rights, see European Convention, *supra* note –, Art. 1. Slaughter and Helfer argue that the European experience is generalizable to 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).

²⁰On the advantages of studying the smaller scale, Toynbee was of the view that the comparatively small scale of the Peloponnesian War was crucial to Thucydides' 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 –, at 28.

²¹Application no. 2346/02. Decision 29/07/2002, 4th section ECHR (hereinafter "ECHR *Pretty*").

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. France's rendition of that decision to its national legal community expurgated its common law attributes, however.²³ *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.²⁴

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

²²European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. See Matthias Hartwig, *Much Ado About Human Rights: the Federal Constitutional Court Confronts the European Court of Human Rights – Part I/II*, 6 GERMAN L.J. 5 (2005), at <http://www.germanlawjournal.com/article.php?id=600> (recent discussion of issues of signatory state independence from ECHR decisions).

²³*La Cour EDH ne reconnaît pas l'existence d'un droit à la mort*, 15-16 LA SEMAINE JURIDIQUE 676 (2003) (hereinafter "Semaine juridique").

²⁴See Vivian Grosswald Curran, *Law and Semiotics*, in HIGH FIVES: A TRIP TO SEMIOTICS (Roberta Kevelson, ed., 1998); Christian Joerges, *The Challenge of Europeanization in the Realm of Private Law*, 14 DUKE J. COMP. & INT'L L. 149, 160 (discussing the "many ... versions of European law").

order.²⁵ 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 tribunals²⁶ reverses itself, as national 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.²⁷

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

²⁵See Joseph HH Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

²⁶For an analysis of legal integration in the ECJ, see Thijmen Koopman, *The Birth of European Law at the Crossroads of Legal Traditions*, 39 AM. J. COMP. L. 493 (1991).

²⁷European cases also follow another route, not addressed in this article: horizontally signifying for future cases at the peak level of European court law.

have the capacity to admit the new.²⁸ 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. 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.²⁹ The member states to date consequently have remained entrenched in their national legal mentality.³⁰

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 time. The *nature* of this evolution, however, is not readily apparent, and,

²⁸For 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).

²⁹Thus, the specialized practitioners of "European" law do specialized "European" law reading for their practice. See, e.g., Andrew Layton, Q.C., M.A. et al., ed.s, EUROPEAN CIVIL PRACTICE (vol. 1, 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 to 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.")

³⁰See *infra*, notes – to –, and surrounding text.

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.³¹

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,³² 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

³¹See Christian Joerges, *Europeanization as a Process: Thoughts on the Europeanization of Private Law*, 2 (manuscript on file with author) (“the Europeanization of private law should be seen as a process that triggers disintegration within national private law systems and affects their systematic consistency”).

³²This 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.

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 apparent commonality offers tempting baits 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..."³³ 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.³⁴

What does such a formulation, utterly foreign to a common law ear, mean? Closer

³³PAOLO MENGOZZI, EUROPEAN COMMUNITY LAW 190 (Patrick Del Duca trans., 1992). I note with respect to the quoted phrase, as well as to the following quote, *see infra* note 34, and surrounding text, that this language is from the first edition of Mengozzi's book, and is not in his subsequent, second edition (of 1999).

³⁴*Id.*

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.³⁵

Similarly, the Italian private-law Supreme Court (*Corte di cassazione*) also 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.³⁶ 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 decontextualized, containing no description of the facts of the case.³⁷ 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

³⁵For a detailed discussion of the role of facts in common law systems, see Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law*, 7 COL. J. EUR. L. 63 (2001).

³⁶See Francesco Mazzotta, *Precedents in Italian Law*, 9 MSU-DCL J. INT'L. L. 121, 128 (2000).

³⁷See Michele Taruffo & Massimo La Torre, *Precedent in Italy*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 141, 148 (D. Neil MacCormick & Robert S. Summers, eds., 1997)

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.³⁸ 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,³⁹ recedes in importance to a vanishing point next to the preeminent court opinions that determine law and law’s meaning.⁴⁰

³⁸See Jean Foyer, “*Le Code civil est vivant. Il doit le demeurer!*” 13 LA SEMAINE JURIDIQUE, 543, 545 (2004) (criticizing the excessive power that the European courts have acquired in the process of “*interpreting*” European Community and human rights law).

³⁹ And 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).

⁴⁰Kahn-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 than when it is judge-made case law. See Mark Freedland, *Otto Kahn-Freund (1900-1979)*, in JURISTS

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.⁴¹ 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.⁴² Moreover, in order to remain compliant with EU directives and court decisions, the member states must change their own internal laws as necessary.⁴³ This process goes against the civilian idea of law as emanating from a coherent whole.⁴⁴ It is a common law progression of specific statutory enactments in reaction to changed circumstances.

UPROOTED, *supra* note –, at 309-310 (citing O. Kahn-Freund, *Reflections on Public Policy in the English Conflict of Laws*, 39 TRANSACTIONS OF THE GROTIUS SOCIETY 39-69 (1953), reprinted in Chapter 9, O. KAHN-FREUND, *SELECTED WRITINGS* (1979)). 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, the ECHR is applying enacted law, see Bruno Genevois, *Le Conseil d'État et l'interprétation de la loi*, 4 RFDA 877, 881 (2002). On the common law culture's incorporation of legislation into case law, see Curran, *Romantic Common Law*, *supra*, note –.

⁴¹See *infra* notes – to –, and surrounding text.

⁴²See Christian von Bar, *Le groupe d'études sur un code civil européen*, 53 R.I.D.C. 127, 138 (2001); Foyer, *supra* note –, 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 v. Bollinger S.A.*, 2 All. E.R. 1226, 1236 (1974); and Curran, *Romantic Common Law*, *supra* note –.

⁴³See, e.g., Treaty of Rome, Part I, art. 10.

⁴⁴For 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); and Christophe Jamin, *Un modèle original: la construction de la pensée juridique française*, BULLETIN D'INFORMATION COUR DE CASSATION (2004).

Many civilians are disturbed by this. As Zimmermann has put it, “[t]his way of ‘europeanizing’ 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.”⁴⁵ Another civilian legal scholar writes that this new way of law-formation is in confrontation with “the established understanding of law.”⁴⁶ This confrontation is with 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.⁴⁷ Not surprisingly, there is support for an EU

⁴⁵Reinhard Zimmermann, *Civil Code or Civil Law? Towards a New European Private Law*, 20 SYRACUSE J. INT’L. L. & COM. 217, 220 (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 COL. J. EUR. L. 63, 63, 78, 80 (1995) (EU law has “no more than a tenuous relationship to the core of private law”); *id.* at 79 (it is troublesome that EU law is proceeding apace “without a clearly defined policy”).

⁴⁶Friedrich Kübler, *Traumpfade oder Holzwege nach Europa? Oder: Was wir uns der Rechtsgeschichte wünschen sollten*, 12 RECHTSHISTORISCHES JOURNAL 307, 307 (1993).

⁴⁷See Curran, *Romantic Common Law*, *supra* note –, at 75-114. *But see* Zimmermann, *supra* note – [1 Col. J. Eur. L. 63], at 85 (*citing* HAROLD BERMAN, *LAW AND REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION* 9 (1983) for the proposition that overarching legal coherence is the basis of western conception of law, without differentiation between common and civil law); and Martti Koskenniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553-579 (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 AFFAIRS 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

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.⁴⁸

Indeed, in arguing for a European civil code, the head of the study group to develop a European civil code, Christian von Bar, attributes the “momentum” for it to a “growing uneasiness with the many new EU directives which had begun to make deep inroads on ... national laws,”⁴⁹ and because “*the current ... ‘piecemeal’ approach of directives ... [is] endangering the quality and coherence of our private law.*”⁵⁰ Elsewhere, von Bar writes that a European civil code is needed “for the *systematic coherence* of our private law,”⁵¹ reflecting in civilian manner an unquestioned assumption of the essential role of both system and overall coherence in the idea of law itself.⁵²

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 evolution as follows: “The creation of new violations ... also _____ uncoordinated forms of normative specification at different levels of transnational activity”).

⁴⁸See Christian von Bar, *From Principles to Codification: Prospects for European Private Law*, Lecture at the Paris *Cour de cassation*, <www.Courdecassation.fr/manifestations/conférence/2002-04-12-vonBar/societe-de-legislation/N.htm>, at 2 (last visited March 24, 2005).

⁴⁹*Id.*

⁵⁰*Id.* at 5 (emphasis added). [Von Bar, *From Principles to Codification*].

⁵¹Christian von Bar, *LES ANNOUNCES DE LA SEINE*, no. 33, 1, col. 3, 3 juin 2002.

⁵²For the crucial nature of both to civilian laww ideation, see Jamin, *supra* note –.

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.*⁵³ He emphasizes that law is “there to regulate in a *general manner.*”⁵⁴ Further, he signals by his choice of section subtitle, “*The Loss of Essential Frames of Reference,*”⁵⁵ 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.⁵⁶ 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.”⁵⁷

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,”⁵⁸ and that she fears is resulting in “legal world *disorder.*”⁵⁹ She

⁵³Jean-Paul Levy (Président de la Commission des textes du Conseil national des Barreaux), *Pénalisation et répression: adaptation à la criminalité ou dérive sécuritaire?* in GAZETTE DU PALAIS, RECUEIL BIMESTRIEL, May 13 2004, 1552, at 1553 (emphasis added).

⁵⁴*Id.* at 1552 (emphasis added) (“*là pour disposer de manière générale*”).

⁵⁵*Id.* (“*La perte de repères essentiels*”).

⁵⁶*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 –, and sources cited therein.

⁵⁷Portalis, *Motifs et discours prononcés lors de la publication du Code civil* (Paris, Firmin Didot Frères, 1838, reprinted in 13 LA SEMAINE JURIDIQUE 553,555 (2004).

⁵⁸MIREILLE DELMAS-MARTY, GLOBALISATION ÉCONOMIQUE ET UNIVERSALISME DES DROITS DE L’HOMME 3 (2004)

⁵⁹*Id.*, at 4 (emphasis added).

emphasizes that a pluralist legal goal must be of “*ordered pluralism*.”⁶⁰

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.⁶¹ She writes that nation states are “disaggregating into ... functionally separate 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 new, transgovernmental order.”⁶²

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”⁶³ She applauds the process of state “disaggregation”⁶⁴ for its functional benefits, stressing both that “[u]niformity of result and diversity of means”⁶⁵ are the hallmark of the new world. She defends “disaggregation” and

⁶⁰*Id.* (Emphasis added).

⁶¹See Anne-Marie Slaughter, *Real New World Order*, *supra* note –, at 183; SLAUGHTER, A NEW WORLD ORDER (2004). For a similar structure to global judicial communication, see Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); –, *A Global Community of Courts*, 44 HARV. INT’L L. J. 191 (2003).

⁶²Slaughter, *supra* note – [World Aff art], at 184.

⁶³*Id.* at 183 [Slaughter, *Real New World Order*].

⁶⁴See *id.* at 184 [Slaughter, [Foreign Affairs]]; SLAUGHTER, A NEW WORLD ORDER, *supra* note –, at 5-6, 12-15, 18-21, 31, 36-37, 132, 254, 257, 263-9 (discussing state disaggregation).

⁶⁵*Id.* at 192

“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.”⁶⁶

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.⁶⁷ 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,⁶⁸ 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 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

⁶⁶*Id.* at 192. *Cf.* Weiler’s description of the EU’s legal order as having “to a large extent nationalized Community obligations” Weiler, *supra* note –, [Transformation of Europe] at 2422.

⁶⁷Slaughter, [Foreign Affairs article], at 184; SLAUGHTER, A NEW WORLD ORDER, *supra* note –, at 5-6, 12-15, 18-21, 31, 36-37, 132, 254, 257, 263-9 (discussing state disaggregation).

⁶⁸DELMAS-MARTY, GLOBALISATION ÉCONOMIQUE, *supra* note –, at 6-7.

where the particular change that impacts an interstate, international arena, need not be engendered and monitored by an overarching world order.⁶⁹ 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.⁷⁰ Such a process of “higgledy-piggledy” change already may be inexorable, as Slaughter believes.⁷¹ 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.⁷²

With the notable exception of Legrand’s analysis, the debate is not taking place on the terrain of common - versus civil law, however.⁷³ Neither Slaughter nor Delmas-Marty, nor

⁶⁹*Id.*

⁷⁰The 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)).

⁷¹See Slaughter, *Real New World Order*, *supra* note –; SLAUGHTER, *A NEW WORLD ORDER*, *supra* note –.

⁷²Similarly undisturbed by challenges to a coherent whole is Stephen Tierney in his approving analysis of “sub-state” phenomena. See Stephen Tierney, *Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State*, 54 *INT’L & COMP. L. Q.* 160 (2005).

⁷³Legrand 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 (1996). 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

others, associate their evaluation in terms of how it typifies a common law versus a civilian mentality.⁷⁴ 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 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.⁷⁵ Some civil law scholars oppose it because of unrelated priorities that supersede the desire to organize

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* 249-268 (Jack Beatson & Reinhard Zimmermann eds. 2004) (until the decline of Roman law courses in British law schools in the 1960s, all British-educated lawyers were familiar with the civilian legal mentality through their study of Roman law).

⁷⁴Nor do others in this debate, such as Lequette, von Bar or Mattei. See Lequette, *supra* note –; von Bar, *supra* note –; Mattei, *supra* note –.

⁷⁵See, e.g., Ugo Mattei, *Hard Code Now!*, *Global Jurist Frontiers*, vol. 2, No. 1, Art. 1 (2002), available at <www.bepress.com/gi/frontiers/vol2/iss1/art1> (proponent of European civil code in order to protect consumers); Lequette, *supra* note --(opponent, in order to maintain national traditions deemed essential to cultural identity).

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.⁷⁶ 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.⁷⁷

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]

⁷⁶One 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 Levi, *supra* note –; Jean-Grégoire Mahinga, *Libéralités entre époux après la loi No. 2004-439 du 26 mai 2004 réformant le divorce*, La SEMAINE JURIDIQUE, 26 janvier 2005, 107 (2005) (emphasis added) ("important modifications are being brought to the law ... the law ... now awaits a *comprehensive reform* [*une réforme d'emsemble*]").

⁷⁷See Lequette, *supra* note –. 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." Christian von Bar, *Le groupe d'études sur un code civil européen*, 21 R.I.D.C. 128, 131 (2001).

application,”⁷⁸ 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.⁷⁹

Like Lequette, Foyer is hostile to a European civil code under the assumption that it would undermine France’s Civil Code: “[W]e should be under no illusion: if a European civil code comes into being,... we will not find in it the concepts of French Law.”⁸⁰ 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 under the influence of Napoleonic conquests.⁸¹ The strong attachment to the Civil Code

⁷⁸Yves Lequette, *supra* note –, at 2210 [*Quelques remarques à propos du projet du code civil européen de M. von Bar*, 28 LE DALLOZ 2202 (2002)] .

⁷⁹Foyer, *supra* note –, at 546.

⁸⁰ *Id.* [Foyer], at 545 ; see also Rémy Cabrillac, *L’Avenir du code civil*, 13 La SEMAINE JURIDIQUE 547, 548 (2004) (a European civil code would mean the erasure of all of the member states’ fundamentally national law).

⁸¹ *See, e.g., Lequette, supra* note –; Foyer, *supra* note –, at 544 (“the [French] Civil Code is a monument of the heritage of France, equal to the Cathedral of Reims or Versailles. We all remember Napoleon’s 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...’*”]).

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.⁸² There is no dearth of French opposition to the un-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 on 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,”⁸³ 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.⁸⁴

Mattei and Di Robilant use the term “psychological refusal” to decry scholarly denial of

⁸²See *id.* [Lequette] and Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997).

⁸³Ugo Mattei & Anna Di Robilant, *Les longs adieux: La codification italienne et le Code Napoléon dans le déclin du positivisme étatique.*, 4 R.I.D.C. 847, 861 (2004).

⁸⁴See Mattei, *supra* note –; and Mattei & Di Robilant, *supra* last note. Contra, Zimmermann, *supra* note –, at 73 [1 Col J Eur L 63] (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, 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”. *Id.* 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 (1999) (Firmin Didot frères, 1841).

the political implications to the debate about the European civil code.⁸⁵ 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.⁸⁶ 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.⁸⁷ 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.⁸⁸ These are the very hallmarks of continental European civil codes.⁸⁹

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

⁸⁵See Mattei, *Hard Code Now*, *supra* note --. 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). 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.*

⁸⁶See DELMAS-MARTY, *GLOBALISATION ÉCONOMIQUE*, *supra* note --.

⁸⁷See DELMAS-MARTY *GLOBALISATION ÉCONOMIQUE*, *supra* note --. *Accord*, MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (2001) (endorsing human rights precisely in their "minimalism," and, like Delmas-Marty, urging them as legally binding and enforceable).

⁸⁸See DELMAS-MARTY *GLOBALISATION ÉCONOMIQUE*, *supra* note --.

⁸⁹See GARAPON & IANNOPOULOS, *supra* note --; Christophe Jamin, *supra* note --; Curran, *Romantic Common Law*, *supra* note --.

Napoleonic Code of 1804, because only the generalization and abstraction of codified law permit civil codes to withstand vicissitudes of time.⁹⁰ 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.”⁹¹

The Enlightenment tenet of an air-tight framework of logic, reason and coherence, also fundamental to the civilian conception of law,⁹² is threatened by implosion from a surplus of legislation. Writing endows law with a character of permanence,⁹³ 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.⁹⁴ As another scholar puts it, European law “tend[s] to ossify the law.”⁹⁵ Portalis wrote that “perpetuity is the wish of laws.”⁹⁶

⁹⁰See GARAPON & IANNOPOULOS, *supra* note – . The French Civil Code was the first successful code of modern times because its drafters understood this. See PORTALIS, *supra* note –, at 17.

⁹¹Foyer, *supra* note –, at 545 (“[les] lois inutiles nuisent aux lois nécessaires”).

⁹²See Curran, *Romantic Common Law*, *supra* note –.

⁹³See Dossier spécial, in *La Semaine juridique* (Nov. 10, 2004), *supra*, note – .

⁹⁴“Dossier spécial[:] législation; Inflation législative galopante,” *La Semaine juridique* 10 novembre 2004, 1 (supplement for the week of November 10, 2004, titled “*Special File[:] Legislation*,” on “*Galloping Legislative Inflation*.”)

⁹⁵Zimmermann, *supra* note – [1 Col. J. Eur. L. 63], at 78.

⁹⁶Jean François Kneegk, *Le bicentenaire du Code civil, “péristyle de la législation françaises,”* in *LA GAZETTE DU PALAIS, RECUEIL BIMESTRIAL, JAVIER-FÉVRIER 2004*, at 8 (“*La*

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-changing needs of society.⁹⁷

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.⁹⁸ 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,⁹⁹ 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, Gény and Saleilles in France.¹⁰⁰

perpétuité est dans le voeu des lois") (citing Portalis).

⁹⁷See generally, PORTALIS, *supra* note –; GARAPON & PAPADOPOULOS, *supra* note –; see also Mattei and Di Robilante, *supra* note –, at 857 (linking codification to an increasing trend to generalization, as epitomized by the use of general clauses).

⁹⁸See *Dossier spécial*, *supra* note –.

⁹⁹See GARAPON & PAPADOPOULOS, *supra* note -- ; Curran, *Romantic Common Law*, *supra* note –. [[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.*”]]

¹⁰⁰See, e.g., IMMANUEL KANT, *FIRST INTRODUCTION TO THE CRITIQUE OF JUDGMENT* (James Haden, trans. 1965); RUDOLF VON JEERING, *DER ZWECK IM RECHT* (1887) (1883); - SCHERZ UND ERNST IN DER JURISPRUDENZ (1964) (1884); HERMANN KANTOROWICZ, using the pseudonym GNAEUS FLAVIUS, *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (Heidelberg, 1907) (1906); EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1936) [*Grundlegung der Soziologie des Rechts*]; EDOUARD LAMBERT, *2 CONGRÈS INTERNATIONAL DE DROIT COMPARÉ. PROCÈS VERBAUX DES SÉANCES ET DOCUMENTS* (1907); FRANCOIS GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (1919) (in two volumes);

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:¹⁰¹ “The system inaugurated a government of men, not of laws, although it operated through a constant effusion of new statutes.”¹⁰² Today, statutory profusion has acquired a lurking association in the civilian legal mind with the end of the rule of law.

Thus, a supranational civil code, the latter itself a kind of economic and cultural constitution of Europe,¹⁰³ 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

Raymond Saleilles, *Préface*, in *id.*

¹⁰¹See MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* (Thomas Dunlop, Trans., 1998); INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider, trans., 1991); RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996); Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy’s Suicide in Vichy France*, 50 *HASTINGS L.J.* 1 (1998).

¹⁰²Maria L. Marcus, *Austria’s Pre-War Brown v. Board of Education*, 32 *FORDHAM URBAN L.J.* 1, 36 (2004).

¹⁰³See GARAPON & PAPADOPOULOS; *supra* note –; Mattei & Di Robilant, *supra* note –, at 863.

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.¹⁰⁴ 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 Human Rights.¹⁰⁵ 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

¹⁰⁴For other illustrations of this phenomenon at work in the ECJ, see Koopmans, *supra* note --.

¹⁰⁵These textual references are interspersed throughout the decision. See ECHR, *Pretty*, Para. 34 *et seq.*

the ECHR, as well as at the ECHR's own past decisions.¹⁰⁶

With respect to a number of cases it cited and discussed, the ECHR extracted a factually decontextualized, abstract, normative rule only.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

The ECHR then also proceeded to reason analogically on its own, however, focusing on the *Rodriguez* case.¹¹⁰ 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

¹⁰⁶See *id.* [ECHR, *Pretty*, *supra* note –]. For a sweeping characterization of its own case law, see ECHR, *Pretty*, at Para. 44.

¹⁰⁷See, e.g., ECHR, *Pretty*, at – Para. 50.

¹⁰⁸See *supra* notes – to –, and surrounding text. The ECHR's other civilian aspects included a 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).

¹⁰⁹See ECHR, *Pretty*, at Para. 14 *et seq.*

¹¹⁰*Rodriguez v. the Attorney General of Canada*, 2 LRC 136 (1994). See ECHR *Pretty*, *supra* note–, at Para. 66.

the Canadian Charter.¹¹¹ The ECHR explicitly signalled 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.”¹¹²

The ECHR upheld the UK’s refusal to apply to assisted suicide a domestic UK statute that had legalized suicide itself.¹¹³ The ECHR found that the UK’s refusal to immunize the applicant’s husband from 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;¹¹⁴ the right to be free from inhumane or degrading treatment;¹¹⁵ the right to self-determination;¹¹⁶ the right to freedom of belief;¹¹⁷ and the right of the disabled to be free from discriminatory treatment.¹¹⁸ The ECHR emphasized that sanctity of life and the respect for human dignity are foundational principles of the Convention,¹¹⁹ upholding the UK position that “[t]he sanctity of

¹¹¹See *Rodriguez*, *supra* note –.

¹¹²ECHR, *Pretty*, *supra* note --. at Para. 66.

¹¹³*Id.* *Pretty*, at Para. 90.

¹¹⁴*Id.* at Para. 37-42.

¹¹⁵*Id.* at Para. 49-56.

¹¹⁶*Id.* at Para. 61-78.

¹¹⁷*Id.* at Para. 82-83.

¹¹⁸*Id.* at Para. 87-90.

¹¹⁹*Id.* at Para. 65.

life entails its inviolability by an outsider.”¹²⁰ 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.¹²¹ The French case law publication from which many in the French legal community received notice of the case is *La Semaine juridique*.¹²² 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

¹²⁰*Id.* at Para. 9.

¹²¹European 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.

¹²²*Semaine juridique, supra* note –.

decision. The ECHR decision of over forty pages was abridged into fewer than four pages.¹²³ 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.¹²⁴ 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.¹²⁵ This involved an independent analysis of the

¹²³ECHR, *Pretty*, *supra* note –; *Semaine juridique*, *supra* note –, at 676 - 679. (My page references reflect the number of pages in, respectively, Internet downloaded version of the ECHR decision, and the hard copy publication of the *Semaine juridique*).

¹²⁴*See supra* notes – to –, and surrounding text.

¹²⁵*See Semaine juridique*, *supra* note –, at – to --.

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.¹²⁶

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.¹²⁷

¹²⁶For the role of scholars in steering court decisions in civil law culture, principally Germany and France, and its roots in Roman law, see, e.g., JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968).

¹²⁷There 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 be understanding 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 a book which was published within days of his death. See VINCENT HUMBERT & FRÉDÉRIC VEILLE, *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 du 18 au 24 décembre 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. France's parliament studied the issue, and has released a legislative proposal for revisions to French national law, along with transcripts of some eighty hearings it conducted. See Proposition de loi relative aux droits des malades et à la fin de vie, No. 1882, Assemblée nationale, 26 octobre 2004, available at <<http://www.assemblee-nationale.fr/12/propositions/pion1882.asp>>. Thousands of pages of transcripts and legislative proposals are available on the Internet. They are available based on the search terms "*Pretty*" and "*suicide assisté*" on the databases of "*Legifrance*," *senat.fr*" and "*assemblee-nationale.fr*". The National Assembly approved the bill in November, 2004, see Sandrine Blanchard, *Les députés adoptent une proposition de loi instaurant un droit au "laisser mourir,"* LE MONDE, Nov. 29, 2004, and the Senate passed it in April, 2005. Craig S. Smith, *France Lets Terminally Ill Refuse Care, but Still Bans Euthanasia*, N.Y. TIMES, April 14, 2005, at A-13.

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,¹²⁸ 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 suggesting 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.¹²⁹ 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.¹³⁰

The French commentator wrote of this: "Is the [European] Court giving us to understand that *failure to apply the law* can be an answer ...?"¹³¹ 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

¹²⁸*Semaine juridique*, supra note —, at 681.

¹²⁹*Id.* [*Semaine juridique*], at 682.

¹³⁰ECHR, *Pretty*, supra note —, at Para. 76.

¹³¹*Id.* at 682 (emphasis added) ("*La Cour veut-elle alors signifier que la non-application de la loi peut être une réponse ...?*").

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.”¹³²

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”¹³³ and that such unacceptable reasoning on the part of the ECHR “would be beyond the thinking of the European judges.”¹³⁴ 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.¹³⁵ 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 Humbert¹³⁶] with clemency, by imposing a punishment [only] of principle,

¹³²Alain Pariente, *Le refus des soins: réflexions sur un droit en construction*,” No. 5 REVUE DU DROIT PUBLIC 1419, 1435 (2003), citing *Conclusions sur l’arrêt Meilhou*, du 4 mai 1861, SIREY, 1862, 2, at 493).

¹³³*Semaine juridique*, *supra* note –, at 682.

¹³⁴*Id.* [*Semaine juridique*, at 682] (“*pareille conclusion dépassant ... la pensée des juges européens*”).

¹³⁵This exact position is echoed in the 2004 book of a French doctor who is the head of the Cochin hospital in Paris, and who wrote about the murder charge against Vincent Humbert’s doctor, see *supra* note –. The Hôpital Cochin doctor said the law had to be applied because in law it is a question of all or nothing, since the law is the law (“tout ou rien”), but also that the courts need not punish the perpetrators. See also LON FULLER, *LAW IN QUEST FOR ITSELF* (1947) (noting that all societies have laws on the books that are not applied, and concluding that therefore legal positivism is intellectually bankrupt).

¹³⁶See *supra* note –.

but he must be tried. The law is ‘all or nothing.’”¹³⁷

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.”¹³⁸

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 the men won’t be punished,* the judge said.”¹³⁹ 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.¹⁴⁰ Similarly, in Italy, even the conscious decision to adopt a common law adversarial

¹³⁷Claire Chartier interview with Dr. Debré, “*L’euthanasie: “Il ne faut pas légiférer,”* L’EXPRESS, Jan. 15, 2004, at 28. Dr. Debré has joined the ranks of those who have written a book on the subject: BERNARD DEBRÉ, NOUS T’AVONS TANT AIMÉ: L’EUTHANASIE, L’IMPOSSIBLE LOI (2004).

¹³⁸Antoine Garapon, *French Legal Culture and the Shock of “Globalization,”* 4 SOC & LEG STUDIES, at 500 (1995) (a position reflected by the Hôpital Cochin doctor reacting to the arrest of Vincent Humbert’s attending physician. *See supra* note –).

¹³⁹USA Today, November 10, 2004 (emphasis added).

¹⁴⁰See (1975) BverfGE 1. Another scholar expressed 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. CON. L. 461, 473 (2004).

model to replace Italian criminal procedure stopped short of changing the civilian obligation to prosecute all violations of the law.¹⁴¹

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"¹⁴² and to "authorize the future commission of [a] crime,"¹⁴³ 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.¹⁴⁴ Here, in a process reminiscent of regression to the mean, the scholar reassimilated 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.¹⁴⁵ Even if *La Semaine juridique* had presented an exact word for word translation

¹⁴¹See Ennio Amodio. *The Accusational System Lost and Regained: Reforming Criminal Prosecution in Italy*, 52 AM. J. COMP. L. 489, 492 (2004).

¹⁴²*Semaine juridique*, *supra* note —, at 179 ("elle demanda au Director of Public Prosecution ... de .. Renoncer ... à faire application de la loi").

¹⁴³*Id.* at —.

¹⁴⁴See —.

¹⁴⁵An 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*

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 courts to avoid.¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸ 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

Clauses Viewed From a Distance, 29 RABELSZEITSCHRIFT 444, 456 (1977).

¹⁴⁶See generally on the various aspects of civilian legal culture, DAWSON, ORACLES, *supra* note —.

¹⁴⁷See Lyndel V. Prott, *A Change of Style in French Appellate Judgments*, VII ETUDES DE LOGIQUE JURIDIQUE 51, 58-66 (1978).

¹⁴⁸For an illustration of this situation, see, e.g., Vivian Grosswald Curran, *Politicizing the Crime Against Humanity: The French Example*, 78 NOTRE DAME L. REV. 677, 696 n. 78.

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.¹⁴⁹

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.¹⁵⁰ In contrast, the scholar's commentary that follows the case is in much larger type, with more generous spacing between lines.¹⁵¹ The effect is to suggest implicitly that the court decision is difficult to read, 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

¹⁴⁹*See id.*

¹⁵⁰*See Semaine juridique, supra note –, at 676-679.*

¹⁵¹*See id.*, at 679-682.

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.¹⁵² 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

¹⁵²See 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 (1996). *But see* Andrew Moravcsik, *The Origins of Human Rights Regimes*, 54 *INT'L. L. ORG.* 217 (2000) (describing the foregoing as the "ideational" as opposed to the "realist" explanation of the ECHR's origins, *id.* at 230, 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.)

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.¹⁵³ 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”¹⁵⁴ 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.¹⁵⁵ This principle was foundational to the European Convention on Human Rights.¹⁵⁶

The ECHR is obliged under the European Convention of Human Rights to uphold life as the most fundamental value and cornerstone of the Convention.¹⁵⁷ 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.¹⁵⁸

The relevant legal language of the Convention has not changed, and sanctity of life

¹⁵³See ROBERT PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* (1988); RAOUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (1967); JAMES M. GLASS, “LIFE UNWORTHY OF LIFE”: RACIAL PHOBIA AND MASS MURDER IN HITLER’S GERMANY (1997).

¹⁵⁴See GLASS, *supra* last note, at [unpaginated page at start of book] (*quoting* Dr. Arthur Guest, Director of Public Health, Ministry of the Interior in the Third Reich, 1935).

¹⁵⁵See, e.g., IGNATIEFF, *supra* note –.

¹⁵⁶See European Convention, *supra* note –.

¹⁵⁷See *id.*, art. 2.

¹⁵⁸See PETER SINGER, *RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS* (1994).

therefore continues to be evoked as the mandated standard of law for all signatory states to the Convention.¹⁵⁹ As modern medicine shifted the medical definition of life, the law shifted its own understanding of life in concert with evolving medical standards, however.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² In so doing, the ECHR is not initiating, but, rather, joining, the major judicial trend throughout the western world.¹⁶³

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.¹⁶⁴ 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

¹⁵⁹See ECHR, *Pretty*, *supra* note --.

¹⁶⁰See SINGER, *supra* note --

¹⁶¹See *id.* [SINGER, *supra* note --].

¹⁶²See *infra*, notes – to –, and surrounding text. Peter Singer has shown this shift throughout the western world. See *id.*

¹⁶³See *How Death Was Redefined*, in *id.* [SINGER, *supra* note --], at 20-37.

¹⁶⁴ECHR, *Pretty*, *supra* note –, at Para. 9; *Semaine juridique*, *supra* note -, at 680.

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 forever” 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.”¹⁶⁵ The patient himself was not able to make any judgment or express any opinion.¹⁶⁶ 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.¹⁶⁷ In legitimating the doctors’ actions, the House of Lords insisted, contrary to evidence, that it still was adhering to a sanctity of life standard,¹⁶⁸ 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.¹⁶⁹ 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

¹⁶⁵See *id.* [Bland], at 1 [Internet pagination] (Lord Keith).

¹⁶⁶See *id.*, at 4-5 [Internet pagination] (Lord Goff).

¹⁶⁷See *Bland*, *supra* note –, at 10-11 [Internet pagination] (Lord Goff) (categorizing the *Bland* case in the above-described manner as a result of what he called a correct formulation of the question); *id.* at 12 (“There is overwhelming evidence that, in the medical profession, artificial feeding is regarded as a form of medical treatment”); see SINGER, *supra* note –, at 57-80 (the categorization of nourishment as medical treatment is the leap from sanctity of life to quality of life in applicable legal standard).

¹⁶⁸See *Bland*, *supra* note –, at 7 (Lord Goff); and Singer’s analysis thereof, in SINGER, [*supra* note–], at 57-80.

¹⁶⁹See *Pretty*, *supra* note –, at –; La Semaine juridique, *supra* note –, at –.

quality of life standard.¹⁷⁰

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.¹⁷¹ The evaluation of whether Bland’s life was worth continuing thus was the true criterion applied.

This is a legal standard of quality of life.¹⁷² 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; and, 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,¹⁷³ and biblical teachings’ contrasting insistence on it,¹⁷⁴ are

¹⁷⁰*Airedale NHS Trust v. Bland* [1993] AL 789 , available at <www.swarb.co.uk/c/hl/1993airedale_bland.html> ; SINGER, *supra* note –, at 57-80.

¹⁷¹See *Bland*, *supra* note --.

¹⁷²This is one of the central points of SINGER, *supra* note --.

¹⁷³See *supra* note --. 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

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, "it is the distinctive privilege of language to be able to hide meaning behind a misleading sign."¹⁷⁵ The history of law is of ample judicial use of this attribute of language.¹⁷⁶

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

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.OF BOOKS, Nov. 20, 2003, at 51. 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).

¹⁷⁴See, e.g., Gen.1: 27 (Humans created in God's image); René Cassin [principal drafter of Universal Declaration of Human Rights], *From the Ten Commandments to the Rights of Man*, <http://www.udhr.org/history/tencomms.htm>, last visited March 21, 2005 (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, at <http://www.jesus.com.a/html/page/human_rights> (last visited March 21, 2005. The Uropean Convention on Human Rights took direct and open inspiration from the Universal Declaration. See Convention, *supra* note –, first sentence : "Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948...".

¹⁷⁵PAUL DE MAN, *BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM* (1971).

¹⁷⁶PIERRE 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 on law and language, EDWARD LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949); Balkin, *supra* note –.

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 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*,¹⁷⁷ rendering the backward glance not just tedious, but also superfluous. As a line from a French poem (“*rien n’est jamais acquis à l’homme*”¹⁷⁸) 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,

¹⁷⁷See Habermas’ account of mounting resentment against the “look back.” *On the Public Use of History*, in JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 29 (Max Pensky, trans., ed., 2001). For an explanation of *acquis communautaire*, see Roger J. Goebel, *The European Union Grows*, 18 *FORDHAM INT’L. L. J.* 1002, 1140-57 (1995).

¹⁷⁸Louis Aragon, *Il n’y a pas d’amour heureux*, in LOUIS ARAGON, *LA DIANE FRANÇAISE* (originally published in Seghers, 1946), available at <<http://www.feelingsurfer.net/garp/poesie/Aragon.Amour.html>>(last visited, May 10, 2005).

better enabling it to reconcile current needs and issues with law, without betraying foundational values.¹⁷⁹

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.¹⁸⁰ The scholar wrote that the ECHR's decision had done no less than restore human dignity to the dying and agonizing.¹⁸¹ 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.¹⁸² 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.¹⁸³

¹⁷⁹For 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 et seq. (2005). On Germany, see REINHARD ZIMMERMANN, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY* (2001).

¹⁸⁰*Semaine juridique*, *supra* note –, at 682.

¹⁸¹*Id.*

¹⁸²I read this essay some time in the 1970s, but have been unable to find 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 in *Freud's Vienna*, in BRUNO BETTELHEIM, *SURVIVING AND OTHER ESSAYS*, 256 (“Some time ago I questioned in print why there is such vast admiration for the *Diary of Anne Frank*”), but this reference is without citation, and also contains no reference to Helen Keller.

¹⁸³On the human personality's capacity for total disintegration while the person remains biologically alive, see BETTELHEIM, *SURVIVING*, *supra* last note, at 9-11; 13; 3; 106-110; 113-114.

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.¹⁸⁴ 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 of 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 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.¹⁸⁵ The ECHR was more nuanced on this issue than the French scholarly commentator. The ECHR acknowledged a tension between quality and sanctity of life,¹⁸⁶ whereas the French commentator saw no justification in the Convention for the modern

¹⁸⁴Bruno Bettelheim, *The Lost Lesson of Anne Frank*, HARPER'S 45, 45 (1960) ("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 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. OF BOOKS, Feb. 26, 2004, at 21.

¹⁸⁵On 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).

¹⁸⁶See ECHR, *Pretty*, *supra* note —, at Para. 65.

trend to challenge life's sanctity through calls for legalized euthanasia and assisted suicide.¹⁸⁷

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."¹⁸⁸ The "trace"¹⁸⁹ of the old is essential to allowing us to configure the new, such that the absolutely new is "absolutely incognizable."¹⁹⁰

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

¹⁸⁷ *Semaine juridique*, *supra* note —, at 682.

¹⁸⁸ HANS-GEORG GADAMER, *TRUTH AND METHOD* 397 (Joel Winsheimer et al., trans., 1995).

¹⁸⁹ See *THE ESSENTIAL WRITINGS OF PEIRCE: SELECTED PHILOSOPHICAL WRITINGS* 24, 30 (Nathan Houser & Christian Kloesel, eds 1992); PAUL RICŒUR, *TEMPS ET RÉCIT III: LE TEMPS RACONTÉ* 177-83 (1985).

¹⁹⁰ PEIRCE, *supra* last note, at 30.

when compared to the precise contours they will acquire with 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 inevitably lies in understanding and

examining the past.¹⁹¹ To ignore the past is to preclude understanding one's own time and, it has been suggested, also to betray it.¹⁹²

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 politics or ideology.¹⁹³ 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.¹⁹⁴ Although Schlesinger never said so explicitly, he may have seen a direct,

¹⁹¹See supra note – [i.e., note above that says: *Cf.*, for example, Habermas' account of mounting resentment against the "look back." *On the Public Use of History*, in JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 29 (Max Pensky, trans., ed., 2001).]

¹⁹²"*Indem wir die Geschichte ignorieren, verleumden wir gleichzeitig unsere Zeit.*" ("To the extent we ignore history, we also betray our own time"). (Nachrichtendienst für Historiker, August 6, 2002 August 12, 2004); and "*Ohne Kenntnis unserer Geschichte bleibt die Gegenwart unbegreifbar*" ("Without knowledge of our history, the present remains beyond our grasp"). Nachrichtendienst für Historiker, August 6, 2002.

¹⁹³ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989). Hilberg's work suggests a similar conclusion, see HILBERG, *supra* note –, as does the more recent ENZO TRAVERSO, *THE ORIGINS OF NAZI VIOLENCE* (trans. Janet Lloyd, 2003).

¹⁹⁴Rudolf Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477 (1995). On the link between the national and the European civil codes, see Zimmermann, *supra* note – [1 Col J Eur L 63], at 63; *id.* at 65, n. 8 (citing additional sources on this issue, including FRANZ WIEACKER, *Der Kampf des 19. Jahrhunderts um die Nationalgesetzbücher*, in *INDUSTRIEGESELLSCHAFT UND PRIVATRECHTSORDNUNG* 79 et seq. (1974); and REINHARD ZIMMERMANN, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY* 2 (2001) (national codifications caused the loss of "fundamental intellectual unity "in European law).

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.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ 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.”¹⁹⁸ 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.¹⁹⁹

¹⁹⁵For my reading of Schlesinger’s view on this matter, see Curran, *Shoulders of Schlesinger*, *supra* note –.

¹⁹⁶Schlesinger, *supra* note –.

¹⁹⁷See *supra* notes – to –, and surrounding text.

¹⁹⁸BAUMAN, *supra* note –, at 95.

¹⁹⁹See Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the European Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE 167 (Christian Joerges & Navraj Galeigh, eds., 2003). Another European who also insists on the value of the look backwards is Reinhard Zimmermann, *supra* note – [1ColJEurL63], at 82-86 (a preliminary to a

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.²⁰⁰

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.²⁰¹ 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.²⁰² On the other hand, if the modern nation state’s semiotic “grammar”

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

²⁰⁰This 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) [CHECK]; Lydia Estevez Gonzalez & Richard MacBride, *Fortress Europe: Fear of Immigration? Present and Future of Immigration Law and Policy in Spain*, 6 U.C. DAVIS J. INT’L. L. & POLICY 153 (2000); Michael Pugh, *Drowning Not Waving: Boat People and Humanitarianism at Sea*, 17 J. REFUGEE STUDIES 50, 54 (2004).

²⁰¹*See* BAUMAN, *supra* note –.

²⁰²*See* BAUMAN, *supra* note –. Along these general lines, see also Koskeniemi, *supra* note – [16 EJIL].

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' *The Postnational Constellation*, "the nation-state is fading ... [b]ut ... there is no guarantee that [it] will be replaced by something better."²⁰³ 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-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.²⁰⁴

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.²⁰⁵ On the other hand, non-national bureaucratic

²⁰³ HABERMAS, *supra* note –, at xiii.

²⁰⁴ See NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH 159-195* (1999).

²⁰⁵ See *supra* note –, and surrounding text.

structures' coexistence with national counterparts may reduce this danger.²⁰⁶ 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.²⁰⁷

Habermas' 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-scale loyalties ("to village and clan"²⁰⁸), 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

²⁰⁶Bignami'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. 1 (2005).

²⁰⁷This tension was a main preoccupation in the writing of Isaiah Berlin. *See, e.g.*, ISIAH BERLIN, *THE AGE OF ENLIGHTENMENT: THE 18TH CENTURY PHILOSOPHERS* (1984); *FOUR ESSAYS ON LIBERTY* (1969); *VICO AND HERDER* (1976); *CONCEPTS AND CATEGORIES* (Henry Hardy, ed., 1978); *THE CROOKED TIMBER OF HUMANITY* (Henry Hardy ed., 1992); *THE SENSE OF REALITY* (Henry Hardy, ed., 1996); *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"); and 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).

²⁰⁸*What Is a People*, in HABERMAS, *supra* note –, at 18. *Cf.* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L. L. J. 191, 215 ("Communities may gradually emerge, but they require construction").

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.”²⁰⁹ 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’ optimism. The emotional depth of the need to create identity by differentiation from the “other” that Berlin describes does not contradict Habermas’ view that “collective identities are made, not found,”²¹⁰ but it casts doubt on whether any collective identity that falls short of the global, once made, can avoid xenophobia. 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.²¹¹

²⁰⁹HABERMAS, *supra* note –, at 19.

²¹⁰Habermas, *supra* note –, at 19.

²¹¹While I use Berlin to caution against Habermas’ 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 coexistence in mutual appreciation and respect, rather than ferocious hatred and exterminationist persecution of the other. *See, e.g.*, ISAIAH BERLIN, *RUSSIAN THINKERS* (Henry

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.”²¹² A similar emphasis on the power of institutions to preserve stability through time and current events infuses the perspective of historical institutionalism,²¹³ 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.²¹⁴ 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,²¹⁵ the better able decision-makers will be 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

Hardy & Aileen Kelly, eds., Viking Press, 1978).

²¹²MONTESQUIEU THE GREATNESS AND DECADENCE OF THE ROMANS, ch. i, *cited in* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 38 (trans. G.D.H. Cole, 1950).

²¹³See Bignami, *supra* note –, and sources cited therein

²¹⁴See ERNST CASSIRER, THE MYTH OF THE STATE (1946). This has been a principal theme of some of my past writing. See Curran, *Legalization of Racism, supra* note –, *Fear of Formalism*, 35 CORNELL INT’L. L. J. 101 (2001-2002).

²¹⁵The phrase is from – ZWEIGERT AND HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 44 (Tony Weir, trans., 1992)

substantive ideals.²¹⁶ 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 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.²¹⁷ 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.²¹⁸ 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

²¹⁶BAUMAN, *supra* note –; Vivian Grosswald Curran, *Racism's Past and Law's Future*, 28 VERMONT L REV. 683 (2004).

²¹⁷There 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* THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (Martti Koskenniemi, ed., 2001).

²¹⁸*See* Koskenniemi, *International Law as Political Theology*, *supra* note –, at 492-493 (“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 – [“Int Law in Eur, 16 EJIL 113], *supra* note –, at 120 (the lawyer’s task is 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.”)

may facilitate consideration of similar issues on a larger scale, as law re-members.